STUDY

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European Parliament

Towards a Climate and Energy Union

The constitutional basis for a sustainable transformation

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Towards a Climate and Energy Union

The constitutional basis for a sustainable transformation

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, considers the legal space for an EU Climate and Energy Union. It assesses the major limits at the EU and national level, as well as the question if (informal) Treaty change is possible and necessary to create the space needed. It also assesses if an individual right to clean energy exists, or can and should be legally construed. It pays special attention to the challenge of funding and the role that the emerging principle of solidarity might play.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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LIST OF ABBREVIATIONS

BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
CBAM	Carbon Border Adjustment Mechanism
CCP	Common Commercial Policy
CCS	Carbon Capture and Storage
CJEU	Court of Justice of the European Union
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EFSF	European Financial Stability Facility
EMU	Economic and Monetary Union
EPP	European People's Party
ERDF	European Regional Development Fund
ESF	European Social Fund
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESR	Effort Sharing Regulation
ETS	Emissions Trading System
EURI	European Union Recovery Instrument
GHG	Greenhouse Gases
IPCC	Intergovernmental Panel on Climate Change
LULUCF	Land use, land use change and forestry Regulation
MFF	Multiannual Financial Framework

MSR	Market Stability Reserve
NDC	Nationally determined contribution
NECP	National Energy and Climate Plan
NGEU	Next Generation EU
NGO	Non-governmental Organisation
ORD	Own Resources Decision
PACE	Parliamentary Assembly of the Council of Europe
QMV	Qualified Majority Voting
RRF	Recovery and Resilience Facility
SGEI	Services of General Economic Interest
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
VAT	Value Added Tax
WTO	World Trade Organization

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EXECUTIVE SUMMARY

To serve and protect its citizens from climate change, the EU and its Member States need to act decisively and quickly. This raises the question if EU law currently offers the legal space required for such effective action, for example by creating a true Climate and Energy Union. Where the current constitutional and legal framework of the EU do not offer sufficient space and capacity to act, the question arises if this framework can be modified, and if so, how.

This study therefore explores the **legal space for the creation of an EU Climate and Energy Union.** To that end, it zooms in on three legally different, but related questions. First, what is **the current legal space for the EU to regulate energy and environmental policy?** Second, where more space is required, **can such legal space be created, and would that require Treaty change, either formally or informally?** On these points, the study pays particular attention to the core issue of funding and the role that the emerging principle of solidarity might play. The third question analysed is if **an individual right to accessible and sustainable energy for EU citizens** can be found or construed in current EU law, including through the **expanding doctrine of positive obligations in climate cases**.

This third and last question on an individual right to accessible and sustainable energy is different in nature but important: any individual right of citizens to sustainable energy will significantly impact the legal space for Member States and the EU to regulate energy and climate change. What is more, any enforceable individual rights for citizens concerning the environment and clean energy will create a legal need for the EU and the Member States to act, especially where such rights lead to positive obligations. Briefly put, the more far-reaching the environmental and energy rights of EU citizens become, the more collective action at the EU level will be required to ensure these rights become a reality. A parallel can be drawn here with negative and positive integration in the EU internal market. The expansive interpretation of the four freedoms in the Treaties by the CJEU (negative integration), created an impulse for effective regulation at the EU level (positive integration).

To help answer these questions, section two briefly sets out what a Climate and Energy Union entails and what it should achieve. Section three outlines the current system of EU competences, the EU's competence relevant for a Climate and Energy Union and their limits, as well as their use in practice. Section four analyses the EU's current powers, possible gaps, as well as possible ways to address these gaps, including by (informal) Treaty change. Section five explores the possibility of finding or construing an individual right to sustainable energy, including through recent case law on positive obligations of Member States to combat climate change.

As to the concept of an actual Climate and Energy Union, this study relies on the two main targets laid down in the European Climate Law, being a reduction in greenhouse gas (GHG) emissions of 55% percent compared to emissions in the 1990's in 2035, and achieving net-zero emissions by 2050. A really effective Climate and Energy Union must be able to achieve these two headline aims. When we speak of the Climate Union in this study, therefore, we refer to the totality of actions required to ensure the EU meets its legally binding targets under the Climate Law, as well as any additional obligations under international law.

The core findings on the current legal space for such a real Climate and Energy Union are as follows. Firstly, the EU already possesses expansive, broadly formulated competences on the environment and energy under Articles 192 and 194 TFEU. These competences, separately and jointly, allow the EU to adopt legal acts on a very broad range of issues related to energy and climate. The flexibility and relatively open-ended nature of these legal bases, moreover, enables these competences to evolve

over time as new challenges arise, especially as these legal bases are linked to even more broadly formulated underlying objectives.

Consequently, Articles 192 and 194 TFEU, as interpreted by the CJEU, generally provide the EU with expansive and flexible competences to create an effective EU Climate and Energy Union. What is more, where these legal bases prove insufficient, other legal bases can be used to supplement or provide an alternative. As seen in the Fit for 55 package, other legal bases including Articles 113, 114, 122(1) and (2) and 175 TFEU can provide additional legal space, with Article 352 TFEU providing a final fall-back option. **Consequently, for most of the measures one needs to take to create an actual Energy and Climate Union, a competence can in principle be found in the current Treaties if the political will to do so can be found as well, meaning no Treaty change is required to expand substantive competences**.

At the same time, certain limits on the EU's legal space to create an Energy and Climate Union do exist. The first and most apparent limits are contained in Articles 192 and 194 TFEU themselves. In environmental policy, these limits are of a procedural nature. Under article 192(2) TFEU, a procedural limit is imposed for certain sensitive areas that require unanimity, being provisions primarily of a fiscal nature, measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources and measures affecting land use, with the exception of waste management. In energy policy, there are limits of both a procedural and substantive nature. Similar to Article 192(2) TFEU, Article 194(3) TFEU requires unanimity in Council for legal acts that are primarily of a fiscal nature, whilst only requiring consultation of the European Parliament for such acts. Article 194(2) TFEU imposes one substantive limit, as it prohibits the adoption of EU energy policies that 'affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply (…).'

The analysis in this study shows, however, that the CJEU leaves significant leeway to Member States and EU institutions and so far does not seem to police these limits stringently. This is especially the case so far with the substantive limits in Article 194(2) TFEU. At the same time, these limits may become increasingly relevant and constrictive as in a true Energy and Climate Union ever more far-reaching measures will become necessary that significantly affect Member States' energy sources and supply and will increasingly affect fiscal policy, water and land use and town planning. The procedural limits in Articles 192 and 194 TFEU, moreover, may be increasingly invoked in the future by Member States as the measures adopted have an ever greater impact on their economies and electorates, or as more nationalist parties enter government.

A second and related limit on the legal space for an effective Climate and Energy Union concerns Article 4(2) TEU. The CJEU, however, has so far given a highly restrictive interpretation to Article 4(2) TEU. **Consequently, under the current case law of the CJEU, it does not seem likely that Article 4(2) TEU will pose a significant limit to the creation of a Climate and Energy Union at the EU level**. The major potential limit to the legal space for a Climate and Energy Union from Article 4(2) TEU, however, would not come from the CJEU, but from **national courts**. An increasing number of these courts are developing defensive lines against EU integration, trying to shield a certain minimum core of national powers from EU integration, often relying on Article 4(2) TEU as an EU law anchor. **Such national legal limits to EU integration should be taken seriously, especially where it may find increasing political support in many Member States.** As this limit to the legal space for a Climate and Energy Union does not solely *derive* from EU law, however, any solution to this limit can also not be solely *found* at the level of EU law. Ultimately, with the far-reaching measures that will be required to combat climate change and ensure energy independence, a more structural and constructive solution is required to

deal with the tension between guaranteeing effective EU action and respecting national identities and democratic decision-making. Until that is found, it is important to keep these national limits in mind, and to ensure an open and forward-looking dialogue with national courts on how an EU Energy and Climate Union should be constructed so as to fit within the available national constitutional space.

A vital fourth limit to the legal space for a Climate and Energy Union concerns funding. An effective Climate and Energy Union will require enormous financial resources, both at the national and EU level. The modifications required to allow the EU to raise such sums, however, affect the very constitutional and political nature of the EU, and may often require Treaty change. Consequently, the relatively limited funding available for an EU Climate and Energy Union, the relatively limited capacity of the EU to raise significant additional funds quickly or more structurally, including through its own resources, and the likely need for those Member States that currently have more fiscal capacity to shoulder a greater part of the burden, form some of the most acute and perhaps fundamental limits to the legal space for an EU Climate and Energy Union. **This financial limit is compounded by the additional need for the EU to invest significant sums to remain globally competitive, as inter alia stressed in the Draghi report.** Even though part of the investment needs for an effective Climate and Energy Union align perfectly with the overall need for investment per the Draghi report, which also focuses on a green economy, certain other parts do not. As a result, to achieve both the climate and energy goals, and the competitiveness goals of the Draghi report requires even more significant combined funding.

Furthermore, as ongoing debates and protests in many Member States illustrate, including when expenditure on the environment means other programs or sectors are negatively affected, this will give rise to tensions and resistance, politically, societally and hence also legally as these conflicts will reach the courts. The enormous financial consequences of an EU Climate and Energy Union will, therefore, also run into national legal limits. This is especially the case as many national courts are imposing financial or fiscal limits on EU integration, which should respect national budgetary autonomy.

A fifth legal limit to an effective Climate and Energy Union may arise from fundamental rights. Fundamental rights can be an important driver and support for a Climate and Energy Union. Other fundamental rights, however, may also limit the legal space for a Climate and Energy Union, or at least for certain measures such a union may wish to adopt. One example of such a limit is the right to property as, amongst others, protected by Article 1 protocol 1 of the ECHR. The same is true for the right to an effective remedy, which can lead to significant delays as parties opposing certain climate measures pursue the national and international remedies at their disposal.

A further potential clash between an effective Climate and Energy Union and fundamental rights, albeit at a more abstract constitutional level concerns democracy. On the one hand, the threat created by climate change is so urgent and existential that effective measures must be taken quickly, with scientific data sometimes showing that certain measures are almost inevitable. On the other hand, democracy requires sufficient policy space for national and EU electorates to make their own choices. This can lead to a (perceived) fundamental clash between democracy and effective climate action. This clash already arises at the national level, where (national) democratic processes can significantly delay or block effective climate measures. The farmers' protests in France, Belgium, and the Netherlands in February 2024 provide one example of what can more broadly be referred to as a "Green Backlash." These fundamental tensions, however, arise in an even more complex fashion in a supranational construct such as the EU, and must be effectively addressed to create a stable, effective and legitimate EU Climate and Energy Union.

A sixth limit concerns enforcement. For instance, the same political backlash such as farmers' protests in capital cities may contribute to reluctance on the part of national governments to implement climate policy emanating from "Brussels". The question then becomes one of enforcement of EU law. Currently, the EU has a relatively advanced legal system for enforcing EU law, combining public enforcement by EU and national institutions with private enforcement of directly effective EU norms by individuals As we have seen, however, particularly in the rule of law crisis and the way in which some Member States deal with migration, effective enforcement of EU norms can become difficult where a national legal system is eroded or where a Member State is willing to openly ignore EU and national judicial decisions. Hence, the EU's reliance on law and sincere cooperation can become a limit to an effective Climate and Energy Union where some measures taken create so much resistance in one or multiple Member States that they, openly or more covertly, refuse to implement EU norms. Consequently, a last, more indirect, limit on the legal space for a Climate and Energy Union concerns the relatively limited, or law-dependent, mechanisms of enforcement in the EU. A more holistic consideration of the legal space required for a Climate and Energy Union should, therefore, also include this dimension of enforcement and inevitable push-back.

In addition to identifying these different limits to an effective Climate and Energy Union, this study also analyses **possible ways of addressing these limits.** It first concludes that **it does not seem feasible to rely on formal treaty change to create more legal space for an effective Climate and Energy Union.** Both legally and politically this route is not realistic. Instead, it seems more fruitful to look at different solutions, including use of the **passerelle clauses** and **informal treaty change**.

The last sentence of Article 192(2) TFEU contains a so-called passerelle clause allowing a shift towards QMV even on the sensitive topics currently requiring unanimity. Article 194 TFEU can benefit from the generic passerelle clause in Article 48(7) TEU. The use of these passerelle clauses, even if still far from simple, is far less cumbersome than a full Treaty revision, and specifically targets one of the key limits on the competences of the EU to create a Climate and Energy Union. As a result, the use of these passerelle clauses for all or at least some of the currently 'protected' areas in Articles 192 and 194 TFEU seems like a logical priority in the creation of an effective Climate and Energy Union.

Much of the required evolution or change in EU law, moreover, may take place via **informal treaty change**. This evolution is in part allowed by the teleological, effectiveness-focused case law of the CJEU, allowing the EU to develop alongside the challenges facing it. As the **EMU and COVID crises** demonstrated, moreover, such informal constitutional change can also modify the budgetary and financial functioning of the EU in a significant manner, as is also clear from the Draghi report.

COVID provides a particularly clear example and potential model for informal constitutional change for a Climate and Energy Union, particularly through the adoption of the so-called 'NextGenerationEU' (NGEU) recovery plan. NGEU was, at its inception, worth 750 billion euro. It is a complex legal construction based on three pillars: two new instruments, the European Union Recovery Instrument (EURI) and the Recovery and Resilience Facility (RRF) and a new Own Resources Decision (ORD). These measures contain both loans and non-repayable subsidies, and are very broad in scope, permitting allocation of funds for six purposes: (i) *green transition*; (ii) digital transformation; (iii) smart, sustainable and inclusive growth, (iv) social and territorial cohesion; (v) health, and economic, social and institutional resilience, and (vi) policies for the next generation, children and the youth, such as education and skills. The ORD, moreover, empowers the Commission to borrow funds on capital markets on behalf of the Union, for the specific purpose of financing the EURI.

Whether NGEU complies with the current allocation of competences between the EU and its Member States is a hotly debated topic. The real novelty introduced by the NGEU is twofold : (i) the large amount

of € 750 billion and the need to temporarily increase the own resources ceiling in the ORD; (ii) the fact that the borrowings are not only used to finance back-to-back loans like most forms of previous financial assistance: € 390 billion will take the form of grants and thus constitute borrowing for spending. **What is more, these innovations rest, to a large extent, on an extensive use of certain legal bases. First of all, Article 122(1) and (2) TFEU were used rather extensively, raising the question if this use exceeded their remit as part of EU emergency law.** Discussion also exists as to the use of **Article 175 TFEU on cohesion policy** as the legal basis for the RRF. Article 175(3) TFEU allows for action to be undertaken 'outside the Funds', if 'specific actions prove necessary'. Lastly, NGEU also saw a significant evolution in EU competences concerning debt, which might sit awkwardly with the letter of Article 310 TFEU which provides that '[t]he revenue and expenditure shown in the [Union] budget shall be in balance'. To overcome this hurdle, **the money used for grants was given the status of 'external assigned revenue', within the meaning of the Union's Financial Regulation**. Such an approach, however, may reach its limit when the sums involved become too large, for example in the context of a Climate and Energy Union.

Partially because of the thin ice they are treading on, many EU actors, including the legal service of the Commission, have time and time again repeated that NGEU is a unique one-off. Despite this insistence, however, NGEU has created a precedent, and hence raises the question whether the same mechanism could be used for the purpose of financing an EU Climate and Energy Union. **Since climate change can be said to pose an urgent crisis, at least at the level of Covid-19, this does not appear impossible. Yet extending or repeating the NGEU approach to an Energy and Climate Union, especially to generate the funding required, would raise further questions from a competence perspective and the limits of (legitimate) informal constitutional change in the EU.**

Based on the NGEU example, one crucial question for the legal space for a Climate and Energy Union, and particularly the capacity for the EU to acquire the massive financial resources it requires, is if climate change in a broad sense can be considered not just an emergency, but also an exceptional, one-off event, as required by Article 122 TFEU. The answer to this question in part depends on the perspective taken. On the one hand, climate change is a one-off, exceptional event, that nevertheless unfolds over an extended period of time, although the window to address it before it reaches a point of no-return is shrinking swiftly. To a certain extent, moreover, the measures adopted to combat climate change can also be considered temporary. After all, the net-zero objective has a clear deadline in 2050. To be compared, some NGEU loans and grants may be repaid until 31 December 2058. On the other hand, several important distinctions can also be made between NGEU and a Climate and Energy Union. To begin with, the amount of money involved can be significantly larger. With €750 billion, NGEU involves a serious amount of money, but a full Climate and Energy Union may involve trillions over the coming decades. At some point, such an increase in the quantity of funds involved may also affect the legal quality and qualification of the funding measures, especially where the 'off-budget' expenditure of the EU would start to eclipse the 'on-the-books' budget of the EU by orders of magnitude. Climate change, moreover, has been long in the making, and can hardly be considered an unforeseen single event. What is more, NGEU has been explicitly justified by EU institutions as a one-off. Using the NGEU playbook, and going even further in terms of size and ambition, for a Climate and Energy Union, runs counter to this argumentation, and may therefore even undermine the legality and legitimacy of NGEU itself.

It can therefore be concluded that the Covid-19 crisis and the NGEU response to it may offer legal space for an EU Climate and Energy Union, particularly concerning its massive funding need. Utilizing Article 122 TFEU for this purpose would require a certain level of creative thinking as well as political will, and would certainly entail significant informal constitutional change in the

EU. Such creativity, however, does not seem beyond the realm of the possible in EU law, also taking into account the lessons from the EMU crisis and the EU's response to the Russian invasion of Ukraine so far.

Even if the EU legal order is able to accommodate such rapid and far-reaching legal evolution, however, national legal orders may not be. As discussed above, national courts are increasingly formulating limits to EU integration so as to protect the core of their own constitutional order, sovereignty and national democratic process. Consequently, the legal design of an effective Climate and Energy Union needs to find a balance between utilizing the legal space offered by EU law and respecting the limits imposed by national constitutional law and courts. **For that reason, the legal space for a Climate and Energy Union must not merely be understood as a question of EU law, but also as a question of compound EU constitutional law comprising both the EU legal order and the 27 national legal orders that form part of the EU.**

The third and last question addressed in this report is if an **individual, fundamental right to accessible and sustainable energy** for every EU citizen already exists, or can be in some way construed from EU primary or secondary law, including from the Charter and the ECHR. This study concludes that **there currently is no enforceable individual right to sustainable energy under EU or ECHR law, although there is a basis for developing the law so as to achieve greater protection for the climate through sustainable energy.** Overall, it seems unlikely that a specific right to sustainable energy would be created via the doctrine of positive obligations, notwithstanding the major developments in this field over the last couple of years. To a large extent, this is due to the understandable hesitation of national and European courts to step in and dictate to governments which acts they should specifically take to achieve their (binding) climate and energy objectives. Consequently, courts are increasingly forcing States to take sufficient actions to meet their climate objectives, but for now leave the precise policy measures to be deployed to the democratically elected officials. In the case of access to sustainable energy, this approach has the added benefit that a sudden individual right to sustainable energy would be impossible to meet, creating a situation where States are forced to violate such an individual right.

Nevertheless, individual rights and positive obligations can play an important role in the creation of an effective Climate and Energy Union. To begin with, the legislator can define more limited and practicable rights to clean energy via EU secondary legislation, building on the competences offered by amongst others Article 192 and 194 TFEU. In addition, the increasingly far reaching positive obligations imposed on governments by courts, coupled with the apparent relaxation of standing requirements for interest groups at the ECtHR can be used by private parties to put pressure on governments and challenge national and EU measures that do not do enough to reach the binding climate objectives or even actively go against these objectives. When that happens, those States will also have an increased incentive to collaborate at the EU level to create an effective Climate and Energy Union that can deliver the necessary sustainable energy.

1. INTRODUCTION

Climate change is one of the most urgent and existential challenges ever to face humanity. To serve and protect its citizens, the EU and its Member States need to act decisively and quickly. Forming an effective Climate and Energy Union is part of the necessary response.

At the same time, the EU is an entity ruled by and dependent on law. Legal norms are the muscles and tendons through which the EU acts and affects reality, in large part by coordinating the actions of its Member States. Any effective Climate and Energy Union must therefore make maximum use of the options offered by European law, but must also fit within the boundaries of EU law and the EU's constitutional structure. Where the European constitutional and legal framework do not offer sufficient space and capacity to act, moreover, the question arises if this framework can be modified, and if so, how. Law, after all, is a tool to serve the common good, but at the same time can only perform this vital function if limitations inherent in law are respected.

This study explores the legal space for the creation of an EU Climate and Energy Union, looking at the constitutional basis for a sustainable transformation in the EU. Based on the questions asked to us by the Committee on Constitutional Affairs of the European Parliament (AFCO Committee), this study zooms in on three legally different, but related questions. First, what is the current legal space for the EU to regulate energy and environmental policy? Second, where more space is required, can such legal space be created, and would that require Treaty change? Third, can a right to accessible and sustainable energy for every EU citizen be established and effectively enforced, either under the current framework, or under an amended constitutional framework?

This third question is legally different in nature, as it focuses on individual rights of citizens and their enforcement, rather than on EU competences. At the same time, the questions are closely related: any individual right of citizens to sustainable energy will significantly impact the legal space for Member States and the EU to regulate energy and climate change. As also recognized implicitly in the Charter, granting enforceable individual rights to persons can impact on the competences of the EU and Member states, as well as the legal space left to wield those competences. What is more, the emergence of any individual right to clean energy would have a significant impact on EU legislation, as the EU legislator would have to step in to create a more detailed legal framework to manage such a right.

To answer these three questions, an underlying framework must first be provided. This framework must begin by outlining how one can determine current and potential EU competences in the relevant field, including any explicit and implicit limits on the use of these competences. Second, this framework must outline how EU competences can change and evolve over time, and to what extent such change can take place without treaty change or where treaty change is required. Third, the framework must clarify how individual rights can arise and be enforced under EU law, and what the relation is between EU competences and individual rights. Lastly, the financial dimension must be taken into account. In addition to legislative competences, successfully managing climate change and the energy transition will require significant financial resources, far outstripping the current EU budget. In addition to legislative competences and individual rights, therefore, another key question is how sufficient financial resources can be collected and brought to bear, without exceeding the EU's constitutional nature and legitimacy. Only once this framework is in place, can the underlying questions be effectively answered.

Consequently, this study is structured as follows. Section two first briefly sets out what a Climate and Energy Union entails and what it should achieve. Section three then sets out the current system of EU competences, the EU's competence relevant for a Climate and Energy Union and their limits, as well as

their use in practice. Section four subsequently provides an analysis of current EU competences, including any gaps in these competences. To the extent gaps exist, including on funding, this section also explores any possibilities to develop the required competences, either through evolution of the current law or through (in)formal Treaty change, inter alia by building on recent legal development following the Covid pandemic. Section five then turns to the possibility of finding or construing an individual right to sustainable energy, including through recent case law on positive obligations of Member States to combat climate change.

2. WHAT IS A CLIMATE AND ENERGY UNION AND WHAT SHOULD IT ACHIEVE ?

Considering the vital importance of combating climate change, and in light of its obligations under international law, the EU aims to create a true Climate Union. The main targets that this Climate Union must achieve have been laid down in the European Climate Law.[1] In particular, this law establishes two legally binding headline targets. First, the Union has bound itself to the interim target for 2030 to reduce its greenhouse gas (GHG) emissions by 55% percent as compared to its emissions in the 1990's. Second, the EU is to achieve net-zero emissions by 2050, in line with the Union's obligations under the Paris Agreement.

Consequently, an actual Climate Union must — at the very least — be capable of achieving these two headline aims, which of course requires a great number of more specific measures and interim targets. When we speak of the Climate Union in this study, therefore, we refer to the totality of actions required to ensure the EU meets its legally binding targets under the Climate Law, as well as any additional obligations under international law.

The creation of an effective Climate Union, moreover, is closely intertwined with the creation of an effective Energy Union. Energy, including the creation of an effective internal market for energy, has long been an EU priority. In the 1990s, for example, the Community already initiated the process of building an internal energy market with the adoption of two pieces of legislation[2]. Two further Energy Packages had been adopted in 2003 and 2009 respectively to further pursue this aim. With the need to transition to clean and renewable energies, however, creating an EU Energy Union has become an integral part of the EU's climate response, shifting the focus from purely economic integration to climate objectives. In February 2015, for instance, the Commission launched its strategy for a 'Resilient Energy Union with a Forward-Looking Climate Change Policy'.[3] The 2015 Strategy sets out five mutually-reinforcing and closely inter-related dimensions: 1) energy security, solidarity and trust; 2) a fully integrated European energy market; 3) energy efficiency to moderate demand; 4) decarbonization of the economy and 5) research, innovation and competitiveness. Since then, energy has played an ever more prominent role in climate policy and legislation. Under the European Climate Law, for example, targets for 2030 include the interconnection of 15% of the EU's electric energy systems, a reduction of 11.7% in energy consumption as compared to 2020 projections, and an increase to 42,5% with a stretch target of 45% of energy consumption provided by renewables. For the purpose of this study, therefore, we consider the Climate and Energy Union as closely connected, and focus on the ways in which the Energy Union can and must contribute to the climate objectives of the EU.

These climate objectives are anchored directly in the EU Treaties, at the most fundamental, constitutional level of EU law. For example, the preamble to the Treaty on European Union (TEU), declares that the Union and the Member States are:

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1 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] *OJ L243/1*.

2 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20–29, and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, p. 1–12.

3 Commission 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM/2015/080 final.

> "determined to promote economic and social progress for their peoples, taking into account the principle of *sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields."

In addition, according to Article 3 TEU the European Union must promote "peace, its values and the well-being of its peoples," establish an internal market which works for "the *sustainable development* of Europe [...] aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment," and stimulate "scientific and technological advance." The same Article also obliges the Union to "contribute to peace, security, [and] the *sustainable development of the Earth*" in its relations with the wider world. Moreover, both according to the principle of environmental integration found in Article 11 TFEU, and the specific legal bases for the Union's Environmental and Energy policies, Articles 192 and 194 TFEU, the Union must integrate "environmental protection requirements" into "the definition and implementation of its policies and activities" to "preserve and improve the environment."

As these quotes also demonstrate, however, the Climate and Energy Union, do not operate or exist in isolation, and do not form the only objectives or obligations of the EU. The EU, for example, must also serve and respect the well-being of its peoples, social and economic progress, energy security, cohesion and scientific and technological advance, as well as secure the geo-political safety and stability of the Union. In short, the EU must "leave no-one behind" whilst tackling climate change in an increasingly hostile geo-political reality that also requires investment in security and strategic autonomy. Consequently, in light of the Union's Treaty commitments and shared values, the transition to net-zero requires a holistic approach that ensures that this transition is also just and safe and not incompatible with the Union's other core purposes and values: the EU must be able to chew climate neutrality gum and walk autonomously on the geostrategic plain at the same time.

To a certain extent, these different aims and values align. Securing sufficient production of renewable energy within the EU, for example, makes the EU greener and reduces dependence on foreign energy. Further investing in the interconnection of Member States' energy grids can lead to the more efficient use of renewable energy generated by wind and solar power. Money, however, can only be spent once, and serious tensions can also arise between these different objectives. Certain levels of autarky and redundancy, for example, which may be essential for security, may significantly increase the cost and time required to get to net-zero. In addition, a more centralised investment and industrial policy aimed at boosting and protecting a green European economy may conflict with EU rules on state aid or free movement, as well as with international obligations. An effective Climate and Energy Union must, therefore, also strike a principled yet effective balance between the climate objectives of the EU and its other objectives and obligations. In turn, this requires a constitutional and legal framework that allows the relevant actors to find this balance.

In addition to balancing these partially dovetailing, partially competing EU objectives, an effective Climate and Energy Union must also stay within the legal limits imposed by the EU constitutional and legal framework. As is true for any Union action, an actual Climate and Energy Union, therefore, has to comply with the Treaties and thus with the principles of conferral and proportionality. This means, per Article 5 of the Treaty on European Union, that Union action shall be limited to "the competences conferred upon it by the Member States in the Treaties" and that the "content and form of such action shall not exceed what is necessary to achieve the objectives of the Treaties." Per Article 4(2)(e) and (i) TFEU, the Union and Member States share competences regarding energy and the environment, meaning Union action within the scope of the Climate and Energy Union must also comply with the

principle of subsidiarity. This means, per Article 5 TEU, that the Union's actions within the scope of the Climate and Energy Union must be limited to those whose objectives "cannot be sufficiently achieved by the Member States," but can "be better achieved at Union level." In addition to these limits on EU competence, a Climate and Energy Union will also have to respect any limits imposed by the Charter, as well as other possible limits in the treaties including article 4(2) TEU. What is more, account should also be taken of any limits imposed, *de iure or de facto*, by the case law of national (constitutional) courts and by the very nature of the EU itself, which whatever it may be, in any event does not form a unitary or federal state.[4]

For this reason, the next section will discuss the general and specific competences of the EU in the field of energy and the environment, including the limits imposed on these competences by different parts of EU law. When studying those limits, and possible modifications to them, however, it is important to keep in mind the fundamental alignment between the creation of an effective Climate and Energy Union and the very origins and raison d'être of the EU itself, starting from its origins in the European Coal and Steel Community: to cooperate in pursuit of mutual advantage and resolve shared challenges in accordance with common values (Article 2 TEU). The climate emergency is a prime example of a shared challenge whose resolution is facilitated by a Union-level response, as required by the principle of subsidiarity. Climate change knows no borders: if left unaddressed it will ultimately harm all Member Peoples, the ultimate beneficiaries of EU integration. However, the distribution of both the necessary resources for and major challenges to successful climate and energy policy is asymmetric. As McKinsey reports, geographical factors impact a Member State's ease in reducing emissions and the cost-effectiveness of decarbonisation interventions.[5] Member States differ in their CO2 storage opportunities, local climate and agriculture practices, and land availability for solar plants, reforestation, and wind farms. Where Northern countries could harvest 30% to 60% more onshore wind, Southern countries could harvest 1,000 more hours of sunlight a year.[6] If Member States successfully pool their resources, they could achieve a win-win solution where the cost of the transition is reduced by approximately 25 euro per tonne of CO2 equivalent.[7] Collaboration between Member States in a Climate and Energy Union is therefore necessary and efficient, but needs to be legally structured and constituted in a manner that is legally permissible and practicable.

The Green Deal and an effective Climate and Energy Union

The headline targets outlined previously, to reduce GHG emissions by 55% by 2030 and to achieve net-zero emissions by 2050, as derived from the European Climate Law, were prompted by the European Green Deal. The Commission first presented the Green Deal strategy on the 11th of December 2019, with the aim of proposing the European Climate Law within 100 days.[8] The Green Deal "is a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-

4 cf Armin Cuyvers, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19 European Law Journal 705, 711; Armin Cuyvers, 'The EU as a Confederal Union of Sovereign Member Peoples: Exploring the Potential of American (Con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU' (PhD thesis, Leiden University 2013)).

5 Paolo D'Aprile and others, 'Net-Zero Europe: Decarbonization Pathways and Socioeconomic Implications' (McKinsey & Company 2020).

6 ibid 20.

7 ibid.

8 Commission, 'Annex to The European Green Deal' (Communication) COM (2019) 640 final.

efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use."[9] It is also a response to the United Nations (UN) 2030 Agenda and the sustainable development goals to "put sustainability and the well-being of citizens at the centre of economic policy, and the sustainable development goals at the heart of the EU's policy making and action."[10]

Overall, the strategy would mobilise "all EU actions and policies" to contribute to achieving the Green Deal objectives and ensure the policy is "bold and comprehensive" in recognition of the scale of the challenges posed by the threat of climate change and their interconnection.[11] This would also permit the pursuit of "synergies across all policy areas" and, in sum, "maximise benefits for health, quality of life, resilience and competitiveness."[12] In seeking to integrate environmental protection with all the Union's actions and policies, the Green Deal builds on Article 11 TFEU which obliges the Union to include "environmental protection requirements" in the "definition and implementation" of its "policies and activities" to promote sustainable development. To date, the Green Deal has supported the adoption of a series of legal instruments concerning issues falling within diverse EU competences, such as the internal market, energy, transport, and the environment. These include, for example, the Nature Restoration Law (Article 192(1) TFEU),[13] the Right-to-Repair Directive (Article 114 TFEU),[14] the Regulation on Better and Sustainable Connectivity (Article 172 TFEU),[15] the Net-Zero Industry Act (Article 114 TFEU),[16] and the Regulation on Reducing Methane Emissions in the Energy Sector (Article 192(1) TFEU).[17]

Non-governmental organisations (NGOs) have criticised the Green Deal targets for being insufficient, calling instead for a reduction in GHG emissions of at least 65% in order to meet the goal of limiting the global rise in temperatures to 1,5C.[18] In addition, NGOs criticise the "net-zero" target, alleging it permits fossil fuel giants, and industry more generally, to continue with "business as usual" and to obfuscate their negative climate impact with carbon capture and storage (CCS) which the NGO's view as unproven technologies.[19] Overall, they appear dissatisfied with industry involvement in drafting the Green Deal, arguing the targets' perceived lack of ambition and the choice of measures reflects

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9 Commission, 'The European Green Deal' (Communication) COM (2019) 640 final 2.

10 ibid (n 3).

11 ibid.

12 ibid.

13 Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 (Nature Restoration Law) [2024] OJ L93/1.

14 Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828 (Right-to-Repair Directive) [2024] OJ L20/1.

15 Regulation (EU) 2024/1679 of the European Parliament and of the Council of 13 June 2024 on Union guidelines for the development of the trans-European transport network, amending Regulations (EU) 2021/1153 and (EU) No 913/2010 and repealing Regulation (EU) No 1315/2013 (Regulation on Better and Sustainable Connectivity) [2024] OJ L230/1.

16 Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 (Net-Zero Industry Act) [2024] OJ L63/1.

17 Regulation (EU) 2024/1787 of the European Parliament and of the Council of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation (EU) 2019/942 (Regulation on Reducing Methane Emissions in the Energy Sector) [2024] OJ L61/1.

18 Greenpeace European Unit, 'Leaked European Green Deal Is Not up to the Task, Greenpeace' (Greenpeace, 29 November 2019) <www.greenpeace.org/eu-unit/issues/climate-energy/2496/leaked-european-green-deal-is-not-up-to-the-task-greenpeace/> accessed 20 September 2024.

19 'A Grey Deal?: Fossil Fuel Fingerprints on the European Green Deal' (Corporate Europe Observatory, 7 July 2020) <https://corporateeurope.org/en/a-grey-deal> accessed 20 September 2024.

"corporate capture" and a prioritisation of economic growth over compliance with the 1,5C target set by the Paris Agreement.[20]

A 2024 retrospective study assessing the achievements of the Union's climate actions in the past 5 years with a focus on the Green Deal concludes that whilst Union action has had a positive effect, the Union is still not on track to achieve its European Climate Law targets or to comply with goals set in the Paris Agreement.[21] Indeed, at its current pace the Union would cut its emissions by only 64% in 2050, whereas it should achieve climate neutrality by 2040 in order to comply with the Paris Agreement.[22]

Politicians have expressed concerns about the Green Deal's potential political and socio-economic effects. For instance, former Romanian MEP Traian Băsescu opined the deal would create tensions inside the EU and that certain Member States which are more heavily reliant on carbon intensive industries may consider exiting the Union.[23] The Chair of the European People's Party's (EPP) Manfred Weber pursued a temporary moratorium on further action on the Green Deal, as he felt the Union had been "more ambitious" with its strategy than the rest of the world.[24] He suggested the Union ought to re-focus on industry and prioritise competitiveness. This was part of a broader EPP response to the Commission proposal for the Nature Restoration Law, which was driven by socio-economic concerns.[25] The proposal, he argued, would increase food prices and constitute an attack on European agriculture, forestry and fisheries. Farmers' protests did erupt across the EU, although the Green Deal did not appear to be their sole concern. The protests also related to other issues such as cheap agricultural imports from outside the EU and rising costs due to the war in the Ukraine.[26]

The current report focuses on the constitutional basis for a Climate and Energy Union. Such a Union would integrate the nascent Climate Union with the existent Energy Union. It has adopted contributing to achieving the headline targets from the Climate Law as a minimum aim for a Climate and Energy Union because these headlines are legally binding and because doing so aligns both with Article 11 TFEU and with the Green Deal's aim to mobilise all Union acts and policies. Given that the report provides an analysis of the legal means by which a Climate and Energy Union could contribute to these targets, its suggestions aim for coherence with Green Deal legislation, as would also be required by the cohesion principle set out in Article 7 TFEU. Nevertheless, the report and its analysis of a Climate and Energy Union has a narrower focus than the Green Deal, since it examines legal avenues for the Union to pursue these climate targets paying particular attention to energy. The report does not, however, assess the accuracy of the critiques concerning the Green Deal outlined above nor can it predict the possible political and socio-economic consequences of any particular approach. Instead,

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20 ibid.

21 Laura Doanová and others, 'What Has the EU Done for You and the planet?' (Report by Shared Planet and FIPRA International, 6 May 2024) <www.transportenvironment.org/uploads/files/Report-What-has-and-can-the-EU-do-for-you-and-the-planet.pdf> accessed 20 September 2024.

22 ibid.

23 Frédéric Simon, 'Basescu: European Green Deal risks pushing 'two or three countries' towards EU exit' (Euractiv , 20 February 2020) <www.euractiv.com/section/energy-environment/interview/basescu-european-green-deal-risks-pushing-two-or-three-countries-towards-eu-exit/> accessed 20 September 2024.

24 Jakob Hanke Vela, 'EPP's Manfred Weber Vows to Vote down EU Nature Law' (Politico, 27 June 2023) <www.politico.eu/article/epp-manfred-weber-vows-vote-down-eu-nature-restoration-law-european-parliament/> accessed 20 September 2024.

25 EPP, 'EPP Group Withdraws from Negotiations on Nature Restoration Law' (EPP Group, 31 May 2023) <www.eppgroup.eu/newsroom/epp-group-withdraws-from-negotiations-on-nature-restoration> accessed 20 September 2024.

26 Sophie Tanno and Chris Liakos, 'Farmers' Protests Have Erupted across Europe. Here's Why' (CNN, 10 February 2024) <https://edition.cnn.com/2024/02/03/europe/europe-farmers-protests-explainer-intl/index.html> accessed 20 September 2024.

the focus remains on the legal space for a Climate and Energy Union, which in turn will be a vital part of the larger Green Deal ambitions and obligations of the EU, including under the Paris Agreement.

3. CURRENT EU COMPETENCES ON ENVIRONMENT AND ENERGY

To grasp the legal space available for the creation of a real Climate and Energy Union, it is first necessary to understand how EU competences are constituted, delineated and policed. As many EU competences are worded in very general terms, and as certain limits are primarily policed at the political level, significant legal space exists where there is sufficient political will. Yet certain limits do of course exist, which become especially relevant where at least one actor with the power to challenge EU acts decides to challenge the validity of any act adopted in front of a national (constitutional) court or the CJEU. This section therefore sets out the general system of EU competences, the EU's general and specific competences relevant for a climate and energy union and how these have been used so far, as well as the limits to these competences. The next section then further explores the ways in which these competences might be developed further and extended, even without treaty change, by looking at some recent development in other relevant fields.

3.1. The system and scope of EU competences[27]

The EU only has those powers *conferred* on it by the Member States.[28] All powers that have not been transferred to the EU remain with the Member States. In technical terms, this means that, unlike a sovereign state, the EU has no "*Kompetenz-Kompetenz*", and cannot legislate on whatever it wants.

The basic principle of conferred powers is laid down in articles 4, and 5(1) and (2) TEU, which provide that:

> '1. The limits of Union competences are governed by the principle of conferral. (…)
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

If the EU wants to create a climate and energy union, therefore, it must first have received the competence to do so. Such competences are conferred via *legal basis provisions*, which also determine through which legislative or non-legislative procedures such competences can be used.[29]

Some legal bases are very limited and specific, whereas others can be extremely broad and open. The prime example is article 114 TFEU on the creation of the internal market. Article 114 TFEU allows the EU to legislate to create the internal market envisioned in Article 26 TFEU:

> 'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions

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27 Parts of this section build on Armin Cuyvers, 'The EU Legal Framework', in E Ugirashebuja and others (eds), *East African Community Law Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) 1.

28 Damian Chalmers, *European Union Law* (CUP 2007) 140.

29 See Case 45/86 *Commission v Council* [1987] ECLI:EU:C:1987:163. Such legal bases must be distinguished from the broader articles that determine the values and objectives of the EU, such as Articles 2 and 3 TEU. Such Articles only indicate what the EU should aspire to, but do not give the competence to adopt any acts.

laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

Article 114 TFEU, therefore, gives the EU a very broad competence to harmonise all national laws that may hinder the free movement of goods, services, capital or people and therefore obstruct the internal market, which can also include rules on energy and climate. Such a broad power then of course raises the question what the *limits* of EU competences are, and who gets to decide these limits. For, as we also know from the Commerce Clause in the US, almost any piece of legislation can in some way be linked to cross-border-trade, which risks turning article 114 TFEU into a *de facto* general competence.[30]

The first decision on whether the EU has been given a certain competence lies with the Commission, when drafting a proposal, and then with the Council and the European Parliament when adopting EU acts. If these parties do not believe the EU has received a certain competence, they will simply not adopt the act. The ultimate legal line judge of EU competences, however, is the CJEU.[31] In policing the outer boundaries of EU competences, the CJEU combines a textual with a teleological, or purposeful approach. It starts from the text of a legal basis, but then gives a lot of weight to the underlying objectives as stated in the EU Treaties of the EU. The CJEU tends to interpret competences in such a way that these objectives can be effectively realised.[32] Consequently, EU competences are usually interpreted in a rather extensive manner geared towards giving the EU the powers it needs to effectively realise its stated aims. This approach provides the EU with sufficient, and flexible, legal space to achieve its objectives. This approach by the CJEU also gives a significant level of deference to the political institutions: if these political institutions have agreed, either by QMV, consensus or unanimity, that the EU has a certain competence by adopting it, the CJEU will often follow this assessment.

This expansive, purposeful interpretation of EU competences has often been criticised, including by national courts. The main criticism is that this approach comes close to undermining the principle of conferral, and hence the competences that remain with the Member States.[33] As a result, informally led by the German Constitutional Court, national courts have started to increasingly lay down, and sometimes police, red lines to EU competences, mostly along the lines of fundamental rights, ultra vires and constitutional identity review.[34] At the same time, especially in response to the multiple crises

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[30] JH Choper and others, *Constitutional Law* (10th edn, Thomson 200687 and 91. See also Thomas W. Merril, 'Towards a Principled Interpretation of the Commerce Clause' (1998) 22 Harvard Journal of Law and Public Policy 31; Diane McGimsey, 'The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole' (2002) 90 California Law Review 1675. Different from the US, however, the EU has less effective political counterbalances.

[31] Case C-376/98 *Germany v Parliament and Council (*Tobacco Advertising I) [2000] ECLI:EU:C:2000:544; C-380/03 *Germany v Parliament and Council* (Tobacco Advertising II) [2006] ECLI:EU:C:2006:772, Joined Cases C-293 and 594/12 *Data Retention Directive* [2014] ECLI:EU:C:2014:238; Case C-358/14 *Poland v Parliament and Council* (Tobacco Advertising III) [2016] ECLI:EU:C:2016:323.As will be discussed further below, not all national supreme courts accept this absolute claim of the CJEU in its full extent, although in practice it is the CJEU that determines the limits of EU competences. Of course the Member States do retain the option of changing the EU Treaties if they disagree, even though this requires unanimity of 27 states, and therefore is not often a realistic option.

[32] Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson/Longman 2002) 261.

[33] cf Pieter Van Cleynenbreugel, 'Meroni Circumvented? Article 114 TFEU and the EU Regulatory Agencies' (2014) 21 Maastricht Journal 1, 64-88.

[34] See for discussion inter alia, Joël Rideau, 'The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia Ltd 2013) 252-253; Christian Calliess, 'Constitutional Identity in Germany - One for Three or Three in One?' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 156-157; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979 or Zdenek Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism - The Czecho-Slovak Pension Saga, and the Dangers of State Court's

facing the EU over the past years, the political institutions of the EU have themselves significantly expanded the scope of several legal bases, as will be discussed in more detail below. As a result, it seems that the scope of EU competences has become even more elastic in the past decade, but also more contested, including at the national level.

The elasticity of EU competences, or rather their capacity to expand as they rarely shrink, is of vital importance for determining the legal space for a Climate and Energy Union. As will be discussed in more detail below, several legal bases have seen impressive expansion over the past years, without any formal treaty change being required. Similarly, several rules or principles that seemingly limited EU competences have been interpreted quite narrowly. Due to the purposeful interpretation of EU competences by the CJEU, and the broad formulation of EU objectives, competences tend to increase with the real world challenges they are supposed to help tackle.

3.2. The nature and use of EU competences

Once it is clear that the EU has the competence to do something, one must determine the nature of this competence, as well as when and to what extent it may be used. The EU has three different types of competences, ranging from exclusive competences to shared competences and supporting competences.[35] For the Climate and Energy Union, especially the distinction between exclusive and shared competences is relevant.

By conferring an exclusive competence, Member States transfer all their authority in a certain area to the EU. As a result, Member States lose all power to regulate this area themselves, even if the EU does not exercise its competence. Considering the far reaching impact on Member States, there are only a rather limited number of exclusive competences granted to the EU. Article 3 TFEU enumerates these areas, comprising the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and the common commercial policy. Of these areas, only the conservation of marine biological resources under the common fisheries policy may appear to directly link to the Climate and Energy Union. Other areas of exclusive competence, however, may also directly or indirectly impact on energy and climate. Effective competition law, or the relaxation of certain rules on competition including state aid, may for example be necessary to achieve the objectives underlying the climate and energy union, as may international trade agreements with third countries covered by the CCP.

Shared competences, the largest group, are literally shared between the EU and the Member States. As a result, both the EU and the Member States are allowed to act in areas of shared competence. Article 4 TFEU lists the many areas in which the EU and the Member States share competences. For the Climate

Defiance of EU Law' (2016) 23 Maastricht Journal of European and Comparative Law 185, 186-187. For three of the more conflictual judgments, see German Constitutional Court, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 (Weiss) (in particular paras 99-128; 154-163; 177-178; 222-235) and Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21 (NextGenEU), as well as the openly hostile judgment of the Polish Constitutional Tribunal of 7 October 2021, K 3/21.

[35] Robert Schütze, 'The European Community's Federal Order of Competences: A Retrospective Analysis', in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 63.

and Energy Union, it is important that these include the internal market, agriculture and fisheries, the environment and energy.

To regulate the use of shared competences, and avoid conflicts, three main principles regulate the use of shared competences by Member States. First, in case of a conflict, the EU norm trumps the national norm.[36] Second, the moment the EU regulates a topic within a shared competence it 'occupies the field'. From that moment onward, the Member States lose the authority to regulate this topic. For example, if the EU prohibits engines running on fossil fuels, Member States lose the competence to regulate fossil fuel engines, even though they may regulate characteristics of other types of engines. The more EU regulation is adapted in a certain area, therefore, the less competence remains for Member States, and the closer a shared competence starts to reflect an exclusive competence in its effects. Third, even where Member States remain competent to act, the principle of sincere cooperation obligates them not to undermine the effectiveness or objectives of existing EU obligations.[37]

Once it has been established that the EU has a shared competence, moreover, two other questions arise: should the EU also use the competence it has received, and if so, how far reaching should its action be? These questions are governed by the principles of subsidiarity and proportionality.[38]

The principle of subsidiarity determines that the EU 'shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.'[39] Even if the EU has a shared competence, it should only use this competence if the Member States cannot achieve a similar result themselves. In the context of a Climate and Energy Union, the question therefore is if Member States, acting individually, could, for example, achieve a similar level of environmental protection as the EU acting collectively. Subsidiarity is a legal principle and can be enforced by the CJEU. Yet it is inherently also highly political in nature, and difficult to adjudicate. The primary subsidiarity check therefore is conducted by the political institutions and the national parliaments.[40] The CJEU generally limits itself to checking formal subsidiarity requirements, primarily if legislative acts contain a paragraph assessing subsidiarity explicitly. In light of this limited check, and considering the inherent cross-border nature and daunting size of climate change, it is not likely that an EU Climate and Energy Union will be legally limited by the principle of subsidiarity to any relevant extent, as long as all the formal requirements are always respected.

Once it has been determined that EU action is called for, moreover, the question becomes how far reaching and encompassing its action should be. This question is governed by the principle of proportionality, which requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'[41] Just as with subsidiarity, proportionality is largely left to the political institutions.[42]

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[36] This derives from the general principle of primacy, cf, Case 06/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

[37] See Article 4(3) TEU.

[38] Note that the principle of subsidiarity does not apply to exclusive EU competences. As only the EU can act in these fields, the question of subsidiarity has already been settled by the constitutional legislator.

[39] Article 5(3) TEU.

[40] See Protocol (No 1) on the role of national parliaments in the European Union [2016] OJ C202/203.
and Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115/206 that may give 'yellow' or 'orange' cards to legislative proposals where they think they infringe the principle of subsidiarity. On the complex nature of these concepts also see PJG Kapteyn and P VerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd edn, Kluwer 1998) 233ff.

[41] Article 5(4) TEU; Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115/206.

[42] At least in the field of competence determination. The CJEU can and often does closely scrutinise proportionality where restrictions on free movement are concerned.

3.3. Current EU competences relevant to the Climate and Energy Union

The treaties contain several competences that are directly or indirectly relevant to the creation of an effective Climate and Energy Union. This section will first outline the two most important general legal bases, being the internal market competence of Article 114 and 115 TFEU and the residual competence of Article 352 TFEU. Subsequently, it sets out the most relevant specific legal bases, being Articles 192 and 194 TFEU.

3.3.1. General EU competences relevant for the Climate and Energy Union

As discussed above, Article 114 TFEU provides a particularly expansive competence to establish an internal market. This legal basis is particularly broad for two reasons. First, the threshold for being allowed to use Article 114 TFEU is particularly low. To justify harmonising measures under Article 114 TFEU it suffices that there is a risk of *potential future obstacles* that will hinder free movement in the internal market. Second, once a sufficient (potential) obstacle to free movement has been identified, a measure adopted on the basis of Article 114 TFEU may also pursue other objectives than the establishment or safeguarding of the internal market, and these other objectives may play a very significant part in designing the EU legislation. In other words, once a measure has a sufficient link to the internal market objective, it may also pursue energy and climate objectives, even to a significant extent.

The famous *Tobacco Advertising* case law offers the best example of this expansive approach.[43] These cases concerned a directive prohibiting all advertising for tobacco products, which was based on (now) Article 114 TFEU.[44][45] The justification for the use of Article 114 TFEU was that the differences in national laws on tobacco advertising could undermine the free movement of certain products, such as newspapers and magazines. According to Germany, however, the directive really aimed to reduce smoking and protect public health, whereas Article 168(5) TFEU prohibits harmonisation in the field of public health.[46]

In *Tobacco Advertising I*, the CJEU first held that the directive went beyond the competence conferred under Article 114 TFEU as it also covered products where there was no risk of limiting cross-border movements.[47] A second, amended directive, however, then excluded these objects, and was subsequently allowed by the CJEU under Article 114 TFEU. The CJEU first stressed that the EU has no general competence to do whatever it wants:

> 'Those provisions, read together, make it clear that the measures referred to in Article [114(1)] of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community

[43] *Tobacco Advertising I* (n 30); *Tobacco Advertising II* (n 30). For a recent addition in this debate also see *Tobacco Advertising III* (n 30).

[44] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] *OJ L213/9*.

[45] Under the old, pre-Lisbon and Amsterdam numbering this was still Article 100A and 95 EC respectively.

[46] With certain limited exceptions in Article 168(4) TFEU that were not applicable in this case.

[47] The directive also allowed Member States to impose stricter norms, but did not provide for a free movement clause (*Tobacco Advertising I* (n 30), paras 101ff).

> legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.
>
> Moreover, a measure adopted on the basis of [Article 114 TFEU] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. (…)'[48]

In the case of diverging rules on tobacco advertising, however, a sufficient risk for free movement was found to exist, or could arise in the future:

> 'It is clear that, as a result of disparities between national laws on the advertising of tobacco products, obstacles to the free movement of goods or the freedom to provide services exist or *may well* arise.
>
> In the case, for example, of periodicals, magazines and newspapers which contain advertising for tobacco products, it is true, as the applicant has demonstrated, that *no obstacle exists at present* to their importation into Member States which prohibit such advertising. However, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption, *it is probable that obstacles to the free movement of press products will arise in the future*.'[49]

It flows from the tobacco case law, and the steady case law from the CJEU since then, that the EU can adopt harmonising measures under Article 114(1) TFEU where there is an actual or potential obstacle, now or in the future to any of the fundamental freedoms.[50] Once this threshold has been met moreover, as indicated above, *other objectives* than the internal market may also be pursued:[51]

> 'Furthermore, provided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires

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[48] *Tobacco Advertising I* (n 30), paras 83-84.

[49] Tobacco Advertising I (n 30), paras 96-97.

[50] cf Amongst many other confirmations of this line Case C-491/01 *The Queen v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (British American Tobacco) [2002] ECLI:EU:C:2002:741, para 60; Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* (Arnold André) [2004] ECLI:EU:C:2004:800, para 30; Case C-210/03 *The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* (Swedish Match) [2004] ECLI:EU:C:2004:802, para 29; or Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECLI:EU:C:2005:199, para 28. Measures are not allowed, however, on a 'mere finding of disparity between national rules'.

[51] Note also in this regard that, even though the EU has no competence in public health, Article 168 TFEU does obligate the EU to take public health into account in all its legislation.

> that, in the process of harmonisation, a high level of human health protection is to be ensured.'[52]

This expansive reading of Article 114 TFEU is particularly relevant for an Energy and Climate Union, as the EU Treaties also expressly contain objectives relating to the environment and energy. Where the minimum threshold to rely on Article 114 TFEU is reached, therefore, which can happen rather quickly with national measures affecting the environment and energy, measures based on Article 114 TFEU may also be decisively shaped by concerns for climate and energy. Based on the ESMA judgment, moreover, such acts under Article 114 TFEU may also include the creation of agencies with far reaching powers.[53] As Article 114 TFEU 'only' requires a qualified majority, moreover, actions aiming to bolster the Energy and Climate Union under this legal basis can only be stopped by a full blocking minority.

Where Article 114 TFEU does not provide a sufficient legal basis for climate or energy measures, moreover, the general residual competence of Article 352 TFEU may offer an alternative. This a-typical legal basis provides a residual competence where the Treaties provide an objective but no specific competence:

> 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'[54]

Article 352 TFEU hence creates a residual competence to ensure that objectives can be realised, ensuring EU effectiveness.[55] Article 352 TFEU, however, requires unanimity, limiting its use for an effective and proactive Climate and Energy Union. In addition, the *Bundesverfassungsgericht* requires approval by the German parliament for any use of Article 352, further limiting its appeal for an Energy and Climate Union that has to act quickly.[56]

The general legal basis of Article 114 TFEU and Article 352 TFEU therefore already offer quite some legal space to regulate energy and the environment, and have also been used for this purpose in the past, as the overview later in this section shows. At the same time, their relevance, or necessity, for a Climate and Energy Union has been reduced by the introduction and gradual expansion of more specific legal bases on energy and the environment, to which we now turn.

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52 Tobacco Advertising I (n 30), para 88.

53 Case C-270/12 *UK v Parliament and Council* (ESMA) [2004] ECLI:EU:C:2014:18.

54 TFEU, Art 352.

55 Alan Dashwood, 'Article 308 as the Outer Limit of Expressly Conferred Community Competence' in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009) 35ff.

56 See especially its *Lissabon Urteil* of 30 June 2009, BVerfGE, 2 BvE 2/08. On the other hand also see Opinion 2/94 Accession to the European Convention on Human Rights [2006] ECLI:EU:C:1996:140, and the limits imposed by the Court of Justice therein. See also JHH Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor?* (CUP 1999) 54-55: 'No sphere of the material competence could be excluded from the Community acting under art. 235.'

3.3.2. Specific EU competences relevant for the Climate and Energy Union

a. **Articles 192 and 194 TFEU**

Two Treaty provisions are most relevant for a Climate and Energy Union, being articles 192 and 194 TFEU. Article 191(1) TFEU lays down the environmental objectives of the EU, stating that Union environmental policies shall contribute to preserving, protecting and improving the quality of the environment; protecting human health; the prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. Article 191(1) TFEU therefore covers a broad array of environmental objectives, including combating climate change and the prudent use of natural resources, which lie at the heart of a Climate and Energy Union. Article 191(2) even obligates the EU to aim at a high level of protection, inter alia based on the precautionary principle.

Article 192(1) TFEU subsequently provides a legal basis to adopt legal acts that realize the environmental policy objectives referred to in Article 191[57]. Article 192(1) therefore provides a broad legal basis for any environmental or climate legislation. Normally, moreover, Article 192(1) allows for the ordinary legislative procedure, and hence decision-making by qualified majority voting in Council. Article 192(2), however, derogates from this, requiring use of the special legislative procedure for provisions a) of a fiscal nature; b) affecting town and country planning, quantitative management of water resources or their availability; land use with the exception of waste management; and c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. Some of these limitations, which will be discussed in more detail below, affect areas of potentially vital concern for an effective Climate and Energy Union, including especially fiscal measures, and measures affecting energy sources and the general structure of energy supply. Article 192(2) TFEU does allow the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, to move towards the ordinary legislative procedure for any or all of

[57] Article 192 (1) and (2) TFEU read as follows:

"1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

these sensitive topics. This so-called passerelle clause can, therefore, be used in the future to facilitate the speed and potential reach of decision-making in these areas.

The second key legal basis is article 194 TFEU. This legal basis specifically concerns energy and was introduced with the Lisbon treaty. This provision reads:

> 'In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, 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.
>
> 2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.
>
> Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).
>
> 3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.'

The intention behind the introduction of Article 194 TFEU was to bundle legislative acts related to energy grounded on different competences together. The CJEU formulated the scope of Article 194(2) as follows:

> '66 Article 194 TFEU, introduced by the Treaty of Lisbon, therefore inserted into the TFEU an express legal basis for the European Union policy on energy. As is apparent from its wording, in particular that of Article 194(2) TFEU, that provision constitutes the legal basis for European Union acts which are *'necessary' to achieve the objectives assigned to that policy by Article 194(1) TFEU*.
>
> 67 Such a provision constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives, subject to, as can be deduced from the terms '[w]ithout prejudice to the application of other provisions of the Treaties' at the beginning of Article 194(2) TFEU, the more specific provisions laid down by the TFEU on energy. As the Council noted, Articles 122 TFEU and 170 TFEU are inter alia covered, concerning severe difficulties arising in the supply of energy products and trans-European networks respectively, as well as the competences that the

> European Union has under other provisions of the Treaty, even if the measures at issue also pursue one of the objectives of the energy policy stated in Article 194(1) TFEU.'[58]

For Article 194 TFEU to be the correct legal basis, it is not required that every provision in an act is solely or primarily concerned with energy. What is required is that the "essential elements" of the act are geared towards achieving the objectives laid down in Article 194(1) TFEU.[59] Article 194 TFEU therefore now forms the primary specific legal basis for EU acts focused on energy. At the same time, Article 194 TFEU also expressly incorporates environmental concerns, linking this provision to the aims in Article 191 TFEU as well. Article 194 TFEU, furthermore, also expressly incorporates the principle of energy solidarity, which will be discussed in more detail below, as it may have both an expanding and a limiting effect on the EU's competences under this provision. What is more, like Article 192 TFEU, Article 194 TFEU contains several limitations that are relevant for a Climate and Energy Union. To begin with, like Article 192 TFEU, this legal basis for energy offers a certain level of protection to a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. In addition, although Article 194 TFEU normally prescribes the ordinary legislative procedure, measures that are *primarily* of a fiscal nature require use of the special legislative procedure, which requires unanimity in the Council. This impacts the fiscal and financial space for a climate and energy union.

b. **Article 122(1) TFEU**

A final Treaty provision which merits attention here is Article 122 TFEU. Placed in the TFEU's Chapter on Economic Policy, this provision itself contains two legal bases. Broadly speaking, it appears as a crisis provision, enabling the Council to adopt extraordinary measures in an especially efficient manner; acting on a Commission proposal by qualified majority voting and without any involvement of the European Parliament. Since the European Economic Community, each Treaty has included a legal basis enabling the Council to take measures to address an economic crisis, particularly where supply difficulties occur. This was used, for example, to respond to the oil crises of the 1970s.[60] In that context, the Court confirmed that the Council should have wide discretion Today, this legal basis is found in Article 122(1) TFEU, which provides that "without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy." Against the backdrop of the 2006 gas supply crisis, the wording "in particular where severe supply difficulties occur" was introduced at Lisbon. Notably, the reference to a "spirit of solidarity between the Member States" was also introduced, echoing the general energy provision of 194 TFEU. The second subparagraph of Article 122 TFEU enables the EU to provide financial assistance to a Member State in difficulties or seriously threatened with severe difficulties[61].

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[58] Case C-490/10 *Parliament v Council* [2012] ECLI:EU:C:2012:209, para 66-67.

[59] ibid, para 60-61.

[60] For e.g. Council Regulation (ECC) No 1893/79 of 28 August 1979 introducing registration for crude oil and/or petroleum product imports in the Community [1979] OJ L220/1.

[61] Article 122 (2) TFEU reads as follows: "2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

Notably, Article 122 TFEU has been used to adopt measures to respond to the eurocrisis, Covid-19 pandemic, and in particular, Article 122(1) TFEU enabled the relatively swift adoption of truly extraordinary, temporary measures to address the energy crisis precipitated by Russia's full-scale invasion of Ukraine in spring 2022. The REPowerEU Plan purports not only to address the immediate energy crisis, but equally to contribute to long-term EU climate objectives by "fast-forwarding the clean (energy) transition".[62] One clear example is the enactment of a framework to accelerate the deployment of renewable energy in the context of the energy crisis.[63]

Article 122(1) TFEU, therefore, can be of great interest for the further evolution of EU law in the context of an EU Climate and Energy Union. Broadly, Article 122 TFEU may be described as part of EU "emergency law"[64], that is Treaty law which allows the EU to act in exceptional circumstances. There is a common view that Article 122, either its first or second subparagraph, may only be used to adopt temporary measures.[65] One key legal question determining the potential of Article 122(1) TFEU to support far reaching (financial) EU action concerns the legal concepts of emergency and temporariness. Can an event that has been foreseen for a long time, and takes decades to unfold, like climate change, be considered an emergency, for example? Or can measures that do have an end date (say 2055) but nevertheless will be in force for decades, be called temporary? On the one hand, the devastating impact of climate change, including recurring natural disasters, and the need to act as soon as possible support a teleological interpretation allowing the use of Article 122(1) TFEU. On the other hand, expanding concepts such as emergency and temporary in this manner, makes the literal interpretation of these concepts so flexible that they may retain little restraining force.

On the concept of "emergency", it has been suggested that a distinction could be made between "fast-burning" and "slow-burning" crises. Climate change falls into the latter category and therefore is not the kind of sudden threat which justifies recourse to Article 122 TFEU. At the same time, the distinction is not perfect; slow-burning crises can have fast-burning phases. Multiple crises of different kinds can exacerbate one another. Indeed, the Recitals of Council Regulation 2022/1854 on an emergency intervention to address high energy prices demonstrates this. Here, the EU introduced electricity demand reduction, mandatory cap on market revenues, and a rather controversial (mandatory) temporary solidarity contribution from windfall profits of energy companies. While the Regulation aimed to address the supply disruptions related to Russia's war in Ukraine, "in parallel, the exceptionally high temperatures observed during the summer of 2022 have pushed up demand"[66] and that "exceptional drought" resulted in an "unprecedented situation" of persistently high volumes of electricity generated from natural gas-fired power plants, contributing to the high prices.

Moreover, Chamon argues that the text of Article 122(1) TFEU does not strictly – legally speaking – limit its use to emergency situations. It enables the Council to decide on "measures appropriate to the

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62 European Commission, 'REPowerEU Plan' (Communication) COM (2022) 230 final.

63 Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36.

64 Bruno De Witte, 'Guest Editorial: EU Emergency Law and Its Impact on the EU Legal Order' (2022) 59 Common Market Law Review 3.

65 ibid; Lee Flynn, 'Article 122 TFEU' in Manuel Kellerbauer (ed), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP, 2019) 1284; Leigh Hancher L and Adriene de Hauteclocque 'Strategic Autonomy, REPowerEU and the Internal Energy Market: Untying the Gordian Knot' (2024) 61(1) Common Market Law Review 63-64.

66 Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ LI261/1, Recital 3. See also Recital 7.

economic situation, *in particular* if severe difficulties arise in the supply of certain products, notably in the area of energy" (emphasis), i.e. an illustrative rather than exhaustive circumstance. By contrast, the second subparagraph is exhaustive, stating that "where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control", the EU may provide financial assistance. Article 122(1) TFEU, in this view, might be termed an "exceptional"[67] not an "emergency" clause. On this reading, one could also argue that measures adopted pursuant to Article 122(1) TFEU do not necessarily have to be "temporary" in nature. The exceptional measures adopted on the basis of Article 122(1) TFEU as part of REPowerEU were in fact temporary in nature and justified with reference to the immediate energy crisis. Yet, the measures could clearly have wider, more lasting economic and strategic effects.[68] Indeed, such effects are surely inherent given the Commission's stated two-fold aim of ending the dependence on Russian fossil fuels and accelerating the green transition.[69] Each measure also included the possibility to extend its application which the Commission in fact made use of. Finally, there is the possibility that a temporary mechanism is later made permanent. A crisis situation may spur political actors to agree to something previously unimaginable with the caveat of it being temporary and exceptional. Yet, where the measure functions effectively, it may later be re-established on a permanent basis. Similarly, some political scientists emphasise the related dynamic of path dependency as playing an important role in European integration. "Aggregate EU" which enabled demand aggregation and joint purchasing for natural gas and LNG is a perfect example of this. Initially, it was set up pursuant to Article 122(1) TFEU for a period of one year to deal with the "high risk of a complete halt of Russian gas supplies and the extreme increase in energy prices".[70] Later, Regulation 2024/1789 on the internal markets for renewable gas, natural gas and hydrogen aimed to "transform … [those] crisis measures into permanent features of the natural gas market",[71] using Article 194(2) TFEU as a basis.

The precise contours of Article 122(1) TFEU are still being worked out. Future political practise and national and EU case law will help further delineate the legal space available for the EU and its Member States under this provision, but as will be discussed in more detail in section 4, it is clear that significant scope for informal constitutional change exists in this area.

c. Choosing between legal bases

With multiple general and specific competences available to support EU action on climate and energy, the question also arises which legal bases should be chosen for specific actions, and when an act should be based on more than one competence. As Articles 114, 192(1) and 194(2) TFEU all prescribe the ordinary legislative procedure, this question has lost a significant part of its relevance post-Lisbon. At the same time, the choice of legal basis in this field is complicated by the fact that, as mentioned above, Article 192 and Article 194 TFEU apparently offer varying levels of protection for individual Member States to, inter alia, determine the national energy mix and general structure of supply. Moreover,

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67 Merijn Chamon, 'The use of Article 122 TFEU: Institutional implications and impact on democratic accountability' (Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, September 2023) Section 4.

68 For discussion, see Hancher and de Hauteclocque (n 62)

69 'REPowerEU Plan' (n 59).

70 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, Recital 3.

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

Articles 192 and 194 TFEU both include a derogation for measures which are primarily of a fiscal nature, mandating the special legislative procedure in those cases. These nuances will be discussed in detail below. In any case, the choice for a legal basis must be legally correct, and if not, can be a ground for annulment. As the CJEU has consistently ruled, also in the context of energy and the environment, 'the choice of the legal basis for a European Union measure must be based on objective factors amenable to judicial review, which include the aim and content of that measure (…).'[72] What is more, since the limitations on EU competence are determined by their legal basis, the choice of a specific legal basis is likely to have legal consequences. For example, Article 193 TFEU stipulates that protective measures adopted pursuant to Article 192 TFEU cannot prevent the adoption of more ambitious protection at the Member State level.

Consequently, one must analyse the aim and content of each measure individually when determining the correct legal basis. Moreover, "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."[73] As the more specific competences, it should therefore first be seen if Articles 192 and 194 TFEU can be relied on as legal bases before moving on to more general legal bases such as Articles 114 or 352 TFEU. Lastly, the EU legislator should strive to base legislation on a single legal basis, but multiple legal bases can be combined where "a measure (…) simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other", and where the procedures required by these legal bases are not incompatible.[74]

With respect to Article 122(1) TFEU, its wording expressly stipulates that "without prejudice to any other procedures provided for in the Treaties", the Council may adopt measures therein. This underscores the exceptional nature of the provision and reinforces the need to respect the principle of conferral. Questions remain open as to how this provision interacts with Article 192 and 194 TFEU, in particular the so-called "sovereignty exceptions" relating to the energy mix of Member States. One can also imagine that difficulties could arise if a primarily fiscal measure was adopted on the basis of Article 122(1) TFEU, as this could be prejudicial to the requirement of Council unanimity for those measures under Article 192(2)(a) and Article 194(3) TFEU.[75]

d. Additional relevant legal bases and competences on funding

In addition to the legal bases discussed above, which can directly support measures on energy and climate, a number of additional legal bases are of further interest regarding the financial aspects of the Climate and Energy Union. Funding is a major hurdle on the road to achieving the Union's net-zero by 2050 and 55% reduction in GHG emissions by 2030 targets. Bloomberg, NEF and McKinsey respectively estimate that Europe's[76] or the EU's transition to a net-zero economy would require an investment of at least $32 or €28 trillion until 2050.[77] Of course, this does not mean that all these funds should come

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72 Case C-490/10 *Parliament v Council* (n 56), para 44.

73 Case C-490/10 *Parliament v Council* (n 56), para 44 (Parliament v Council, paragraph 34 and the case law cited).

74 Case C-490/10 *Parliament v Council* (n 56), para 46: "the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (Parliament v Council, paragraph 36 and the case law cited)".

75 Indeed, cases are now pending before the Court of Justice that the use of Article 122(1) TFEU to adopt some of the REPowerEU measures was incorrect. For discussion see Hancher and de Hauteclocque (n 62).

76 "Europe" comprised the EU, the UK, Norway, and Switzerland in this report.

77 'Huge Acceleration Required for Europe to Get on Track for Net Zero' (*BloombergNEF*, 15 May 2023) <https://about.bnef.com/blog/huge-acceleration-required-for-europe-to-get-on-track-for-net-zero/> accessed 25

from the EU or be channelled via the EU: much of the funding will come from the Member State level or from the private sector. At the same time, this also raises the question of how much legal space the EU has to influence or direct national economic policy and spending as well as private sector investment to achieve the aims of a real Climate and Energy Union. When this report talks about funding, therefore, it does not just mean EU funding or the EU's own resources, but all means via which the EU can bring financial resources to bear to achieve the aims of a Climate and Energy Union.

The Union's independent financial bodies, the European Central Bank (ECB) and the European Investment Bank (EIB), have adopted responses to climate change in their role as the eurozone's central bank and the Member States' common investment bank, respectively. For instance, the ECB has committed to including climate change considerations in its activities [78] in order to fulfil its mandate as the Union body tasked with ensuring price stability in the Union and to support the Union's general economic policies and contribute to achieving the Article 3 TEU objectives, pursuant to the Monetary Policy chapter in the TFEU. It aims to do so by, for example, "supervising banks to manage climate and environmental risks."[79] For its part, the EIB has committed to supporting through its activities the green transition, the objectives of the Green Deal, and climate action and environmental protection more generally,[80] as falls squarely within its purview as defined in Article 309 TFEU to contribute "to the balanced and steady development of the internal market in the interest of the Union." In particular, it has committed to supporting at least 1 trillion euro in climate action and environmental sustainability investment by 2030[81] and to end its support of projects reliant on "unabated fossil fuels" by 2021.[82]

The Union legislator has also already adopted a variety of measures aimed at meeting the financial challenge posed by climate change. Some of these aim to contribute to funding the transition indirectly, for instance, by establishing a framework to facilitate sustainable investment, through the Regulation commonly referred to as the Green Taxonomy, on the basis of Article 114 TFEU.[83] Others seek to leverage the Union budget. For instance, investEU will provide a guarantee of up to 26,2 billion euro from the EU budget that would in turn mobilise up to 372 billion euro in public and private investments in a series of policy priorities such as achieving the objectives of the Paris Agreement.[84] The Union has also set up a dedicated executive agency, the European Climate, Infrastructure and Environment Executive Agency (CINEA),[85] with the mandate *i.a.* to manage the elements of existing

February 2024; 'How the European Union Could Achieve Net-Zero Emissions at Net-Zero Cost' (*McKinsey Sustainability*, 3 December 2020) ' <www.mckinsey.com/capabilities/sustainability/our-insights/how-the-european-union-could-achieve-net-zero-emissions-at-net-zero-cost> accessed 27 February 2024.

78 ECB, 'Climate and nature plan 2024-2025' (January 2024) <www.ecb.europa.eu/ecb/climate/our-climate-and-nature-plan/shared/pdf/ecb.climate_nature_plan_2024-2025.el.pdf> accessed 23 September 2024.

79 ibid.

80 EIB, 'EIB Climate Strategy' (November 2020) <www.eib.org/attachments/strategies/eib_climate_strategy_en.pdf> accessed 23 September 2024.

81 EIB Group, '>€1 TRILLION FOR <1.5°C: Climate and environmental ambitions of the European Investment Bank Group' (January 2020) <www.eib.org/attachments/thematic/eib_group_climate_and_environmental_ambitions_en.pdf> accessed 23 September 2024.

82 EIB, 'EIB energy lending policy: supporting the energy transition' (November 2019) 4 <www.eib.org/attachments/strategies/eib_energy_lending_policy_en.pdf> accessed 23 September 2024.

83 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 (Green Taxonomy) [2020] OJ L198.

84 Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the investEU Programme and amending Regulation (EU) 2015/1017 [2021] OJ L107.

85 Commission Implementing Decision (EU) 2021/173 of 12 February 2021 establishing the European Climate, Infrastructure and Environment Executive Agency, the European Health and Digital Executive Agency, the European Research Executive Agency, the European Innovation Council and SMEs Executive Agency, the European Research

funds, such as Horizon Europe based on Articles 173, 182, 183 and 188 TFEU,[86] dedicated to climate science and energy supply and to manage climate and environment specific funds such as the LIFE programme for the Environment and Climate action which disposes over an envelope of 5,4 billion euro and is based on Article 192(1) TFEU.[87] Notably, Union funding mechanisms dedicated to the transition not only seek to foster green innovation and to support the development of sustainability infrastructure and climate action, but also to fairly address the socio-economic implications of the transition.[88]

The need for further measures persists, however. Bloomberg NEF's latest figures place Europe's 2022 investment in the transition at $227 billion.[89] The Commission itself estimates meeting the objectives of the Green Deal and REPowerEU would require an additional annual investment of at least €620 billion.[90] This is to be compared with the EU's total budget for the period 2021-2027 at €1216 billion. By these accounts, current investment levels fall significantly short of what the targets require.

On the expenditure side of the budget, the EU adopts a multiannual financial framework (MFF) for a period of at least five years (Art. 312 TFEU). The MFF sets the major categories of expenditures, corresponding to the EU's major sectors of activity, including the environment.[91] On the resources side of the EU's budget, Article 311 TFEU is the key provision, which underpins the EU's system of financial resources. In principle, the EU budget should be wholly based on its own resources. The Council adopts a decision where the different categories of EU own resources are laid down (the so-called Own Resources Decision or ORD).[92] Among the own resources may be found the EU's customs duties, a part of the VAT collected by Member States, and the Member States' direct contributions, as well as the proceeds of the EU plastics contribution. A Climate and Energy Union may be funded by existing resources, but considering the amounts involved, new categories of own resources will probably have to be created. The revenues accrued from the newly created EU Carbon Border Adjustment Mechanism are for instance tabled to be integrated into the system of own resources.[93]

Considering the need for further investment, a central question is whether the EU may borrow funds on capital markets to finance the transition to a net-zero economy, in addition to creating new own resources. This question is of course not only relevant for a Climate and Energy Union, but also for the development of the EU more generally, including for the massive investments that are needed to ensure competitiveness. For this reason, an EU capacity to borrow also figures prominently in Draghi's

Council Executive Agency, and the European Education and Culture Executive Agency and repealing Implementing Decisions 2013/801/EU, 2013/771/EU, 2013/778/EU, 2013/779/EU, 2013/776/EU and 2013/770/EU [2021] *OJ L50*.

86 Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe - the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 [2021] *OJ L170*.

87 Regulation (EU) 2021/783 of the European Parliament and of the Council of 29 April 2021 establishing a Programme for the Environment and Climate Action (LIFE), and repealing Regulation (EU) No 1293/2013 [2021] *OJ L172*.

88 e.g. Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2024 establishing the Just Transition Fund [2024] *OJ L231*.

89 'Huge Acceleration Required for Europe to Get on Track for Net Zero' (n 74).

90 Commission, '2023 Strategic Foresight Report: Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy' (Communication) COM (2023) 376 final, 7.

91 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] *OJ L433/11,* see specifically Annex 1.d

92 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (ORD)[2020] *OJ L424/1*.

93 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] *OJ L130/52,* Recital 74. See also Commission, 'Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union' COM (2021) 570 final.

report on the future of European competitiveness. Since many of the measures and investments he envisions explicitly aim to create a green, net-zero economy, a significant part of the borrowing he envisions would align with the creation of an EU Climate and Energy Union as well.[94]

Neither the TEU nor the TFEU provide for an explicit empowerment for the EU to make borrowings on capital markets, to the exception of Article 309(1) on the European Investment Bank. This does not mean, however, that borrowing is prohibited.[95] Actually, a number of provisions in the TFEU have been used to make borrowings.[96] Article 122 TFEU again becomes relevant here. While the first subparagraph enables the adoption of general measures to address "an economic situation" such as an energy supply crisis, Article 122(2) TFEU enables the provision of conditional financial assistance where a Member State is "in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control".[97] The European Union Recovery Instrument (EURI) does not specify whether it is based on Article 122(1) or (2) TFEU,[98] which could be interpreted as separate legal bases that permit discrete measures in related, but distinct contexts. Consequently, interpreting this ambiguity in EURI's legal basis is central to the legal analysis of this instrument. For instance, the Council legal service opined EURI was based on Article 122(1) TFEU and this significantly impacted its assessment of the legality of the instrument.[99] EURI receives the resources borrowed on capital markets pursuant to Article 5 of the Own Resources Decision (ORD)[100] and funnels them to the Recovery and Resilience Facility (RRF),[101] which further distributes these funds. These measures together provide the backbone for Next Generation EU (NGEU), whereby the EU borrowed massive amounts on capital markets to fund a major recovery package in the wake of the Covid-19 pandemic. This means that EURI is central to NGEU and, therefore, that adopting a shared reading of Article 122(1) and (2) TFEU as opposed to assigning it to 122(1) or (2) TFEU can fundamentally alter ones' assessment of NGEU overall.

A second question then arises: how may such borrowed money be dispersed? According to the orthodox view, borrowing to finance the EU's direct spending, as opposed to borrowing to finance loans to countries, is not possible. This is based, inter alia, on a strict reading of Article 310(1) TFEU which states that 'revenue and expenditure shown in the budget shall be in balance'.[102] This view has

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94 See M. Draghi, 'The future of European competitiveness Part A, A competitiveness strategy for Europe as well as Part B, on In-depth analysis and recommendations' (9 September 2024). Available at < https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en>.

95 Jonathan Bauerschmidt, 'Next Generation EU and the Evolution of the European Economic Constitution' (2023, forthcoming). Generally, see Sebastian Grund and Armin Steinbach, 'Debt-financing the EU', (2024) 61 Common Market Law Review 993.

96 Ibid, 11-12.

97 This was previously used in the euro crisis. See Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

98 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.

99 Council legal service, 'Opinion of the legal service: Proposals on Next Generation EU' (June 2020) (Opinion) 9062/20 para 115-141<data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf> accessed 23 September 2024.

100 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 (ORD) [2020] OJ L 424.

101 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (RRF) [2021] OJ L57.

102 See also Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union [2018] OJ L193/1, art 17. On this 'orthodox view', see Matthias Ruffert and Päivi Leino-Sandberg, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433, 450-451.

however been contested, and, as we shall see, seemingly discarded in the case of the NGEU where borrowed money was given to individual Member States in the form of grants and loans.

As indicated above, however, a third and final question that has to be asked concerning funding is how and to what extent can the EU influence how Member States spend EU money? While the power to set out economic policy lies with the Member States, the EU may require that the money it provides is spent in certain policy fields. As will be discussed in Section 4 in more detail, the reimbursement vehicle for NGEU was based on the third subparagraph of Article 175 TFEU – part of Title XVIII of the TFEU on economic, social, and territorial cohesion. NGEU therefore aimed not only at the *recovery* from the immediate COVID-19 crisis but also at longer-term *resilience* of the Union. Energy and climate are central to this; each Member State was required to dedicate almost two-fifths of their NGEU money to the green transition. Under Title XVIII, the Treaty specifies numerous Funds, which form part of the EU's ordinary budget and pursue specific cohesion-related objectives. Significantly, the third subparagraph of Article 175 TFEU provides a legal basis for additional measures to be taken if necessary to achieve cohesion policy objectives, rather broadly defined as "promot[ing] the overall harmonious development" of the Union. Commentators describe Article 175 TFEU as a sort of joker card that has been used for the EU to take action where there is no clear competence in the Treaties.[103] Prior to NGEU, Article 175 TFEU had already demonstrated its potential with respect to climate and energy policy; it was used to set up a Just Transition Fund[104] to mitigate some of the socio-economic hardships which the green transition may entail.

[103] De Witte B, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635.

[104] Just Transition Fund (n 85).

3.4. Potential legal limits and boosters to EU competences on energy and climate

3.4.1. Treaty limits to legal bases: Article 192(2)(c) and Article 194(2) TFEU

As indicated above, both Article 192 TFEU and Article 194 TFEU contain several limitations relevant to the Climate and Energy Union. Both contain a level of protection for a Member State's right to determine the conditions for exploiting natural resources, its right to choose between different energy sources and to determine the general structure of its energy supply. In international relations, these are traditionally understood as national sovereign prerogatives. In 1962, the UN General Assembly already adopted a Resolution on the states' permanent sovereignty over natural resources.[105] In establishing the International Energy Agency in the 1970s, governments were reminded of their special responsibility as regards energy supply.[106] In the EU context, the Member States have traditionally been reluctant to cede control in this area.[107] As will become apparent below, concerns to protect certain prerogatives are now reflected in Article 192(2) and 194(2) of the TFEU.

Yet, the development of a genuine Climate and Energy Union – in particular, the pursuit of more ambitious environmental goals – will necessarily interfere with these (sovereign) prerogatives. It is therefore necessary to consider, based on the analysis above, whether and to what extent the Union's legislative room for manoeuvre is limited in this respect.

a. Article 192(1) or Article 192(2)(c)? Determining the correct legal basis in environmental policy

Case C-5/16

In environmental matters, Article 192(2)(c) provides an alternative legal basis from Article 192(1), requiring the special legislative procedure to adopt "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". The wording here expressly provides a threshold, as only measures which *significantly* affect a Member State's choice in its energy mix will trigger this derogation.

In *Case C-5/16*, the Court considered whether the decision establishing the market reserve mechanism for the ETS should be adopted under Article 192(1) or 192(2)(c). The market stability reserve, which had been adopted under Article 192(1), would reduce the number of allowances available for auction under the ETS. This was intended to tackle a structural supply-demand imbalance which had materialised in the ETS, and therefore ensure it could contribute towards the EU's climate change targets. Poland challenged the market stability reserve on several grounds. Given its strong reliance on coal and lignite, the increase in the price of emission allowances in the fossil fuel sector would "significantly affect" its choice of energy mix and structure of energy supply. Adopting a literal reading of Article 192(2)(c) TFEU, Poland argued that it was intended to cover "measures significantly affecting" a Member State's choice of energy mix and structure of supply, rather than measures intended to have such an effect. Poland

[105] UNGA Res 1803 (XVII) (18 Dec. 1962) 'Permanent Sovereignty over Natural Resources'.

[106] Preamble, OECD, Agreement on An International Energy Programme (signed 18 Nov. 1974, entered into force 19 Jan. 1976) 1040 UNTS 271.

[107] Leigh Hancher, 'A Single European Energy Market – Rhetoric or Reality?' (1990) 2 Energy Law Journal 217.

therefore argued that it should have been adopted on that legal basis. It raised other arguments, including that reliance on natural gas imports would undermine security of Poland's energy supply.

The Court of Justice rejected this approach. It started by recalling its established test for the choice of legal basis, as outlined in Sections 3.1-3.3 above: that it must be based on objective factors amenable to judicial review, including the aim and content of the measure. The Court recalled *Case C-36/98* where it applied the objective factors test to determine whether a particular Convention relating to water management should have been based on the ordinary environmental legal basis or one of the derogations. At that time, Article 130s(2) provided a derogation, requiring any environmental measure "concerning" water resource management to be adopted using the SLP. The same derogation is now provided for in Article 192(2)(b). The Court stated that the same reasoning must also apply to Article 192(2)(c), i.e. it must apply its well-established "objective factors" test in respect of Article 192(2) in general. The Court acknowledged there is a variation in wording of Article 192(b) and its predecessor Article 130s(2); the latter related to measures "concerning" water management, whereas today Article 192(b) refers to measures "affecting" water management. The Court held, however, that the reasoning of the Court in *Case C-36/98* demonstrated that it understood these two terms to be "broadly equivalent". The Court concluded that the "effects" of a legislative measure are only demonstrated after legislation enters into force and if these effects were relevant to the choice of legal basis, then the legislature would be required to make assumptions and speculate. Thus, the "effects" of a measure cannot be part of the "objective factors" test to determine the correct legal basis.:

> 41 *Given that, in order to know the real and specific effects of a legislative measure, it is necessary to analyse those effects after its entry into force, the legislature's choice would have to be based on assumptions as to the likely impact of that measure, which, by their nature, are speculative and are in no way objective factors amenable to judicial review within the meaning of paragraph 38 above.*
>
> 42 *Consequently, it must be found that the assessment of the effect of an EU measure on a Member State's energy policy is not a factor that must be assessed in addition to the aim and content of that act, or by derogation therefrom.*

Adopting a teleological reading, moreover, the Court added that Article 192(2) TFEU must be read in conjunction with the objectives of environmental policy as set out in Article 191 TFEU which includes the fight against climate change, in particular through international agreements. It pointed out that measures aimed towards that end will "necessarily affect the energy sector of Member States", and so to read the exception in Article 192(2)(c) TFEU in a broad manner would make this the default rather than the derogation. It recalled its general position that "exceptions to principles must be interpreted strictly":

> 44 *As the measures taken to that end necessarily affect the energy sector of Member States, a broad interpretation of point (c) of the first subparagraph of Article 192(2) TFEU would risk having the effect of making recourse to the special legislative procedure, which the Treaty FEU intended as an exception, into the general rule.*
>
> 45 *That conclusion is irreconcilable with the Court's case-law, according to which provisions that are exceptions to principles must be interpreted strictly (see, by analogy, judgment of 10 June 2010, Bruno and Others, C-395/08 and C-396/08, EU:C:2010:329, paragraph 35 and the case-law cited).*

It concluded, then, that Article 192(2) TFEU is only the appropriate legal basis "if it follows from the aim and content of a proposed measure that the *primary outcome* sought by that measure is significantly to affect the Member State's choice between different energy sources and the general structure of

energy supply of the Member State".[108] In rejecting Poland's argument that the protection offered by Article 192(2)(c) – i.e. the use of the special legislative procedure, giving each Member State a veto – could easily be circumvented by the draughtsman simply stating the objective is otherwise, the Court emphasized the second objective factor here, to look also at the content. The Court then applied the "aim and content" test to the contested measure. Looking at the Commission's proposal as well as recitals of the contested decision, the Court concluded that both the aim and content was intended to remedy the demand-supply imbalances in the ETS and render it more resistant to future disturbances. In essence, it is a "one-off intervention"[109] intended to correct this structural weakness that could prevent the ETS fulfilling its function of driving low-carbon innovation. While Poland argued that the "principal aim" of the contested decision is in fact to affect the energy mix of the Member State through an increase in the price of allowances, the Court rejected this. Those effects are "only an indirect consequence" of the close relationship between the contested decision and the existing ETS, with the MSR "designed merely as a supplement or a correction of the ETS".[110]

The Court's reasoning has been criticised, in that the overall purpose of the ETS is to reduce the use of fossil fuels. Coal must, in turn, "gradually, but massively, be reduced and in the longer term must be phased out entirely".[111] Thus, Fehling argues that a rule which would directly or indirectly oblige the Member States to raise the market share of renewables to a much higher level may trigger Article 192(2)(c) TFEU. In such a case, the effect of the measure would no longer be a purely "speculative" factor, but an "objective factor amenable to judicial review" and so relevant to determining the correct legal basis. It should be noted, however, that the Court stated its position in unambiguous, generalised language:

> 41. *Given that, in order to know the real and specific effects of a legislative measure, it is necessary to analyse those effects after its entry into force, the legislature's choice would have to be based on assumptions as to the likely impact of that measure, which, by their nature, are speculative and are in no way objective factors amenable to judicial review within the meaning of paragraph 38 above.*

Even though it may be challenged in some regards, and even though the precise limit of when a measure would, objectively and sufficiently, affect the choice between energy sources sufficiently is not fully clear, this broad formulation by the CJEU does imply that the EU legislator has significant leeway to adopt legislation that affects the energy choice and mix of Member States, as long as affecting that mix is not objectively the primary purpose of the legislation.

b. Second subparagraph of Article 194(2) TFEU: when is it relevant? What is its legal effect?

The development of a genuine Climate and Energy Union will require ambitious climate targets to (continue to) be incorporated into energy policy. As mentioned, Article 194 TFEU – similar to Article 192 TFEU – also offers a certain level of protection to the prerogatives of the Member States under discussion. In providing the legal basis for energy policy, Article 194(2) stipulates that "such measures 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, without prejudice to Article 192(2)(c)". Unlike Article 192(2) in respect of environmental policy, Article 194(2)

[108] Case C-5/16 *Poland v Parliament and Council* [2018] ECLI:EU:C:2018:483, para 46, emphasis added.

[109] ibid, para 61.

[110] ibid, para 69.

[111] Michael Fehling, 'Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement' (2021) 10 Transnational Environmental Law 339, 344.

does not provide an alternative legal basis for energy policy. It simply states that "such measures shall not affect" the listed national prerogatives. This is, therefore, a substantive rather than a procedural limitation.

Following the entry into force of the Lisbon Treaty, this provision was criticised for its ambiguity. Academic debate offered several possible interpretations – for example, that an EU energy policy must provide an opt-out or derogation where a Member State's prerogatives are likely affected.[112] In leaked advice, the Legal Service of the Council apparently interpreted Article 194(2) TFEU as requiring unanimity to ensure that the consent of the Member State affected is obtained. In that context, this meant that an intergovernmental agreement regulating structurally the gas supply, by affecting for example a Member State's choice of supply routes, must be adopted as a mixed agreement.[113] In *Opinion 2/15*, Advocate General Sharpston suggested that Article 194(2) TFEU clarifies the scope of the EU's competence to adopt a measure in the first place.[114] This literal reading of the broad, mandatory wording "shall not affect … its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)" would definitively preclude the adoption of any energy policy measure based on Article 194(1) which is likely to affect those rights.[115] In Case T-370/11, the Court apparently settled the debate by characterising Article 194(2) TFEU as a "prohibition",[116] in contrast to Article 192(2)(c) "which is "only procedural in nature".[117]

i. Case T-370/11

Case T-370/11 was another challenge brought by Poland against a measure related to the ETS. Here, Poland challenged Decision 2011/278/EC, an implementing measure adopted by the Commission pursuant to Article 10a of the ETS Directive. Poland argued that by setting the emission benchmark with reference to natural gas rather than another resource such as coal, the Commission failed to take account of the specificity of national energy mixes and thereby infringed Article 194(2) read in conjunction with Article 192(2)(c) TFEU. On the legal framework, Poland contended that Article 194(2) TFEU sets out a "principle relating to all policies of the European Union": the right of individual Member States to determine, inter alia, the national energy mix. The CJEU must assess the legality of any EU act – including the contested decision – having regard to all the provisions of the Treaty, not only those relating to the specific policy field. The General Court plainly rejected this: "there is no reason to

[112] Angus Johnston and Eva van der Marel, 'Ad Lucem? Interpreting the New EU Energy Provision, and in Particular the Meaning of Article 194(2) TFEU' (2013) 22 European Energy and Environmental Law Review 181. In this comprehensive review, the authors suggest several possible interpretations: that the derogations in Art. 114(4) and (5) may still be applicable; possible "fleshing out" using Art. 114(4) and (5) as "role model"; that any EU measure adopted on the basis of Art. 194 TFEU which affects the national prerogatives should include an "opt-out" or "free-standing derogation" allowing Member States to derogate from the EU measure if those national prerogatives are affected; that EU harmonisation measures in the field may require unanimity voting in Council when the measure risks affecting the Member State's prerogatives; a complete prohibition, i.e. that a measure based on Art. 194 TFEU may not (whatsoever) affect a Member State's energy rights.

[113] See the leaked advice as published by Politico: 'Opinion of the Legal Service on the Recommendation for a Council decision authorising the opening negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline (2017) 12590/17 <www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf> accessed 20 September 2024.

[114] Opinion 2/15 Free Trade Agreement between the European Union and the Republic of Singapore, Opinion of AG Sharpston, para 488.

[115] For example, Fehling interprets Article 194(2) as a "strict substantive restriction of Union powers". See Fehling (n 108) 342-343.

[116] Case T-370/11 *Poland v Commission* [2013] OJ C114/34, para 16-17.

[117] ibid.

suppose the second subparagraph of Article 194(2) TFEU establishes a general prohibition to assign that right that is applicable in EU policy in the area of the environment".[118] First, it pointed out that Article 194 TFEU is a "general provision which relates solely to the energy sector and, consequently, delineates a sectoral competence"[119]. Second, it recalled that the second subparagraph of Article 194(2) TFEU expressly stipulates that it applies "without prejudice to Article 192(2)(c) TFEU". The latter provides specific rules in the field of EU environmental policy.

In the present case, the implementing measure had been adopted pursuant to the ETS, which itself had been adopted on the environmental policy legal basis (now Article 192(1) TFEU). As such, the relevant legal question was whether the measure "significantly affected" the Member State's prerogatives and, according to Article 192(2)(c), should therefore have been adopted using the special legislative procedure. In this case, Poland challenged the legality of an implementing measure, Decision 2011/278/EC, adopted on the basis of Article 10 of the ETS. The Court held that because Poland had not challenged Article 10 of the ETS directly, then it could not validly claim that the implementing measure – adopted on that basis – infringes Article 192(2)(c) TFEU.

ii. Case C-594/18 Hinkley Point C

As discussed in the previous section, the General Court in *Case T-370/11* held that a Member State could not challenge EU environmental policy using the second subparagraph of Article 194(2) TFEU. In general terms, it indicated that the provision may only be used to challenge EU energy policy — i.e. policy adopted on the basis of Article 194(1) TFEU. However, the *Hinkley Point C* case confirms that the right of a Member State to determine its energy mix may be a relevant factor in legal assessments that arise outside of the direct realm of EU energy policy.

Here, Austria challenged a Commission decision which permitted state aid provided by the UK to develop the Hinkley Point C nuclear power station under Article 107(3) TFEU. In a detailed judgment, the General Court rejected several arguments. In its judgment, the General Court found that environmental principles such as the protection of the environment or precautionary principle were not applicable, inter alia, because nuclear energy was governed under the Euratom Treaty.[120] On appeal, AG Hogan suggested that those principles could not be applicable as this would effectively mean that nuclear power is *per se* inconsistent with the environmental objectives of the TFEU. The Advocate General emphasised that the consistency of nuclear with environmental concerns is a highly contentious political issue for which there is no consensus. The Court, in his view, has "neither the competence, nor, just as importantly, the democratic legitimacy"[121] to rule on such an issue. The development of nuclear energy is a clearly defined objective of EU primary law under the Euratom Treaty and cannot as a matter of law be subordinated to environmental objectives of the TFEU.

The Court of Justice took a different approach. It held that environmental principles were applicable in the case. For the first time, it held that the Commission must check that state aid permitted under Article 107(3) TFEU must not infringe EU environmental law. However, no such infringement of EU environmental principles had occurred here for two reasons. First, it emphasised that security of energy supply is a fundamental objective of EU energy policy. Second, it recalled that the second subparagraph of Article 194(2) TFEU provides that energy policy measures cannot affect a Member

[118] ibid.

[119] ibid.

[120] Case T-356/15 *Austria v Commission (Hinkley Point C)* [2018] EU:T:2018:839, paras 512-518.

[121] Case C-594/18 *Austria v Commission (Hinkley Point C)* [2020] ECLI:EU:C:2020:352, Opinion of AG Hogan, para 42.

State's choice between different energy sources, and that nuclear energy is not precluded from that choice. It concluded that:

> 49 *Thus, since the choice of nuclear energy is, under those provisions of the FEU Treaty, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, recalled in paragraph 33 of the present judgment, do not conflict, so that, contrary to the Republic of Austria's contentions, the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant.*

While the Court did not explicitly say so, the judgment suggests that the objectives and principles of EU environmental law cannot be interpreted in so expansive a manner as to undermine the development of nuclear energy. A high level of environmental protection may be enshrined in EU primary law but so too is the objective of ensuring security of supply; the right to determine the national energy mix; and the development of nuclear — the latter in the Euratom Treaty.

A second point of appeal related to the proportionality test; the Commission had not sufficiently weighed, according to Austria, the positive and negative effects of the state aid for Hinkley Point C. In particular, Austria considered the decision to "perpetuate the current supply structure" with nuclear energy as a substantial element — a negative element, in light of the objectives of energy efficiency, developing renewable energy, and promoting interconnections as laid down in Article 194(1) TFEU which the Commission had not attached sufficient weight to. In response, the General Court noted:

> 79 *The project to build Hinkley Point C was intended solely to prevent a drastic fall in the contribution of nuclear energy to overall electricity needs. In light of the UK's right to "determine its own energy mix and maintain nuclear energy as a source in that mix, which follows from the second subparagraph of Article 194(2) TFEU, and from the second paragraph of Article 1, Article 2(c) and the first paragraph of Article 192 of the Euratom Treaty, the decision to maintain nuclear energy in the supply structure cannot be considered to be manifestly disproportionate as compared to the positive effects."*[122]

The General Court looked at the Commission's weighing up of different effects and was satisfied there had been no error of assessment. In rejecting arguments about the negative effects on investment into alternative energy sources, the General Court pointed out that aside from the UK's right to maintain nuclear in its energy mix, the Commission had found that it would not be possible for the UK to address its future low levels of energy generation capacity and supply 60 gigawatts — of which Hinkley Point C would provide a small portion of 3.2 gigawatts — by resorting solely to other low-carbon sources.[123] On appeal, the Court of Justice repeated this reasoning. It also recalled the Commission's analysis that the intermittent nature of renewable energy (and, thus, its lower output) meant that it was unrealistic to expect the UK to develop wind generation capacity within the same time frame as envisaged for the construction of Hinkley Point C. The Court concluded by recalling the General Court's reasoning at paragraph 507, cited in full above. The proportionality test had been sufficient — considered in light not only of the objective of creating new nuclear energy but more broadly "in light of the UK's

[122] *Hinkley Point C*, General Court (n 117) para 507.

[123] ibid, para 508.

electricity supply needs, whilst rightly pointing out that the United Kingdom is free to determine the composition of its own energy mix".[124]

The question of whether state aid which pursues a more ambitious objective — for example, not simply to *maintain* nuclear energy but to significantly expand its use — would also fall within the UK's right to determine its energy mix is left open. In his Opinion, AG Hogan suggested that the UK's right to determine its energy mix must include a right "*to develop*"[125] nuclear energy, in light of the Euratom Treaty. The Court is more reserved in its language, identifying the right to "*maintain*"[126] nuclear energy. At the same time, the Court refers to Article 1 of the Euratom Treaty, which tasks the Community with "creating the conditions necessary for the speedy establishment and growth of nuclear industries". Article 2(c) is also cited, which states, inter alia, that the Community "shall facilitate investment" for the development of nuclear. It also refers to Article 192 of Euratom which provides that "Member States shall take all appropriate measures … to ensure the fulfilment of the obligations arising out of this Treaty". These provisions of EU primary law support the conclusion that the Commission should look on the provision of state aid for nuclear energy — even where it pursues much more ambitious objectives related to nuclear development — favourably.

Another question which arises is how the *Hinkley Point C* judgment may be applied to other circumstances — for example, where EU funds are provided (rather than national funds) for energy development or where the EU encourages private investment. On the latter point, the EU taxonomy for sustainable investment at present characterizes nuclear energy-related activities as "low carbon activities"[127] and accepts its role in some Member States' decarbonisation efforts. It could be difficult for the Commission to decide not to treat nuclear energy favourably under such regimes; from a legal perspective, this would be inconsistent with the objectives of the Euratom Treaty.

A final important question is whether the Court's judgment in Hinkley Point C has an impact beyond nuclear energy. On the specific issue of state aid, it should be noted that Member States are encouraged to phase out energy subsidies, in particular for fossil fuels, and must report on action taken towards that end.[128] However, the Court of Justice made some general remarks that could have implications beyond the realm of state aid. It upheld the approach of the General Court which had "rightly pointed out that the UK is free to determine the composition of its own energy mix".[129] The dicta of the Court in Hinkley Point C indicates a more general, principled position: EU policy and practice cannot be such as to definitively exclude nuclear — or any other energy source — from being an element of a Member State's energy mix if this would prevent that Member State from meeting their energy supply needs. For example, an EU law which directly prohibits the operation of all nuclear power stations or coal mines would cross this red line. In the case of nuclear, the reasoning and outcome in Hinkley Point C suggests that EU law or policy which *de facto* excludes nuclear energy from the mix by making it excessively difficult to maintain nuclear power stations may also cross a red line.

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[124] Case C-594/18 P *Austria v Commission* (*Hinkley Point C*) [2020] ECLI:EU:C:2929:742, Court of Justice, para 80.

[125] Case C-594/18 P *Austria v Commission (Hinkley Point C)* [2020] ECLI:EU:C:2020:352, Opinion of AG Hogan, para 42.

[126] *Hinkley Point C*, Court of Justice (n 121) para 79.

[127] Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2021] OJ L188/1, Recitals 6 and 10.

[128] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council [2018] OJ L328/1.

[129] *Hinkley Point C*, Court of Justice, (n 121) para 80.

On a literal reading, the second subparagraph of Article 194(2) could be interpreted to also exclude measures which *de facto* exclude any particular energy source from the national energy mix. However, the proportionality test carried out by the General Court — and endorsed by the Court of Justice — considered the right of the Member State to determine the energy mix as one factor to be weighed in the proportionality assessment. Here, the Commission decision enabling the development of nuclear was proportionate in light of several factors: the UKs right to determine the energy mix; that Hinkley Point C was limited in its ambition and formed part of a broader electricity market reform to ensure security of supply; the Euratom objectives; and the lack of more environmentally friendly alternatives. By contrast, where an EU measure enables the development of fossil fuels, the impact on greenhouse gas emissions and the Union's international obligations in that regard could tip the balance in the opposite direction. In any case, the threshold for the Court to replace the Commission's assessment with its own is very high; only where the proportionality test was "manifestly disproportionate" will it do so.

3.4.2. Energy as an issue of public security

a. ***Campus Oil*-style public security**

It is well-established case law that guaranteeing a state's security of energy supply, particularly in times of crisis, constitutes a "public security" objective which may justify a restriction on the internal market freedoms. The CJEU has repeated this reasoning on several occasions.[130]

i. Campus Oil

In the seminal *Campus Oil* case, the Court held that an obligation on importers of petroleum products to purchase 35% of their supply from the only Irish refinery at prices determined by the Government constituted a restriction on the free movement of goods. However, this could be justified as on "public security" grounds under Article 36 TFEU, given that petroleum products were a crucial energy source at that time. As described by the Court:

> 34. *petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them.*[131]

[130] In most cases, the Court referred to the need to ensure security of supply in times of crisis. For example, see, Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:2023:568, para 68); Case C-244/11 *Commission v Greece* [2012] ECLI:EU:C:2012:694, para 65; Case C-483/99 *Commission v France* [2002] ECLI:EU:C:2002:327, para 47; Case C-503/99 *Commission v Belgium (Distrigaz)* [2002] ECLI:EU:C:2002:328, para 47; Case C-543/08 *Commission v Portugal (Golden Shares in EDP)* [2010] ECLI:EU:C:2010:669, para 84. By contrast, in its *Hidroelectrica* judgment, the Court stated in a more general sense without reference to "crisis" situations that 'the protection of a secure energy supply' can constitute a ground of public security to justify a derogation from the free movement of goods. See Case C-648/18 *Hidroelectrica* [2020] ECLI:EU:C:2020:723, para 36.

[131] Case 72/83, Campus Oil Limited and others v. Minister for Industry and Energy and others [1984] ECLI:EU:C:1984:256, para 34.

Given their existential importance, the aim of ensuring a minimum supply of petroleum products at all times falls within the notion of "public security" under Article 36 TFEU and therefore capable of justifying a restriction on the free movement of goods.

The Court set out two further conditions which must be met before Article 36 TFEU can be applied. First, a Member State cannot rely on the "public security" justification if Community law "already provides for the necessary measures to ensure [its] protection".[132] Here, although "certain precautionary measures" had been taken at the Community and international levels to reduce the risk of Member States being left without essential supplies, there "would nonetheless still be a real danger in the event of a crisis".[133] While EU law at that time provided "certain guarantees" of energy security, it did not provide an "unconditional assurance"[134] of supply in times of crisis.

Second, Article 36 TFEU can only apply to "matters of a non-economic nature". Here, given the seriousness of the consequences that a supply interruption may have for a country's existence, then the aim of ensuring a minimum supply at all times "transcends purely economic considerations".[135] Once objective circumstances corresponding to the needs of public security are established, then other objectives of an economic nature may also be pursued.

The Court then continued to its third main point of analysis. Having been satisfied that Article 36 TFEU was applicable, it conducted a proportionality assessment. The principle of proportionality requires that a measure must be suitable for securing its objective, and not go beyond what is necessary to attain it.[136] In *Campus Oil*, the Court accepted that maintaining the operation of a national refinery would enable Ireland — a country almost wholly lacking oil resources of its own — to enter into long-term contracts with oil-producing countries, and so have a better guarantee of supplies in the event of a crisis. A national refinery also guarantees against the additional risk of being wholly dependent on refineries in third countries. On that basis, the Irish measure was appropriate to achieve the objective of security of energy supply. The plaintiffs argued that even if the operation of a national refinery is justified, it is disproportionate to oblige importers to purchase a certain proportion of their requirements from that refinery at a price fixed by the competent government minister. The Irish government contended that the purchasing obligation was necessary as the biggest players on the market refused to purchase any products at all from the national refinery. The fixing of the price by the minister was necessary to avoid financial losses. The Court accepted this line of reasoning; a purchasing obligation could be necessary where the refinery cannot freely dispose of its products at competitive prices on the market concerned, any losses not covered by those prices must be borne by the State. Finally, the Court emphasised that the quantities must not exceed the minimum necessary to ensure public security in times of crisis, and to ensure that the refinery can operate at a sufficient level at all times and meet its long-term contracts for regular supply.

[132] ibid, para 27.

[133] ibid, para 30.

[134] ibid, para 31.

[135] ibid, para 35.

[136] ibid, para 37; Commission v Portugal (Golden shares in EDP) (n 127) para 87.

ii. Narrowing the Campus Oil defence

In the four decades since *Campus Oil*, the Court has consistently repeated its basic ratio: an energy security-related objective[137] may constitute a ground of "public security"[138] or be considered an "overriding reason in the public interest", capable of justifying a derogation from the internal market freedoms. At the same time, the Court has since clarified that the scope of the "public security" derogation — in any circumstances — must be interpreted strictly. The notion cannot be unilaterally determined by each Member State without any control by the EU institutions; there must be a "genuine and sufficiently serious threat to a fundamental interest of society".[139]

The outcome of the *Campus Oil* case should be understood as rather exceptional. In 1990, the Court considered several Greek measures which were intended to ensure public-sector refineries could exist in Greece. Similar to the Irish government, the Greek government contended that its "special geopolitical situation"[140] necessitated the adoption of measures to ensure a regular supply, and that this could only be achieved by maintaining public-sector refineries. Here, the Court held that the Greek government failed to show that a 65% purchasing obligation from the national refinery was necessary to achieve that objective. In particular, it failed to demonstrate that the public sector refineries could not have freely disposed of its products on the market at competitive prices, as was claimed by the Irish government in *Campus Oil*. The Greek government also failed to show that an obligation on companies to submit procurement programmes and comply with marketing quotas set by the government was necessary. Given that Greece has a number of refineries whose production capacity exceeds crisis minimum requirements, less restrictive means — for example, an obligation to notify the government rather than a prior authorisation scheme — would have secured the objective of security of supply. More recently, the Court has again reiterated that a Member State cannot merely raise energy security as a justification, but must "clearly state the exact reasons why the particular measure at issue is appropriate and necessary".[141]

In a second case concerning Greece, the Court considered a rule whereby marketing companies were obliged to maintain minimum oil stocks in order to comply with Community-level minimum oil stock requirements. In particular, the marketing companies could transfer that obligation to Greek refineries only if they had bought supplies from the Greek refineries over the past year. The Court succinctly rejected this system as pursuing purely economic — rather than security — interests.[142] In the recent *Hidroelectrica* case, the Court restated its position that purely economic and commercial considerations cannot be considered grounds of public security — including in the energy sector. In short, "securing the supply of electricity does not mean securing the supply of electricity at the best price".[143]

The issue of security of energy supply has arisen most frequently in the context of the free movement of capital and the so-called "golden shares" cases. Member States have regularly argued that certain measures — for example, a prior authorization scheme for the acquisition of significant shares, a

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[137] Case C-244/11 *Commission v Greece* (n 127) para 65; Case C-207/07 *Commission v Spain* [2008] ECLI:EU:C:2008:428, para 47.

[138] The Treaty expressly provides "public security" as a ground to derogate from the internal market freedoms. See, for goods: Art. 36 TFEU; workers: Art. 45(3) TFEU; establishment and services: Art. 52(1) TFEU, Art. 62 TFEU; capital: Art. 65(1)(b) TFEU.

[139] Case C-54/99 Association Église de Scientologie de Paris, Scientology International Reserves Trust and The Prime Minister (Église de Scientologie) [2000] ECLI:EU:2000:124; Commission v France (n 127); Commission v Belgium (Distrigaz) (n 127).

[140] Case C-347/88, *Commission v Greece* [1990] ECLI:EU:C:1990:470, para 47.

[141] e.g. Commission v Portugal (Golden shares in EDP) (n 127) para 87.

[142] Case C-398/98 *Commission v Greece* [2001] ECLI:EU:C:2001:565.

[143] *Hidroelectrica* (n 127) para 43.

ministerial veto power over certain decisions, or a government representative sitting on the board — in relation to the largest energy or electricity companies are necessary to ensure national energy security. While public security has generally been accepted as a relevant, legitimate objective, such measures have almost invariably been rejected as disproportionate.[144] In fact, a security of energy supply defence has only been successful in one "golden shares" case, *Distrigaz*, where the disputed system of government control was one of opposition; strictly limited in its material and temporal scope; based on precise and objective criteria; accompanied with a formal statement of reasons; subject to judicial review.[145] The system was impeccably crafted; no alternative less restrictive means were considered available. Subsequent attempts to rely on *Distrigaz* have since failed, the Court's close scrutiny often finding that too much discretion has been left to the Member State.

In the years following the *Campus Oil* judgment, the two Greek cases demonstrated the exceptional nature of the Irish case.[146] Broadly, the Court has continued to rigorously apply the proportionality test, such that the scope for a *Campus Oil*-style defence has been narrowed.[147]

iii. Campus Oil today : security as an evolutive notion

In *Campus Oil,* the Court held that the need to ensure consistent supply of energy may constitute a "public security" objective capable of justifying a derogation from the internal market freedoms. In more general terms, energy security-related objectives may constitute a "public security" ground capable of justifying a Member State's refusal to apply or departure from EU law. The concepts of "energy security" and "public security" are both evolutive. Like the concept of "public policy", security concerns "may differ from one era to another and from Member State to Member State".[148] The notions of energy security and public security are decidedly different in today's world.

First, energy supply has become a much more multifaceted issue. While the "exceptional importance" of oil informed the Court's decision in *Campus Oil,* the situation today with the rise of renewables is decidedly altered.[149] As the Council has acknowledged, concerns about fossil fuels at affordable prices have moved towards securing access to raw materials, technologies, and critical supply chains.[150] As Advocate General Cápeta remarked recently, "the world has changed, as every citizen has seen and felt, whether in the form of empty supermarket shelves or higher energy bills".[151] The notion of energy security has broadened significantly in recent years.

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144 for e.g. Commission v France (n 127); Case C-207/07, Commission v Spain (n 134) ; Commission v Portugal (Golden shares in EDP) (n 127); Case C-244/11 Commission v Greece (n 127).

145 *Distrigaz* (n 127)

146 Kaisa Huhta, 'The Evolution of the Public Security Defence in EU Free Movement Law: Lessons from the Energy Sector' (2023) 24 Cambridge Yearbook of European Legal Studies, Section III.

147 For a full discussion, see Kaisa Huhta, 'The scope of state sovereignty under article 194(2) TFEU and the evolution of EU competences in the energy sector' (2021) 70 ICLQ.

148 Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:267, Opinion of AG Cápeta, para 72; The Court of Justice has repeatedly remarked on the evolutive nature of "public policy", see, for example, Case C-438/14 *Bogendorff* [2016] ECLI:EU:C:2016:401, para 68; Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 87. A similar approach is appropriate as regards the concept of "public security".

149 In 2000, AG Jacobs already remarked on the dramatically changed energy landscape. See, Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2000:585, Opinion of AG Jacobs, para 209 where he observes that wind did not yet play an important role in energy.

150 Council Conclusions on Climate and Energy Diplomacy – Delivering on the external dimension of the European Green Deal (Brussels, 25 Jan. 2021), point. 12.

151 *Xella Magyarország*, Opinion of AG Cápeta (n 145) paras 1-5.

Second, security of energy supply is increasingly understood as a serious and genuine "security" issue. This is especially apparent since Russia's invasion of Ukraine and its accompanying "weaponisation" of energy.[152]

On the one hand, the circumstances in which security of energy supply concerns arise and are understood as matters of public security have become much more varied. Thus, Member States may seek to rely on a *Campus Oil*-style argument of "public security"" to disapply EU law more frequently. On the other hand, the likelihood of a Member State's security of energy supply concerns meeting the legal threshold of "public security" to derogate from EU law is reduced. The threshold is to demonstrate a "genuine and sufficiently serious threat to a fundamental interest of society". In *Campus Oil,* the language of the Court is striking: the very existence of the country, its essential services, and the survival of its inhabitants were dependent on ensuring the security of oil supplies. Given the centrality of oil as an energy source in 1980s Ireland, its continuous supply was of truly existential importance and so transcended purely economic motivations. Moreover, the fact that Ireland had only one refinery on its territory was relevant. Later, AG Jacobs would point out that the "special economic role of petroleum products was a decisive factor in the Court's rather exceptional judgment".[153] Given today's energy landscape — of more diversified resources and better interconnections — it is doubtful that a single energy source and the maintenance of its indigenous production could be of such existential importance. In general terms, then, developments indicate that the circumstances within which a Member State may raise energy security concerns have broadened, but the likelihood of a particular risk being sufficiently serious as to justify a unilateral derogation from EU law has been reduced.[154]

Third, security concerns no longer only arise at the Member State level, but are increasingly considered also at the Union level. Since Lisbon, ensuring the "security of energy supply in the Union"[155] is a primary objective of Union energy policy. The security of the Union as a whole is emerging as a notion related to, though distinct from, the security of individual Member States. In the political sphere, this is reflected in the prevalence of notions of "European sovereignty" and "strategic autonomy". Secondary legislation increasingly tends to aim towards safeguarding security of energy supply of both the Member States and of the European Union *as a whole.*[156] This is also seen in the case law of the CJEU. In the *OPAL pipeline* case (which will be discussed in detail in Section 3.5), the Court concluded that the principle of solidarity requires assessments to take account of "the interests both of the Member States and of the Union as a whole."[157] In *Trade Express-L*, the Court considered whether the Oil Stocks Directive (Directive 2009/119) required oil companies to maintain emergency stocks in specified

[152] For discussion of the 'securitisation' of energy and climate issues, from a public policy and discourse analysis perspectives, see, Anna Herranz-Surralés 'The EU Energy Transition in a Geopoliticising World' (2024) 31 Geopolitics; Andreas C. Goldthau and Richard Youngs 'The EU Energy Crisis and a New Geopolitics of Climate Transition' (2023) 61(1) JCMS.

[153] See *PreussenElektra,* Opinion of AG Jacobs (n 146), para 210.

[154] For discussion, see: Huhta (n 143) pp 1-22.

[155] Art. 194(1)(b) TFEU.

[156] e.g. see the stated objectives of secondary legislation such as 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, Article 1 'establishes provisions aiming to safeguard the security of gas supply across the Union'; For another example,see Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas [2022] OJ L206/1. Article 1 of that Regulation sets out its purpose, namely, to 'establish rules to address a situation of severe difficulties in the supply of gas, with a view to safeguarding *Union* security of gas supply in a spirit of solidarity' (emphases added). Under Article 6(1)(b), MS are free to choose their appropriate demand reduction measures provided they, inter alia, "do not endanger the security of gas supply of other MS *or of the Union*" (emphasis added).

[157] Case C-848/19 P, *Germany v Poland (Opal pipeline)* [2021] ECLI:EU:C:2021:598, para 53 and also para 69, the latter stating that "the energy interests of the Member States and the European Union, and in particular to security of energy supply".

petroleum products unrelated to their activities. In his Opinion, AG Rantos went so far as to characterise the minimum stocks built up in individual Member States as part of the "shared stocks of the European Union … an essential part of the public security for Member States and for the European Union".[158] The Court echoed the AG, emphasising that the Oil Stock Directive "seeks to ensure public security for Member States *and for the European Union,* for which the availability of oil stocks and the safeguarding of energy supply are essential elements".[159] Logically, this objective could be more effectively pursued if Member States had discretion to determine the composition of their emergency oil stocks in accordance with national circumstances.

Fourth, EU energy law now operates on the premise that energy security will, first and foremost, be ensured through the operation of a properly functioning, well-connected internal energy market. Since the 1990s, five Energy Packages have been adopted towards the completion of the internal energy market. According to Article 194 TFEU, the internal market provides the context within which the EU energy policy objectives — including security of supply — can be achieved. The effective functioning of the internal market — and, by extension, the absence of restrictive national measures — contributes to the objective of energy security. For example, while the Security of Gas Supply legislation has been revised on four occasions, its basic premise remains the same: "an internal gas market that operates smoothly is the best guarantee of the security of gas supply across the Union,"[160] it is only in "exceptional circumstances" where the market fails to ensure energy security that the solidarity measures provided therein become operational. In short, the internal market should be the "primary driver" of energy security, with state intervention as a "last resort".[161]

AG Campos Sánchez' Opinion in *Hidroelectrica* reflects these two latter developments. In that case, a recital of an applicable regulation (Regulation 2015/1222) provided that energy security is "an essential element of public security and therefore inherently connected to the efficient functioning of the internal market and integration of isolated electricity markets of Member States".[162] The AG therefore concluded that the free trade of electricity between the Member States is a fundamental element for security of supply — equally addressing its two dimensions, i.e. in each Member State and in the Union as a whole. This supported his conclusion that a national measure restricting trade could not be justified on grounds of public security.[163]

Generally, the fact that public security has taken on a Union dimension and that energy security in the Union should primarily be provided by a properly functioning, well-connected internal market make recourse to a *Campus Oil*-style defence more difficult.

iv. Campus Oil today: a developed Union legal framework

In *Campus Oil,* the Court indicated that the "public security" justification would no longer apply if EU law "already provides for the necessary measures to ensure [its] protection".[164] While the Community

[158] Joined Cases C-395 & 428/22 *Trade Express-L and Others* [2023] ECLI:EU:C:2023:798, Opinion of AG Rantos para 40. Emphasis in original.

[159] Joined Cases C-395 & 428/22, *Trade Express-L and Others* [2024] ECLI:EU:C:2024:374, para 42. Emphasis added.

[160] Commission Regulation (EU) 2017/1938 (n 153) Recital 7.

[161] Huhta (n 144) pp 78-81.

[162] Regulation 2015/1222, of 24 July 2015 establishing a guideline on capacity allocation and congestion management [2015] OJ L197/24, Recital 2.

[163] Case C-648/18 *Hidroelectrica* [2020] ECLI:EU:C:2020:256, Opinion of AG Sanchez para 80-81.

[164] *Campus Oil* (n 128) para 27.

provided "certain precautionary measures", these were limited — minimum oil stock requirements; limited coordination of national policies; and the potential to suspend national export licences during a crisis. Finally, the Court pointed to measures taken outside the Community framework under the auspices of the OECD aimed at establishing solidarity in the event of an oil crisis. The Court concluded that the Community legal regime did not provide Member States like Ireland — whose energy security depends wholly or almost wholly on energy imports — with an "unconditional assurance" that supplies will be maintained during a crisis and so "appropriate complementary measures at national level"[165] on grounds of public security could not be excluded.

This suggests that the public security defence will remain applicable as long as the area of energy security has not been exhaustively harmonised by EU secondary law. Even still, a strict literal reading of this aspect of *Campus Oil* suggests it would remain of limited impact. It is questionable whether any legislative regime – fully harmonised or not – could provide an *unconditional* assurance of energy security in all circumstances. AG Jacobs suggested a less stringent approach, already questioning in 2000 whether recourse to the "public security" exception was still permissible in this context given the secondary legislation in the energy field adopted since *Campus Oil*.[166] In light of the colossal developments in EU energy law in the twenty-first century, this argument has much greater force today. A more logical reading of Campus Oil, as proposed by some commentators, emphasises that the Court indicated that national measures must be *appropriate* and *complementary* to the Union's legal framework. National measures could be enacted for purposes of public security; however, any such national measure cannot contradict the existing Union's "rules nor the philosophy underlying those rules"[167] – irrespective of the level of harmonisation.

The idea that a national measure must be appropriate and complementary to the EU legal framework is reflected in two recent Court judgments. In *Hidroelectrica,* the Court considered a Romanian rule whereby electricity operators in that Member State were obliged to offer for sale all electricity available on a centralised, competitive national market through a single operating platform. In effect, this prohibited direct exports to other Member States. Its purpose was to ensure transparency of contracts, fair competition, and energy supply for consumers. The Court accepted that the national measure could, in principle, be justified on grounds of public security as the relevant EU secondary legislation "does not fully harmonise the [electricity] market … [it] establishes merely a number of general principles that Member States must follow".[168] However, the national measure cannot be motivated by purely economic considerations as this would strike at "the very principle of the internal market".[169] Moreover, it pointed out that EU secondary legislation sets out mechanisms for cooperation between national regulatory authorities and other rules to ensure the transparency of the market.[170] In practice, then, the national measure was not necessary. As the AG surmised: "there are undoubtedly sufficient legislative instruments … with no need to wait for full harmonisation of the sector".[171]

[165] Ibid., para 31.

[166] P*reussenElektra,* Opinion of AG Jacobs, (n 146) para 209.

[167] Dirk Vandermeersh 'Restrictions on the movement of oil in and out of the European Community: The Campus Oil and Bulk Oil cases' (1987) 5 Journal of Energy and Natural Resources Law, pp 51-53

[168] *Hidroelectrica* (n 127) para 27

[169] ibid, para 43.

[170] ibid, para 44.

[171] *Hidroelectrica*, Opinion of AG Campos Sánchez-Bordona (n 160) para 71.

In *Eni and others,*[172] the Court considered the French legal framework setting out the public service obligations on natural gas suppliers to ensure continuity of supply in crisis. In particular, it was argued that a rule requiring suppliers to locate most of their storage capacities within the Member States violated the Security of Gas Supply Regulation (Regulation 994/2010). The Court began by acknowledging that the old Security of Gas Supply Directive (Directive 2004/67) had expressly provided a minimum common approach to security of natural gas supply, and so Member States were left with a broad margin of discretion to adopt national measures to that end. By contrast, the new Security of Gas Supply Regulation (Regulation 994/2010) was expressly intended to provide a "tighter framework for that discretion, in order to prevent measures developed unilaterally by a Member State jeopardising the proper functioning of the internal gas market and the supply of gas in the other Member States."[173] In this case, the national court would need to ascertain whether the French legal regime left sufficient possibility for natural gas suppliers to locate storage capacities outside the Member State as required by the Security of Gas Supply Regulation.

The Security of Gas Supply legislation has undergone two further revisions (Regulation 2017/1938, later amended by Regulation 2022/1032). There are now stringent obligations on individual Member States to ensure security of energy supply in times of crisis – through minimum filling of storage facilities; extensive preventive and emergency planning; monitoring and reporting. As a last resort, Member States are legally obliged to provide gas to a neighbouring Member State which is itself unable to supply its solidarity-protected customers. In response to Russia's full-scale invasion of Ukraine and the accompanying gas crisis, additional emergency legislation was adopted to further integration in the field of gas. These will remain in force until 31 December 2024. The principle of solidarity is also now of fundamental importance to the legal regime. In this context, it could even be argued that the EU legislative framework in relation to gas supply crises is so developed that Member States can no longer have recourse to a *Campus Oil*-style public security derogation. If it is still possible to raise such grounds for derogation from the EU legal framework, it would be rather difficult for a Member State to demonstrate the proportionality of the national measures – i.e. to demonstrate why a conflicting national measure is appropriate and necessary in circumstances where EU law provides a detailed framework to ensure continuity of supply in times of crisis. Beyond gas, EU climate and energy law has developed extensively as the review of current legislation in Section 3.6 demonstrates. Broadly, it thus becomes more difficult for a Member State to justify a unilateral derogation from that framework.

b. **Article 4(2) TEU**

Article 4(2) TEU provides that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Moreover, it requires the EU to "respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Where a Member State relies on Article 4(2) TEU to justify a derogation from EU law, the Court has continued to apply its well-established principles concerning justifications for exceptions on EU law. In essence, the CJEU therefore does not treat Article 4(2) TEU as some sort of carve out or safe haven for

[172] Case C-226/16 Eni SpA and Others v Premier ministre and Ministre de l'Environnement, de l'Énergie et de la Mer, (Eni & Others) [2017] ECLI:EU:C:2017:1005.

[173] Ibid., paras 21-22.

national sovereign powers, but rather as a norm of EU law which may justify some deviations from EU norms and remains squarely within the final jurisdiction of the CJEU.

For example, in *Cilevics*, the Court accepted that the protection of an official language falls within the notion of "national identity". While acknowledging the wide discretion of the Member State in pursuing that legitimate objective, the Court nonetheless conducted its traditional proportionality test, assessing whether the national measure was appropriate and necessary to obtain that objective.[174] In *Sayn-Wittgenstein*, the Court accepted the abolition of nobility titles as an element of Germany's "national identity". Notwithstanding that fact, that constitutional choice must be considered as a "public policy" ground to justify a derogation from the free movement of EU citizens. It may only be relied upon if there is a "genuine and sufficiently serious threat to a fundamental interest of society". Hence, while the national authorities enjoy a certain discretion in pursuing that objective, they must nonetheless comply with the principle of proportionality.[175] In general, therefore, where Member States invoke Article 4(2) TEU as a justification to a restriction on the internal market freedoms, the traditional proportionality test applies, and the CJEU has the final say.[176] In the case law of the CJEU, therefore, Article 4(2) TEU is far from a sovereign trump card that Member States can use when they consider their national identity or their national security is at stake.

i. Article 4(2) TEU – broader constitutional context

The Court has also elaborated on Article 4(2) TEU in the contentious rule of law backsliding context. It has confirmed that the organization of the judiciary falls within the notion of "national identity" and the Member States (therefore) enjoy discretion in that regard. However, that discretion is not unlimited. In choosing their constitutional model, the Member States must comply with the value of the rule of law, enshrined in Article 2 TEU, and given further expression in Article 19(1) TEU.[177] Moreover, it is for the Court of Justice to determine any potential conflict, i.e. to determine whether the national regime is compatible with EU law or not.[178] In more general terms, this could mean – as several Advocate Generals have argued – that a Member State cannot rely on Article 4(2) TEU to derogate from the foundational values set out in Article 2 TEU. Article 4(2) TEU must be interpreted consistently with the EU's broader constitutional framework.[179]

In this context, it has also been observed that references to Article 4(2) TEU do not necessarily alter the law dramatically, but serve to underscore the constitutional nature of the issues.[180] What is more, as with the *Campus Oil* exception, this use of Article 4(2) TEU raises the question if an increased protection for EU values and identity may limit the scope for Member States to rely on Article 4(2) TEU to protect national values and identities: if national values, identity or security is sufficiently, or even better,

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[174] See also by analogy the *Bogendorff* (n 145) or *Sayn-Wittgenstein* (n 145) cases.

[175] *Bogendorff* (n 145). See also the Opinion of AG Collins in *RS* at para 62: Case C-430/21 *RS (Effect of the decisions of a constitutional court)* [2022] ECLI:EU:C:2022:44, Opinion of AG Collins, para 62.

[176] Case C-391/20 *Boriss Cilevičs and others* [2022] ECLI:EU:C:2022:166, Opinion of AG Emilou, para 89 and the case law and academia cited therein.

[177] Case C-156/21, *Hungary v European Parliament and Council* [2022] ECLI:EU:C:2022:97; Case C-157/21, Poland v. European Parliament and Council; Case C-430/21 *RS (Effects of the decisions of a constitutional court)* [2022] ECLI:EU:C:2022:99.

[178] RS (Effects of the decisions of a constitutional court) (n 174), para 71.

[179] RS (Effects of the decisions of a constitutional court), Opinion of AG Collins (n 172) paras 61-64; Boriss Cilevics, Opinion of AG Emiliou (n 173) para 87; Case C-490/20 V.M.A v Stolichna obshtina, rayon 'Pancharevo' (Sofia municipality, Pancharevo district, Bulgaria) [2021] ECLI:EU:C:2021:296, Opinion of AG Kokott, para 73.

[180] Matteo Bonnelli, 'Has the Court of Justice embraced the language of constitutional identity?' (*Diritti Comparati*, 26 April 2022) <www.dirritticomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/> Accessed 20 September 2024.

protected at the EU level, reliance on Article 4(2) TEU could even diminish net protection, at least from the perspective of the CJEU and the EU. This tension can also be seen in the reliance on Article 4(2) TEU in the context of relocation.

ii. Relocation Decisions

With respect to "national security", Article 4(2) expressly stipulates that it "shall remain the sole responsibility of each Member State". In the *Relocation Decisions* case, three Member States relied on Article 72 TFEU read in conjunction with Article 4(2) TEU, to justify a refusal to implement relocation decisions intended to help Greece and Italy cope with the refugee crisis. Article 72 TFEU stipulates that measures related to the area of freedom, security and justice will not affect the exercise of the Member States' responsibilities with regard to, inter alia, the safeguarding of internal security. The relocation decisions were adopted on the emergency legal basis of 78(3) TFEU. The Court pointed out that according to Article 80 TFEU, the principle of solidarity and fair sharing of responsibility between Member States governs the Union's asylum policy. Thus, the burdens entailed by the relocation decisions must, in principle, be divided between all the other Member States.[181] In that light, the Court rejected several procedural arguments brought forward by the applicant Member States.

As will be discussed in detail below, this can be applied by analogy in the field of energy. While the "fair sharing" principle does not apply to energy law, Articles 194 and 122 TFEU provide for measures to be taken "in a spirit of solidarity". In *OPAL pipeline*, the Court has confirmed that energy solidarity is a specific expression of solidarity, a fundamental principle of EU law.[182] A similar logic may also apply here; it is increasingly difficult for a Member State to justify unilateral derogations from solidarity-based EU mechanisms which aim to give effect to the principle of energy solidarity, (particularly in times of crisis).

In the *Relocation Decisions* case, the Court reiterated that there is no "inherent general exception"[183] excluding public security measures from the scope of EU law. Consistent with that case law, it held that as Article 72 TFEU is a "derogatory provision",[184] it must be interpreted strictly. The scope of the requirements relating to the maintenance of national security cannot be determined unilaterally by each Member State, without any control by the Union institutions. Here, the Member State relying on Article 72 TFEU must prove that it was necessary to derogate from EU law in order to exercise its responsibilities in terms of safeguarding internal security. The judgment illustrates that Article 4(2) TEU has not altered the pre-existing legal situation with respect to public security derogations: there is no general carve out the moment a Member State relies on national identity or security.[185]

On Article 4(2) TEU, the Court further pointed out that there was no indication that safeguarding the "essential State functions"[186] as referred to in Article 4(2) TEU could not be carried out other than by

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[181] Joined Cases C-715, 718 & 719/17, *Commission v Poland & Others (Relocation Decisions)* [2020] ECLI:EU:C:2020:257, para 80.

[182] *Opal pipeline* (n 154) para 38.

[183] *Relocation Decisions* (n 178) para 143.

[184] Ibid., para 144.

[185] For discussion: Evangelia L. Tsourdi 'Relocation blues – Refugee backsliding, division of competences, and the purpose of infringement proceedings: Commission v Poland, Hungary and the Czech Republic' (2021) 58 Common Market Law Review 1819; Bruno De Witte 'Exclusive Member State competences – is there such a thing?' in Garben and Govare (eds.), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017), pp 59-73, at pp 70-72.

[186] *Relocation Decisions* (n 178) para 170.

disapplying the relevant EU law. On the contrary, it noted that the contested decisions had provided the Member States with "genuine opportunities"[187] for protecting their security interests (by enabling the Member State to conduct an individual examination of each asylum applicant proposed for relocation) without prejudicing the overall objective of the decisions (to ensure swift, effective relocations and alleviate the pressure on Greece and Italy).

This reasoning echoes elements of the Court's approach in *Hidroelectrica* as discussed in the previous section. There, the Court found that national measures taken to ensure transparency on electricity markets were disproportionate, given that EU secondary legislation already set out certain rules and mechanisms for cooperation towards that objective of transparency. Importantly, the *Relocation Decision* demonstrates the Court's willingness to take this approach where security matters are at issue; the Court will take into account the fact that the EU legislature has specified procedures such that Member States can protect their security interests. As EU energy law exists today, this would appear to be the case. As discussed above, for example, the Security of Gas Supply Regulation (2017/1938) in fact places obligations on individual Member States to ensure security of energy supply in times of crisis – through filing obligations; preventive planning; emergency responses.

iii. Case C-742/19

In *Ministrstvo za obrambo* (Case C-742/19), the Court considered whether military personnel should be excluded from the scope of EU legislation which regulates working time, insofar as it is part of the "essential functions of the State" under Article 4(2) TEU. The Court repeated its position that the mere fact that a national measure is taken for security purposes does not mean it falls outside the scope of EU law.

The Court went on to consider what the requirement that Union institutions "respect", inter alia, essential state functions under Article 4(2) TEU means. It held that the application of Union law "is not such as to hinder the proper performance of those essential functions".[188] The rules cannot be interpreted in such a way as to prevent the armed forces fulfilling the essential state functions and so adversely affect those. As a consequence, the "specific features" which each Member State imposes on its armed forces, "must be duly taken into consideration by EU law".[189] In this case, factors included the particular international responsibilities, geopolitical contexts, and threats that each individual Member State faces.[190] Following that statement, the Court went on to emphasize that the working time rules gave expression to fundamental rights of workers, and so military personnel cannot simply be excluded in all circumstances. The Court conducted an extensive analysis of various activities of the armed forces, to determine whether certain security activities must be exempt from the working time rules. It concluded by specifying four circumstances where activities may be excluded from the scope of the EU working time rules: initial or operational training or military operation; an activity "so particular" that it is not suitable for staff rotation; an activity in "the context of exceptional events … indispensable for the life … of the community at large"; where its application would "inevitably be detrimental to proper performance of actual military operations".[191]

This case provides some insight into what the Union institutions must do in order to "respect", inter alia, national security as provided for by Article 4(2) TEU. On the one hand, the Court's dicta suggest that where EU legislation engages with such issues, it is appropriate to allow a degree of flexibility so

[187] Ibid., para 171.

[188] Case C-742/19 B.K. v Republika Slovenija (Ministrstvo za obrambo) [2021] ECLI:EU:C:2021:597, para 43.

[189] Ibid.,, para 44.

[190] Ibid., paras 41-47

[191] Ibid., para 88.

that individual Member States can respond to security issues in accordance with their particular national circumstances. On the other hand, it demonstrates that where secondary legislation sets a security exception in terse terms, the Court will itself step in and provide detailed interpretation of when the security exception may apply. This is true even in an area as sensitive as military activities. Elsewhere, the Court has indicated that Article 4(2) TEU may be used as a parameter of validity to determine whether EU legislation is valid – that determination is ultimately one which only the CJEU itself can make.[192]

iv. La Quadrature du Net

In *La Quadrature du Net,* the Court again confirmed that the notion of "national security" – as distinct from "public security" – does not provide any general exception from (the scope of) EU law. In this case, nine Member States submitted that national legislation which has as its purpose "to safeguard national security" falls outside the scope of EU law, in accordance with Article 4(2) TEU. According to that provision, they argued, activities which are "essential functions of the Member States" are within their exclusive competence.[193] In the concrete case, it was submitted that therefore French legislation governing the intelligence services must not be subject to EU data retention rules. The Court of Justice rejected that contention. It reiterated its pre-Lisbon case law: while an individual Member State is free to define the essential security interests and adopt appropriate measures to that end, "the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law."[194] In this case, the French legislation fell within the scope of particular EU secondary legislation.

The French Government challenged the *La Quadrature du Net* judgment before the Conseil d'État, arguing that the Court of Justice had acted *ultra vires* by impinging on an exclusive competence of the Member States. Traditionally, the Conseil d'État has largely accepted the primacy of EU law. It has refused to review the Court of Justice's judgments save in exceptional cases where a French "constitutional principle" – typically offering higher fundamental rights protection – has no EU equivalent. Here, however, the Conseil d'État expanded those objectives to include vague notions of "national security" against which it could review the implementation of any EU legislation.[195] By referring to Article 4(2) TEU, the Conseil d'État implied that this formed part of the French "national identity" which EU law must respect. The *La Quadrature du Net* decision proved controversial in several Member States. Shortly after, when the Irish Supreme Court referred similar questions in relation to data retention for criminal investigations, twelve Member States made observations to the Court of Justice. What this illustrates, however, is that Article 4(2) TEU, and EU law generally, does not just live or exist on the EU law plane, but crucially has to (co-)exist with national law at the plane of national laws. Where national courts start to impose limits on EU law, this may formally be against EU law, but it may nevertheless significantly limit the effectiveness and legitimacy of EU law at the national level, where it must be implemented and respected. Hence, the national understanding and legal

[192] RS (Effect of the decisions of a Constitutional Court) (n 174).

[193] Joined Cases C-511, 512 & 520/18, *La Quadrature du Net* (2020) ECLI:EU:C:2020:791, para 89.

[194] As discussed, even the organisation of militaries, for example, comes within the scope of EU law, see *Ministrstvo za obrambo* (n 185) para 39. See also the case law cited therein: Case C-623/17 *Privacy International* (2020) EU:C:2020:790, para 44 and the case-law cited). See also, in that sense, Case C-273/97 *Sirdar* (1999) EU:C:1999:523, paras 15 and 16), and Case C-285/98 *Kreil* (2000) EU:C:2000:2, paras 15-16).

[195] For discussion: Araceli Turmo 'National security as an exception to EU data protection standards: The judgment of the Conseil d'État in French Data Network and others' (2022) 59 Common Market Law Review 203.

operationalization of potential limits on EU competences, also regarding climate and energy, must be considered.

3.4.3. International obligations as limits or amplifiers of EU competences

a. **The Paris Agreement**[196]

The international climate regime operates under the UNFCC, with the Conference of the Parties meeting annually. The most significant development in recent years is the Paris Agreement, an international treaty entered into force on 4 November 2016. The European Union is itself a Party to the Agreement, meaning it is an integral part of the EU legal order, and is binding on the Union institutions and the Member States.

The Paris Agreement is much more stringent than previous agreements in setting a goal for the limitation of global warming. Article 2 provides that the Agreement "aims to strengthen the global response to the threat of climate change"[197] by, inter alia, holding the increase in the global average temperature to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". While there is uncertainty as to the precise legal effect of its provisions, Article 2 can be read as an "overarching" or "collective" goal which the Parties committed to as a matter of joint responsibility. The Paris Agreement maintains the principle of "common but differentiated responsibilities and respective capabilities" (CBDR RD). While "developing States" must now contribute to the collective goal, it is stipulated that "developed country Parties should continue to take the lead by undertaking economy-wide absolute emission reduction targets".[198] This lends support for the EU and its Member States – as Developed parties – to set ambitious, holistic climate targets for themselves and to take action towards that end; an accelerated transition to renewable energies in the EU economy being one indispensable element. As regards its external relations, the Union may need to be cautious when placing burdens on its partners falling outside the "developed" category.[199]

Instead of setting concrete substantive targets for individual Parties or groups thereof, the Parties are given latitude to submit their own "nationally determined contribution" (NDC) which should become more ambitious over time. The advantage of this "bottom-up" approach is that by allowing states autonomy, it facilitates widespread participation – which is essential to address the global challenge of climate change. The disadvantage is that individual states may lack ambition in setting and/or implementing their NDCs. In the absence of robust law, national policies adopted in pursuit of the Paris Agreement's ambition of limiting global warming "well below 2°C" are wide open to public contestation and political changes. Climate change is a long-term, global challenge whereas politics

[196] Paris Agreement (adopted on 12 December 2015) U.N. Doc. FCCC/CP/2015/L.9/Rev/1

[197] Paris Agreement (adopted on December 12, 2015) U.N. Doc. FCCC/CP/2015/L.9/Rev/1, art 2.

[198] Ibid, art 4.

[199] Gracia Marín Durán and Joanne Scott 'Global EU Climate Action and the Principle of Common but Differentiated Responsibilities and Respective Capabilities' (2024) EUI Working Paper 2024/2 <cadmus.eui.eu/bitstream/handle/1814/76653/LAW_2024_02.pdf?sequence=1&isAllowed=y>

are usually informed by short-term, material, and local imperatives. Some academics suggest, therefore, that climate change objectives should be enshrined in constitutional law. [200]

b. The Union's legal framework for the implementation of the Paris Agreement

The specific objective of EU-wide neutrality by 2050, with the interim objective of GHG emissions reductions by at least 55% compared to 1990 levels by 2030, was in fact enshrined into secondary legislation, namely, the 'European Climate Law'. [201] Article 2 provides:

> *1. Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.*
>
> *2. The relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.*

Article 4 provides an interim binding target of 55% reductions by 2030. The Fit for 55 legislative framework implements this objective. The EU ETS, ESR, and regulation on land-use related emissions and removals (LULUCF) have been identified as the most important domestic policies in that respect.

The fact that the EU's progressively increasing climate change ambition to meet its international obligations under the Paris Agreement provides an additional layer of legitimacy. It legitimises the EU policies taken in pursuit of that ambition. Alongside the EU, the individual Member States are also Parties to the Paris Agreement. However, they agreed to act jointly with the EU, meaning that a single NDC has been submitted on their behalf for which each Member State is "individually and together [with the EU]" responsible. The EU updated its NDC last year to reflect its increased ambition under the Fit for 55 package. [202] The fact that the Member States are Parties to the Paris Agreement themselves is significant. Any national measure which undermines the climate objectives may not only be incompatible with EU law obligations but also international law obligations. From a political perspective, it should be more difficult for a Member State to blame the EU for forcing climate action upon them; each individual State freely and voluntarily signed the Paris Agreement. From a legal perspective, a national measure which undermines the climate objectives is not only potentially incompatible with EU law obligations but also with international law obligations.

Within the EU, each Member State is given a measure of flexibility in how to achieve the climate objectives in a manner best suited to their national energy mix and preferences. The Governance Regulation obliges each Member State to prepare a ten-year, integrated National Energy and Climate Plan (NECP). The system is similar to the "ratchet mechanism" of the Paris Agreement, whereby there are continuous reporting requirements coupled with an increasing level of ambition. [203] The

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[200] Aileen McHarg "Climate change constitutionalism? Lessons from the United Kingdom' (2011) 4(2) Climate Law 469. Navraj Singh Ghaleigh 'Article 2: Aims, objectives and principles' in Geert van Calster and Leonie Reins (eds.) *The Paris Agreement on Climate change,* Section 2.28.

[201] European Climate Law (n 1).

[202] Spain and the European Commission on behalf of the European Union and its Member States 'Update of the NDC of the European Union and its Member States' (Madrid, 16 October 2023) <unfccc.int/sites/default/files/NDC/2023-10/ES-2023-10-17%20EU%20submission%20NDC%20update.pdf>

[203] As discussed in Leigh Hancher, 'EU energy governance – moving targets and flexible ambitions between opacity and opportunism?' (2022) 41 Yearbook of European Law 162.

Commission and Member State are in regular dialogue, with the Member States obliged to "take due account" of any Commission recommendation "in a spirit of solidarity between Member States and the Union and between Member States".

The NECPs must focus on how the Member State plans to pursue the objectives of the Energy Union and the 2030 objectives relating to GHG emission reductions, renewable energy share, and energy efficiency (targets relating to renewable energy share and energy efficiency are binding on EU Member States as a matter of EU secondary law). Notably, Recital 18 of the Governance Regulation describes these objectives as "indissociably linked" and of equal importance. This explains why the Governance Regulation was adopted on the basis of both Article 192(1) and Article 194(2) TFEU – i.e. forming part of both EU environmental and energy policy.

A piece of EU legislation, such as the Governance Regulation, being adopted on both Article 192(1) and 194(2) TFEU creates a legal ambiguity: which "sovereignty exception" – the second subparagraph of Article 194(2) or Article 192(2) – is relevant? It is not clear how the Court would deal with this particular ambiguity. As outlined above, the "sovereignty exceptions" have different consequences: Article 192(2)(c) could require the measure to be adopted using the special legislative procedure, whereas the second subparagraph of Article 194(2) TFEU could prohibit its adoption altogether. In that sense, Article 192 TFEU is a less risky legal basis. Considering the relationship between environmental and energy policy, Fehling puts forward a creative argument in favour of using the former where possible. He argues that an "international law-friendly" and teleological interpretation of these provisions points towards a broader reading of environmental policy and narrower reading of energy policy. In particular, Article 193 TFEU guarantees the right of Member States to adopt stricter national standards in environmental policy, thereby empowering individual Member States to accelerate their climate ambitions. [204]

In any case, EU law should itself pursue a high level of climate ambition. Article 6(4) of the European Climate Law provides that the Commission must assess the consistency of any draft measure, including budgetary measures, or legislative proposal with the climate neutrality and interim GHG emissions reductions set out therein. Moreover, the Commission is obliged to "endeavour to align" its proposals and draft measures with those objectives and provide reasons where non-alignment occurs. This can be understood as a potentially far-reaching operationalisation of the environmental protection principle set out in Article 11 TFEU. [205] It provides a pressure point which other actors may apply on the Commission to ensure that in exercising its role as legislative initiator, it takes care to ensure that any EU law proposal – in any policy field – is consistent with the EU's climate ambitions.

c. Environmental protection and international obligations – the EU's constitutional dimension

The Treaties (TFEU and TEU) provide the constitutional framework for the European Union. [206] Typical of constitutional texts, the Treaties set out how public power, including law-making, operates – with different functions and interactions between the institutions. In the case of the Union, the Treaties must also set out the division of competences between the EU and its Member States.

The Treaties also provide more extensive detail, for example in guiding or limiting policy choices. On the one hand, some legal scholars remark that this is unusual insofar as it exceeds what is typically seen

[204] Fehling (n 108).

[205] Hancher (n 200), p 171.

[206] Case 294/83 *Les Verts* [1986] ECLI:EU:C:1986:166.

in national constitutional texts.[207] On the other hand, some legal scholars have argued that the Treaties have always – since the very origins of the European Communities – attached particular constitutional significance to certain objectives; this distinguishes the Treaties from ordinary international treaties.[208] In the Union's constitutional system, the political institutions are entrusted with the implementation of the Treaty objectives. In its role of judicial review, the Court of Justice takes account of the Treaty objectives. The Court tends to use two methods of interpretation in tandem: teleological and systematic.[209] In this way, the Court interprets EU law in light of the objectives it pursues, and in a manner which is consistent/coherent with the overall constitutional/Treaty framework.

Under the Treaties, the promotion of sustainable development, both within the Union and in its engagement with the international community, are recognised as general objectives of the Union. [210] In respect of its external action, Article 21 TFEU provides that the Union shall promote multilateral solutions to common problems, in particular in the UN framework. It further specifies that external action shall, inter alia, "help develop international measures … to ensure sustainable development". Article 191(1) enshrines the promotion of measures at the international level to deal with environmental problems, particularly the issue of climate change, as an objective of the Union's environmental policy. Finally, Article 11 TFEU enshrines an environmental protection integration principle, stipulating that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Thus, particularly since the Lisbon Treaty, the proactive, ambitious engagement of the Union in the international climate change framework finds solid support in the Treaties.

These Treaty provisions also support a broad reading of the Union competences in fields other than environmental or energy policy, but which may nonetheless contribute towards environmental protection and/or climate ambition. In *Opinion 2/15,* the Court accepted that the Union's "new generation" Free Trade Agreements, including the Trade and Sustainable Development chapters, still fell within the common commercial policy – a remarkable finding as CCP is an exclusive EU competence. In light of the aforementioned Treaty provisions, it held that the objective of sustainable development henceforth formed an "integral part"[211] of the CCP. Generally, this case demonstrates that the Union's competences must be interpreted in a broad manner that encompasses the importance placed on the pursuit of ambitious international climate action and environmental protection in the Treaties. This demonstrates the teleological and systematic interpretation in practice.

Such arguments are particularly convincing with respect to the union's competences directly in the fields of environmental (192 TFEU) and energy (194 TFEU) policy. Fehling has argued that these competences should be interpreted in an "international law friendly",[212] teleological manner which reflects the Treaty objectives. In this sense, the "national sovereignty exceptions" of Article 192(2)(c) and the second subparagraph of Article 194(2) should be interpreted narrowly; a broad interpretation would hinder the Union's ability to act as a driving force for climate ambition and environmental

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[207] For example, see Dieter Grimm. on the 'over-constitutionalisation' of EU law: Dieter Grimm 'The democratic costs of constitutionalisation: The European case' (2015) 21(4) European Law Journal 460.

[208] Pierre Pescatore 'Les Objectifs de la Communaute Europeenne Comme Principes d'Interprétation dans la Jurisprudence de la Cour de Justice' (Bruylant, 1972) at 325, 325-63.

[209] Koen Lenaerts, K., and José A. Gutiérrez-Fons 'To say what the law of the EU Is: Methods of interpretation and the European Court of Justice' (2014) 20(2) Columbia Journal of European Law 3, Section II.C.

[210] Art. 3(3) and 3(5) TEU, 21(2)(d) and (f) TEU; Art. 205 TFEU.

[211] Opinion 2/15, para 147.

[212] Fehling (n 108)

protection both internally and externally. Conversely, Article 192(1) TFEU, as the legal basis to adopt environmental policy using the ordinary legislative procedure should be interpreted broadly, in light of the environmental objectives set out in Article 191 TFEU. Similar remarks can be made with respect to energy policy.

This teleological approach is seen in *Case C-5/16* where the Court held that the decision establishing the market reserve mechanism for the ETS was correctly based on Article 192(1) TFEU. In support of this conclusion, it recalled that Article 191 TFEU seeks to give the Union a role in the fight against climate change, "in particular by establishing and executing international agreements to that end".[213] The Court pointed out that these international agreements will "necessarily affect the Member States' energy structures",[214] and so to avoid Article 192(2)(c) – an exception – becoming the rule, it must be interpreted narrowly. AG Mengozzi was more explicit in his teleological reasoning. Given that "efficient modern environment policy cannot ignore energy questions",[215] he expressed fear that a broad interpretation of Article 192(2)(c) "would effectively block any legislative initiative" by providing each Member State with a veto right – such that EU legislation would merely "invite" state action to reduce CO2 emissions.

3.5. The emerging principle of energy solidarity and its role in demarcating Union and Member State competences with regards to a Climate and Energy Union

The Court's Grand Chamber judgment in *Opal pipeline*[216] clarified the legal significance of the principle of energy solidarity in conjunction with the principle of sincere cooperation and cemented their central importance to the Union's energy policy, and therefore to the Energy Union. In *Opal pipeline*, the Court reasoned that the fundamental principle of solidarity gives rise to rights and obligations both for the Union and for the Member States and that it can, through its specific expression in Article 194 TFEU, act as a criterion of legality for Union acts adopted within the scope of the Union's Energy policy. At the very least, then, energy solidarity is a key principle defining the rights and obligations of the Union and the Member States in the area of energy, and, by extension, their respective competences regarding the same.

According to the Court's interpretation of the principles of energy solidarity and sincere cooperation in *OPAL pipeline*, both the Member States and the Union are required to take into account, whilst exercising their respective competences within the context of the implementation of the Union's energy policy, amongst others, the interests of other Member States and the European Union as a whole also as regards the four aims of the Union's energy policy as enshrined in article 194 TFEU. Namely, the functioning of the energy market, energy security in the Union, energy savings and efficiency and the development of new and renewable forms of energy, and the interconnection of energy networks. Should these interests conflict, the Union and Member States would be required to balance them and endeavour not to do them any harm. An expansive interpretation of the principle of energy solidarity read in conjunction with the principle of sincere cooperation could even entail that the Member States and institutions cannot, when acting within the scope of their respective

[213] Poland v Parliament and Council (n 105), para 43.

[214] Ibid, para 44.

[215] Case C-5/16 *Poland v Parliament and Council* [2017] ECLI:EU:C:2017:925, Opinion of A.G. Mengozzi, para 25.

[216] *Opal pipeline* (n 154)

competences regarding energy, adopt measures which may threaten the achievement of the aims of the Union's energy policy, in particular those mentioned in Article 194 TFEU, without carrying out the balancing exercise prescribed by energy solidarity. This may mean that Member States' unilateral, national measures in the field of energy taken within the scope of their retained competences may be found to be in breach of EU law, should they prevent the achievement of these aims and should they have been taken without regard to the balancing exercise prescribed by energy solidarity.

Notably, the judgment emphasized the importance of all four aims mentioned in Article 194 TFEU, holding that energy solidarity could not be equated with energy security. Instead, energy solidarity is the thread that brings these aims together and gives them coherence. This means that the aims most intimately connected to the Union's climate policy — of promoting energy efficiency and the development of renewables as well as promoting the interconnection of energy networks — are placed on an equal footing with energy security and the functioning of the internal market for energy. Furthermore, Advocate General Campos Sánchez-Bordona, who was followed by the Court on solidarity's role in connecting these aims, also noted with regards to the nature and scope of the principle that it could have repercussions for the development of the Union's energy policy "increasingly interconnected as it is with EU climate policy."[217] When read in light of Articles 7 and 11 TFEU, which require cohesion between all of the Union's policies and the integration of environmental protection in their definition and implementation, the judgment paves the way for the principle of (energy) solidarity to also play a crucial role within the development of the Climate Union. It could aid in the integration of the Union's Climate and Energy policies and thereby increasingly satisfy Articles 7 and 11 TFEU.

To assess the impact of *OPAL pipeline* and its recognition of the principle of (energy) solidarity as a source of obligations and criterion of legality, the next part first provides the necessary factual and legal background to the judgment. Second, it outlines the main elements of the judgments issued by the General Court and the Grand Chamber in light of the Advocate General's Opinion. Third, it draws out the possible implications of the Court's findings with regards to the realisation of an actual Climate and Energy Union, looking both at the potential of solidarity to broaden and restrict the EU's competences as well as to enhance the coherence of the Union's Energy and Climate policies.

3.5.1. Background

Prior to *OPAL pipeline*, it was widely thought that the "spirit of solidarity" included in Article 194 TFEU was a political notion, devoid of legal effect.[218] The phrase was introduced into Article 194 TFEU during the negotiations preceding the Treaty of Lisbon at Poland's behest.[219] However, Poland's successful challenge of the Commission decision at issue in *OPAL pipeline* showed their insistence gained them a "valid principle"[220] rather than an unenforceable policy direction aimed at the legislator. The *OPAL pipeline* case took place in a fraught geopolitical context. It concerned a pipeline which connects Nordstream I and the Czech Republic, running through Germany. The pipeline permits gas to travel from Russia through the Baltic Sea and into Germany and Western Europe, whilst bypassing Ukraine and Poland as transit routes.

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[217] Case C-848/19 *Federal Republic of Germany v Republic of Poland (Opal pipeline)* [2021] ECLI:EU:C:2021:598, Opinion of AG Campos Sánchez-Bordona, footnote 5.

[218] Kaisa Huhta and Leonie Reins, 'Solidarity in European Union law and its application in the energy sector' (2023) 72 International & Comparative Law Quarterly 771, p. 775.

[219] Ibid, p.776.

[220] *Federal Republic of Germany v Republic of Poland*, Opinion of AG Campos Sánchez-Bordona (n 214), footnote 5.

WIGA Transport Beteiligungs-GmbH & Co ("WIGA") and E.ON Ruhrgas AG owned 80 and 20% of the pipeline, respectively. WIGA, in turn, was jointly controlled by OAO Gazprom and BASF SE. OAO Gazprom operates gas pipeline systems and supplies gas. PJSC Gazprom produces and explores gas, operates gas pipeline systems, and transports gas and is majority owned by the Russian state. The Commission sent a statement of objections to Gazprom concerning its business practices in Central and Eastern Europe in 2018 for alleged abuse of its dominant position through unfair pricing and the hindering of cross-border gas sales through, for instance, export ban clauses.[221] Ultimately, it accepted Gazprom's commitments and did not impose a fine. The Polish state-controlled oil and gas company, which merged with PKN Orlen, challenged the Commission's decision accepting the commitments before the CJEU in Case T-616/18 on grounds including a breach of the principle of energy solidarity. The General Court handed down its judgment in February 2022, and the appeal before the Court of Justice is pending at time of writing. The General Court dismissed the action, on grounds including that the applicant failed to demonstrate that the commitments were contrary to energy policy and energy solidarity.[222]

The relevant legislative background to *OPAL pipeline* was provided by Directive 2003/55,[223] which was then replaced by Directive 2009/73.[224] These directives concern common rules for the internal market in natural gas and were adopted on the basis of Articles 47(2), 55, and 95 of the Treaty Establishing the European Community.[225] These provisions are based on the Union's internal market competences and justify the directives' aim to complete the internal market in gas to achieve e.g. "efficiency gains, price reductions, higher standards of service and increased competitiveness."[226] The directives include measures aiming at "unbundling," that is, to separate energy supply and generation from the operation of transmission networks.[227] They also contain provisions that mandate third-party access to transmission and distribution systems such as pipelines and the regulation of transmission and distribution tariffs.

The OPAL pipeline project was exempt from these third-party access obligations pursuant to Article 22 of Directive 2003/55, and subsequently Article 36 of Directive 2009/73. This Article permits the relevant national authority to provide such an exemption for a limited period of time in order to permit the development of major new infrastructure under certain conditions. National authorities must transmit requests for exemptions to the Commission and notify it of their decisions in this regard. The Commission may review, amend, approve, or withdraw the exemption decision.

Regarding OPAL pipeline, the relevant national authority in Germany duly transmitted the first request for an exemption to the Commission, which reviewed and amended the proposed exemption in its initial decision of 2009. This amended exemption decision imposed conditions on the use of 50% of the pipeline's capacity in the form of gas and capacity release programmes. The German authority granted this amended exemption for a period of 22 years. The additional conditions were never

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221 *Upstream Gas Supplies in Central and Eastern Europe* (Case AT39816) Commission Decision C(2018) 3106 [2018].

222 Case T-616/18 Polskie Górnictwo Naftowe i Gazownictwo SA v European Commission [2022] ECLI:EU:T:2022:43.

223 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 [2003] *OJ L176*.

224 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 L 211/94*. This directive was subsequently replaced by Directive 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, amending Directive (EU) 2023/1791 and repealing Directive 2009/73/EC [2024*] OJ L, 2024/1788*.

225 Treaty establishing the European Community (Consolidated version 2002) [2002] *OJ C 325*.

226 Directive 2003/55/EC (n 220) recital 2.

227 Ibid, recital 10; Directive 2009/73/EC (n 220) recitals 7-9.

fulfilled, and so half of OPAL's transmission capacity remained unused. The German authority was then approached to amend the exemption decision, in order to permit use of this remaining capacity on more advantageous terms. The authority transmitted this proposed amendment to the Commission in 2016, which decided to approve it with some amendment. The German authority finally granted this amended exemption in November of the same year, which could effectively double the use of OPAL's transmission capacity. This could reduce Poland's revenues from its own pipelines carrying Russian gas and possibly reduce its influence over Russian gas streams into Western Europe. It might also have increased German and Union dependence on Russian gas. Poland, supported by Latvia and Lithuania, challenged the Commission decision granting the 2016 amendment. Poland's action for annulment was based on six pleas in law, including the breach of Article 36(1)(b) of Directive 2009/73 and the principle of solidarity in Article 194 TFEU and the Commission's lack of competence. Only the first of these, based on Article 36(1)(b) and solidarity was examined by the Court. Since it was partially upheld, the Court felt it was unnecessary to examine the other pleas. This first plea was that the 2016 amendment was in breach of "Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity." Meanwhile, the Commission, supported by Germany, pleaded that the application ought to be dismissed.

3.5.2. The Judgments

a. **The case before the General Court**

Poland alleged, with support from Latvia and Lithuania, that the contested decision would put security of supply in the Union at risk, particularly in Central Europe. It would reduce the transport of gas through the Braterstwo and Yamal pipelines which could both undermine energy security in Poland and "the diversification of sources of supply of gas".[228]

The General Court dismissed the first part of Poland's first plea, by holding that Article 36 of Directive 2009/73 did not require the Commission to assess whether the amendment of the exemption enhanced security of supply. This was a criterion that was applicable, by virtue of Article 36, only to the initial investment in the OPAL pipeline. Given that the Commission had assessed this criterion in its initial decision, its conclusion could not differ in 2016. Overall, the contested decision was not in breach of article 36.[229] This underlines the fact that it was the principle of energy solidarity, as expressed in Article 194 TFEU, which proved to be the successful ground for this Action for Annulment and not rules derived from the Directive which was the basis of the Commission Decision at issue, a directive which was itself based on the internal market legal bases and not Article 194 TFEU. This shows that energy solidarity can be invoked as a criterion of legality so long as the issue is connected to the Union's Energy Policy even when the legal basis of the relevant secondary law is not Article 194 TFEU. It is important to note, however, that much of the Union's energy policy legislation was adopted on the basis of the internal market competences until Article 194 TFEU was added through the Lisbon Treaty as a specific legal basis for the Union's energy policy.

With regards to the second part of its first plea, Poland and Lithuania argued that the principle of solidarity is a Union priority in the field of energy, and that measures of the EU institutions which

[228] Case T-883/16 *Republic of Poland v European Commission* [2019] ECLI:EU:T:2019:567, para 51.
[229] Ibid, para 52–60.

compromise energy security in certain regions run counter to this principle.[230] In support of its claim that its energy security was at risk, Poland submitted that the 2016 decision would enable Gazprom to make greater use of Nordstream I, which it controls. This would influence conditions of supply and use of transmission services provided by competing pipelines, such as Braterstwo and Yamal, which could ultimately lead to the interruption of transmission through these alternatives. This, in turn, could render the maintenance of supply in Poland impossible, with consequences for companies' capacity to meet their obligations regarding guaranteed supply to protected clients, the effective functioning of the gas system and storage facilities, and the cost of obtaining gas. Furthermore, given the imminent expiry of contracts regarding the Yamal pipeline, Poland feared for importation capacity from Germany and the Czech Republic, increased transport tariffs from these countries, and the diversification of sources of gas supply in Poland and Central and Eastern European Member States.[231]

The Commission argued, first, that energy solidarity is a political notion addressed to the legislature rather than a legal criterion. The relevant legal criteria are derived from Article 36(1) of the Directive, and examination of those criteria satisfies the Commission's obligations of review. Second, energy solidarity only concerns crisis situations, rather than the normal functioning of the energy market. Third, the enhancement of security of supply, which it examined in the context of its Article 36 review, can be seen as an examination of energy solidarity. Fourth, given that Nordstream I is recognised as being in the common interest, and the amended exemption enabled its increased use, the decision is in the common and European interest. Lastly, the Commission contends the variation would not detrimentally affect security of supply in Poland or Central and Eastern Europe.

The General Court upheld the second part of Poland's first plea, in so far as it was based on the infringement of the principle of solidarity as expressed in article 194 TFEU. It roundly dismissed the Commission's arguments. Energy solidarity is an important legal principle, which is not limited to crisis situations. The Commission's examination of the criteria in Article 36 would not exhaust its obligations flowing from the principle of energy solidarity. The principle of energy solidarity is not satisfied as soon as a project is in the common Union interest — rather, the principle requires a balancing of the individual Member State interests and the Union interests in the event of a conflict. Finally, the Commission had not, in fact, performed the necessary examination in the decision at issue.

Notably, the Court held that the 'spirit of solidarity' in Article 194 TFEU is "the specific expression in this field of the general principle of solidarity between the Member States." Solidarity is "at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU".[232] In terms of content, it "entails rights and obligations both for the European Union and for the Member States".[233] Whilst these obligations include mutual assistance in critical or emergency situations to maintain gas supply, they are not limited to such situations, nor are they incumbent merely upon the legislature.[234] Within the context of the Union's energy policy this means: "the European Union and the Member States [must] endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability, the diversification of supply or of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity."[235] This

[230] Ibid, para 61.
[231] Ibid, para 63–4.
[232] Ibid, para 69.
[233] Ibid, para 70.
[234] Ibid, para 71.
[235] Ibid, para 73.

passage is cited with approval by the Court of Justice and recalled verbatim in Commission exemption decisions post-*OPAL pipeline*. However, the Court does qualify this obligation. It does not mean that the Union's energy policy "must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy."[236] Rather, the obligation is to take them into account and balance them in the event of a conflict.[237]

b. The case before the Court of Justice

Germany appealed the General Court's ruling on five grounds, and, whilst the Commission did not submit a response of its own, it asked the Court to uphold Germany's first ground of appeal during the oral procedure. The first ground of appeal was that the General Court had erred in law when holding that energy solidarity has binding effects and that it entails rights and obligations for the Union and the Member States. Rather, it is a merely political notion and not a legal criterion. As such, it must be given more specific content in secondary legislation to have legal effect. The second ground was that solidarity did not apply to the situation at issue because it was relevant only to emergencies. The third ground was that, even if the Commission ought to have taken solidarity into account, the Commission had taken it into account but was not required to give a detailed account of its examination. The fourth ground of appeal was that the Commission's decision was correct in terms of content, and that, since there was no risk to Polish security of supply, there was no duty for the Commission to state in detail the reasons for its decision in this respect, nor for it to mention the principle of energy solidarity explicitly. The final ground of appeal was that, if there was a defect with the Commission's decision, it was the purely formal defect of not having explicitly mentioned the principle of energy solidarity, which does not automatically vitiate the decision. In addition, Germany argued that Poland should have challenged the initial decision on the grounds of energy solidarity, and that, since it had not done so, the current action was out of time and should not succeed. The Court dismissed all of these grounds and upheld the General Court's judgment.

Notably, the Court echoed the General Court's pronouncements on energy solidarity as a specific expression of one of the "fundamental" principles of EU law, solidarity.[238] It "underpins the entire legal system of the European Union" and is closely linked to the principle of sincere cooperation.[239] The Court cites the *Relocation Decisions* cases and their mention by the Advocate General as evidence that "there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union."[240] Energy solidarity is therefore a criterion by which the legality of acts of the Member States and the Institutions in the area of the Union's energy policy can be assessed. In its wholesale dismissal of the last two grounds of appeal, the Court makes it clear that the annulment was not due to a failure to state reasons, an insufficiency in the statement of reasons, or omission of an explicit mention of energy solidarity, but rather due to a breach of the principle of energy solidarity. The Court summarised this breach as a failure to "adequately examine[d] the impact of the extension of the exemption in relation to the OPAL pipeline on the Polish gas market and on the markets of the Member States other than the Republic of Poland, which could be geographically affected."[241] The latter

[236] Ibid, para 77.

[237] Ibid.

[238] *OPAL pipeline* (n 154), para 38.

[239] Ibid, para 41.

[240] Ibid, para 43.

[241] Ibid, para 97.

dismissals emphasize that complying with the obligations of energy solidarity is separate from the "duty to give reasons" and that the required balancing goes beyond the mention of the principle and relevant interests. The latter is further emphasized by the Grand Chamber's dismissal of the Commission's argument that "it had not received information concerning the risk to security of supply in the Polish market for gas" which would justify its failure to take the principle of energy solidarity into account in the decision.[242] In effect then, the principle of energy solidarity required the Commission to request the information it needed to carry out the assessment.

3.5.3. Implications of the Court's findings for the realisation of an actual Climate and Energy Union

a. **Giving rise to obligations for the Union and Member States**

A first implication of *Opal pipeline* is that it seems to recognise that energy solidarity gives rise to both positive and negative obligations which are justiciable before the Court of Justice. In the case, these obligations were enforced through the judicial review of a Commission decision pursuant to an Article 263 TFEU Action for Annulment. The Court ultimately held that energy solidarity is a criterion of legality for Union acts in the context of Union energy policy. However, the Court also explicitly recognised energy solidarity gives rise to obligations incumbent upon the Member States. This suggests the Commission could pursue infringement proceedings for Member States' failure to fulfil their energy solidarity obligations pursuant to Article 258 TFEU; such infringement proceedings could also be prompted by Member States pursuant to Article 259 TFEU.

In the judgment, the Court expanded on the legal significance of the inclusion of solidarity within Article 194 TFEU, clarifying its use in judicial review. Per the Article, the fourfold aims of the Union's energy policy shall be governed by the "spirit of solidarity between Member States." The Court held that this refers to the principle of energy solidarity, a specific expression of the fundamental principle of solidarity in the field of energy.[243] Far from being an unenforceable political notion, energy solidarity produces "binding legal effects on the Member States and institutions of the European Union".[244] The principle of solidarity "entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it."[245]

Energy solidarity "forms the basis of all the objectives of the European Union's energy policy, serving as the thread that brings them together and gives them coherence." Crucially for the principles' potential to integrate the Climate and Energy Unions, one of these four objectives is to "promote energy efficiency and energy saving and the development of new and renewable forms of energy" according to 194(1)(c) TFEU. The case focused on the aim outlined in 194(1)(b) TFEU, to "ensure security of energy supply in the Union," and so specified the "general obligation" entailed by energy solidarity as an obligation:

[242] Ibid, para 50.
[243] Ibid, para 38.
[244] ibid, para 43.
[245] ibid, para 49.

"for the European Union and the Member States, in the exercise of their respective competences in respect of EU energy policy, to take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity."[246]

The Court further clarified that this obligation does not mean actors may never harm the relevant interests of the relevant stakeholders, but rather that they must "take into account, [...], the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict."[247] This obligation can be read in rather procedural terms, in that the Court may limit itself to verifying that the relevant actor says it took relevant interests into account and attempted to balance them, rather than substantively reviewing whether the interests and stakeholders mentioned are the correct ones and whether the decision reflects that these were balanced.

In the case, the Commission had not fulfilled its energy solidarity obligation because it did not, in its review of the proposed variation, examine what its "medium-term consequences, inter alia for the energy policy of the Republic of Poland, might be" nor balance them "against the increased security of supply at EU level".[248] This led the Court to annul the Commission's decision. Since the Court held the Commission had not carried out the required assessment, there is no clear indication of the extent to which and the standards by which the Court would have reviewed an assessment had it been carried out. The fact that the Court's dismissal of Germany's arguments in its appeal — that the Commission had complied with the obligations of energy solidarity in its assessment, but had merely omitted mention of the word — stemmed from its finding that this called in question the General Court's factual assessment rather than raising a point of law, allows this ambiguity to persist. AG Sánchez-Bordona did indicate in his Opinion that he felt the scope of the Court's review should be limited because the decisions involved concern "complex technical matters".[249] In his view, the judicial review should primarily concern whether the necessary assessment was carried out at all and whether it took the relevant interests into account or whether it "manifestly overlook[s]" one or more of these interests.[250] His wording is interesting in its use of "manifest" since it appears to reference the "manifest error of assessment" test the Court applies in instances that concern complex technical or economic analyses. However, the standard he sets may be for an even more limited review, given that he explicitly refers only to reviewing whether the relevant interests were taken into account.

He further recognises that the "assessment of interests" required by energy solidarity "will necessarily be defined over time" depending on the development of the Union's energy policy and on the scrutiny of the Court.[251] This recognition that energy solidarity will be defined further with time should be read in light of sustainability's inclusion in the four aims of the Union's energy policy in 194 TFEU, and "climate action and decarbonising the economy" being one of the five pillars of the Energy Union.[252] The dynamism of energy solidarity, and the Court's explicit recognition that it concerns all four aims mentioned in 194 TFEU and is not limited to energy security together with the evolution of the Energy

[246] ibid, para 71.

[247] ibid, para 73.

[248] ibid, para 90.

[249] *Federal Republic of Germany v Republic of Poland*, Opinion of AG Campos Sánchez-Bordona (n 214), para 114–5.

[250] ibid, para 116.

[251] ibid, para 117.

[252] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions State of the Energy Union Report 2023 [2023] COM/2023/650 final, footnote 4.

Union to increasingly emphasise the climate indicate the direction in which energy solidarity will evolve. They strengthen the possibility that energy solidarity will, in future, require ever more explicit and detailed reference to the climate consequences of action within the scope of the Union's Energy policy.

Nevertheless, energy solidarity may require the relevant actor to actively seek out the necessary information, as it had required the Commission to investigate potential effects for the Republic of Poland, despite the latter's silence on the issue. Furthermore, it might also require other actors to share information and cooperate with the carrying out of this assessment, as AG Pikamäe suggested in his Opinion regarding Case C-121/21 *Czech Republic v Poland*, a case on Polish lignite mining close to the Czech border which was settled before the Court could pronounce its judgment.[253]

Beyond the uncertainty regarding the standards of review the Court will apply in future cases on energy solidarity, the nature of the obligations energy solidarity embraces appear to be both positive and negative. On the positive side, there are the obligations to determine the relevant interests and balance them in the event of a conflict and as part of that to request the information necessary to carry out this assessment, as well as the obligation to help in energy emergencies. On the negative side, there is the obligation to not harm relevant interests even though this is far from an absolute prohibition, as long as a sufficient balancing has been carried out.

As to whether these obligations are procedural or substantive, it must be noted that the duty to give reasons already straddles the boundary between procedural and substantive obligations. However, in *Germany* v *Poland*, the Court confirmed that judicial review based on energy solidarity was not an expression of the duty to give reasons, but rather derived from an obligation to actually balance the relevant stakeholders' relevant interests (and endeavour not to harm them). It made this explicit when dismissing Germany's argument that energy solidarity was about a duty to give reasons, or some formalistic assessment of whether solidarity was mentioned. Instead it was about whether the substance of the decision reflected the balancing exercise, which the Court determined it did not. This leans closer to a criterion of legality regarding the substance of the decision. Energy solidarity's capacity to give rise to obligations that are substantive is further bolstered by the General Court's statement that energy solidarity also includes the obligation to assist Member States in the event of an energy crisis.[254]

The Grand Chamber explicitly upheld the General Court's statements from paras 71-3 on the scope of the principle of energy solidarity.[255] Whilst some might argue energy solidarity can be reduced to a "tick box exercise" where the word energy solidarity is mentioned and the interests are enumerated and the decision maker claims they were balanced, the Court maintains that the purpose of the duty to balance is to avoid the adoption of measures that might affect relevant stakeholder's interests.[256] Germany then pled, in its appeal, that this was an error in law because it would constitute a duty of "unconditional loyalty," but the Grand Chamber refuted this, citing the General Court to the effect that energy solidarity does not mean energy solidarity requires Member State and Union actions never, under any circumstances, have negative impacts for the particular interests of Member States, but rather that they must endeavour to avoid them through the balancing exercise.

The statement regarding obligations of mutual assistance in an emergency was not repeated in the Grand Chamber judgment, perhaps because all parties agreed on this point, or because the case did

[253] Case C-121/21 *Czech Republic v Poland* [2021] ECLI:EU:C:2021:420, Opinion of AG Pikamäe.

[254] Republic of Poland v European Commission (n 225), para 71.

[255] *Opal pipeline* (n 154), para 71.

[256] Republic of Poland v European Commission (n 225), para 71.

not take place in an emergency context. However, the General Court did address the Commission's argument that it could not be blamed for omitting the "solidarity assessment" because Poland had not provided it with the necessary information of its own accord and swiftly dismissed it.

b. Implications for the competences of the Union and the Member States in energy and climate policy

Whilst the Court did not examine competences explicitly in *OPAL pipeline*, since it only examined Poland's first ground for annulment, it did not dismiss an impact on the delineation and exercise of Union or Member State competences. Indeed, the Court held that energy solidarity applied "in the exercise of their respective competences in respect of EU energy policy." In other words, whenever the Union or Member States are acting "in respect of EU energy policy," they must comply with the principle of energy solidarity. The case itself is an apt illustration of the fact that even measures which are not based on Article 194 TFEU must be assessed in light of energy solidarity. The directives which formed the legal basis for the Commission decision were both based on the Union's internal market competences. Nevertheless, given the decision's potential impact on Member State interests protected by energy solidarity, the Commission ought to have completed the assessment mandated by Article 194's energy solidarity. Admittedly, the case took place in a specific legal context showing a particularly strong connection between the subject matter and Article 194 TFEU. Whilst Article 194 TFEU did not exist when the initial directive was adopted, the current successor directive enabling Commission review of exemption decisions is based on Article 194 TFEU. However, the General Court did hold that the Commission's assessment of the variation to the exemption was not in breach of the directive, but only of energy solidarity. In addition, the General Court appears to accept in Case T-616/18, that energy solidarity is relevant when assessing Commission competition law decisions in the area of energy, although it found the applicant had failed to show the principle had been breached in that case.[257] *OPAL pipeline* in any event illustrates that energy solidarity, and its application by the Court, operates in fraught geopolitical contexts.

With regards to the achievement of an actual Climate and Energy Union, then, it is important for Union measures, whatever their legal basis — environmental, internal market, or energy — to duly carry out the assessment and balancing outlined previously when they fall within the context of the Union's energy policy. Given that individual national interests, such as energy security in one Member State, are not automatically outweighed by a gain in energy security in the Union overall, this assessment and balancing may be increasingly difficult to carry out where climate change policies are concerned, in that there may be tensions between the four aims of the Union's energy policy which solidarity brings together, as well as between the common EU interest and diverse national interests.

In this respect, then, energy solidarity might reduce the scope for common Union action, if it threatens to negatively affect individual Member States' relevant interests. However, this is mitigated by the fact that the Court held that energy solidarity does not mean Union policy may never negatively affect Member State interests, but rather that this must be balanced against other relevant interests in the event of a conflict. With regards specifically to environmental measures, it is important to note that even energy security is increasingly understood as embracing objectives that are compatible with environmental protection, such as the diversification of sources of supply through the development of renewables or the improved interconnection of Member State energy networks. In addition, the Court noted in *OPAL pipeline* that energy solidarity cannot be equated with energy security, but rather that it

[257] Polskie Górnictwo Naftowe i Gazownictwo SA v European Commission (n 219), para 420-427.

embraces all four aims mentioned in Article 194 TFEU, which include the development of renewables. Lastly, Article 194 TFEU itself mentions the need to ensure a high level of environmental protection.

Moreover, whilst energy solidarity could be interpreted as a limit to the Union's exercise of its energy and climate competences since it can be a ground for judicial review, it could also be an argument in favour of an expansive interpretation of its competences in these areas. The Court itself cited its case law on mandatory refugee relocation to support the argument that solidarity can be legally binding and give rise to legal rights and obligations. The first of these was the precursor to the *Relocation Decisions* case, discussed in Section 3.4.2.b.ii. Here, several Member States challenged the legal basis of the Council decision setting up the relocation scheme. There, the Court used the principle of solidarity as expressed in Article 80 TFEU to support the Council's use of Article 78(3) TFEU as a legal basis.[258] More generally, since energy solidarity embraces the four aims of energy policy, it lends itself well to use in the teleological interpretation, both of legal bases, which can expand their scope, and of secondary law adopted in the context of energy policy, which can also expand the scope of this legislation in order to ensure the effective pursuit of these aims in accordance with the principle of effectiveness. Furthermore, energy solidarity is an expression of the fundamental principle of solidarity, which underpins the entirety of Union law, and is intended to give coherence to the Union's energy policy and its scope extends to the entirety of energy policy, with vague outer limits since actions in the context of its implementation are also included. As such, energy solidarity would require that derogations from it are interpreted strictly. The prohibition from 194(2) TFEU could be interpreted as a derogation from the principle of energy solidarity, which could be a further argument in favour of interpreting it restrictively.[259]

Indeed, it can be argued that the obligations of energy solidarity in combination with those of sincere cooperation extend to Member States' exercise of their retained competences, so long as their actions somehow impact achievement of the aims of the Union's energy policy. Even when the Member States are exercising retained competences, they must comply with the principle of energy solidarity. "In respect of EU energy policy" is likely synonymous to "in the context of the implementation of [EU energy policy]," phrasing the Court uses when clarifying the nature of the obligations entailed by energy solidarity.[260] This could mean energy solidarity's scope of application goes beyond measures Member States take to directly implement Union energy policy, and extend to measures Member States take which somehow impact Union energy policy, or are in some other way brought into the "context of implementation of EU energy policy." Indirectly, then, energy solidarity might extend the scope of the Union's energy policy and broaden its impact such as to affect areas hitherto within Member States' retained competences. This might mean, for example, that Member State fossil fuel subsidies which are not adopted to implement Union energy policy still fall within the scope of application of the principle of energy solidarity, because they impact the implementation of Union energy policy, which aims to promote decarbonisation. This might mean a Member State's failure to comply with their energy solidarity obligations as outlined above when adopting such measures could be held to have failed to fulfil their obligations during infringement proceedings.

[258] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631.

[259] This mainly reinforces the more general argument already advanced in section 3.4.1.a.

[260] *Opal pipeline* (n 154), para 73.

c. Solidarity's potential in enhancing the coherence of the Union's energy and climate policies

Prior to the introduction of Article 194 TFEU, Union energy policy was largely pursued through the Union's internal market competences. This did not exclude climate and environmental considerations, given that, so long as a measure meets a certain threshold of concern for achieving internal market aims, other aims of public interest, such as the protection of the environment, may still be decisive in shaping the measure. However, the new legal basis for the Union's energy policy, Article 194 TFEU, explicitly mentions the protection of the environment as a relevant concern. In addition, among the four aims this policy is meant to pursue, which are given coherence by energy solidarity, one finds the development of renewable sources of energy. Therefore, the Treaty framework for the Union's energy policy provides ample opportunity for the Union to achieve its long-standing political priority of achieving an "integrated climate and energy policy."[261] This lack of coherence is particularly problematic in light of Articles 7 and 11 TFEU, given that they require not only coherence in general between the Union's policies, but in particular, the integration of a high level of environmental protection in the implementation and definition of all of the Union's acts and policies.

The judgment emphasised all four aims mentioned in Article 194 TFEU — including the second, which is intimately connected to the Union's ambitions regarding climate change and environmental protection. The Court held that energy solidarity is the thread that brings these aims together and gives them coherence. The Advocate General, who was followed by the Court on solidarity's role in connecting these aims, also noted with regards to the nature and scope of the principle that it could have repercussions for the development of the Union's energy policy "increasingly interconnected as it is with EU climate policy."[262] When read in light of Articles 7 and 11 TFEU, which require cohesion between all of the Union's policies and the integration of environmental protection in their implementation, the judgment paves the way for the principle of (energy) solidarity to also play a crucial role within the development of the Climate Union. Indeed, it could aid in the integration of the Union's Climate and Energy policies and thereby increasingly satisfy Articles 7 and 11 TFEU.

It can be argued that the Commission's REPowerEU Plan, which aims to accelerate the Union's transition to renewable energy sources in response to Russian aggression, is an early illustration of energy solidarity's potential to further integrate the Union's climate and energy policies. The legislative instruments adopted as part of this plan purport to implement energy solidarity, by referring to it in their preamble or explanatory memorandum, even when they are not based on Article 194 TFEU.[263] Even the Court's judgment in *OPAL pipeline* is referenced: "The principle of energy solidarity is a general principle under Union law as stated by the European Court of Justice in its judgment of 15 July 2021, in Case C-848/19 P, Germany v Poland and it applies to all Member States. In implementing the principle of energy solidarity, this Regulation allows for cross-border distribution of the effects of faster deployment of renewable energy projects."[264] These references suggest the inference that energy solidarity permits the legislator to integrate climate policy, for instance through the promotion of renewables, into energy policy to a greater degree, and also to pursue more effective climate and energy policy by distributing the effects of its measures across Member States.

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[261] European Council, Presidency Conclusions of the Brussels European Council of 8-9 March 2007 [2007] 7224/1/07 REV 1, para 27–39.

[262] *Federal Republic of Germany v Republic of Poland*, Opinion of AG Campos Sánchez-Bordona (n 214), footnote 5.

[263] Carl Bergström, 'EU rulemaking in response to crisis: the emergence of the principle of energy solidarity and its use' (2023l) Nordic Journal of European Law 100, 109.

[264] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36, recital 22.

Solidarity's potential role in integrating the Union's energy and climate policies is further reinforced by reference to solidarity in EU environmental law. Just as energy solidarity is the specific expression of the fundamental principle of solidarity in the area of energy, such references could give rise to a specific expression of the fundamental principle of solidarity regarding the climate and the environment. Article 2 of the European Climate Law[265] makes such a reference when it stipulates that the "relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective [...] taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective."[266] This phrasing is strikingly reminiscent of Article 80 TFEU, which stipulates that the "principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States" governs Union policy on asylum, border checks and immigration and its implementation. This specific expression of solidarity was at issue in both *Slovak Republic and others* concerning the initial legal basis challenge of mandatory relocation[267] and in the subsequent infringement proceedings against Poland, the Relocation Decisions case.[268] In *Opal pipeline*, the Court cites these cases to the effect that the principle of solidarity is capable of legal effects, and, in particular that the specific expression of solidarity in Article 194 TFEU is a source of obligations for the Union and Member States and a criterion of legality for acts within the context of energy policy. It is conceivable that, perhaps with support from the principle of sincere cooperation, references in EU environmental law give rise to a cognate of energy solidarity in the context of environmental and climate policy, and that this could serve similar functions. Overall, the fundamental principle of solidarity and its specific expression could be brought to bear to increase the cohesion and effectiveness of the Union's climate and energy policies, creating the "policy synergies" the Commission envisaged in its initial communication concerning the Green Deal.

3.6. The current use of competences for environmental and energy related acts

The rather broad scope of current EU competences on energy and climate, both under the specific legal bases of Articles 192 and 194 TFEU as under other more general or specialized legal bases, is further demonstrated by the extensive legislative activity of the EU in these fields over the past years. It is particularly visible in the legislative flurry triggered by the Fit for 55 agenda. To complement the legal analysis above, this section therefore gives a brief empirical overview of legislative activity, focusing on the legal bases used to support the Fit for 55 agenda so far.

Since 2009, 210 legal acts have been adopted on the basis of Article 192 TFEU alone, 192 of these acts are still in force today. These cover a broad array of issues, from nature restoration to shipment of waste, and from creating a carbon border adjustment mechanism (CBAM), to regulating mercury. Though the use of Article 192 TFEU seems to be relatively constant, a gradual trend of increased use seems visible. In 2024, it has so far formed the legal basis (at least in part) for 16 legal acts, whereas in 2023 it was used

[265] Regulation (EU) 2021/1119 (European Climate Law) (n 1), art 2.
[266] Emphasis added.
[267] Slovak Republic and Hungary v Council of the European Union (n 255) para 252-3
[268] Relocation Decisions (n 178).

for 25 legal acts and in 2022 for 12. In 2021 Article 192 TFEU was used, at least in part, to support 18 legal acts, in 2020 9 acts, and in 2019 18 acts.[269]

The broad use of Article 192(1) TFEU shows that it can be used for many different areas, including those that have a clear overlap with other legal bases, including Article 194(2) TFEU. For example, Regulation 2024/1787 concerns the reduction of methane emissions in the energy sector.[270] This subject touches closely on the issue of energy, yet the sole legal basis used is Article 192(1) TFEU, in light of the environmental objective of the measure. Article 192(1) TFEU was also used as the sole legal basis for Regulation 2021/1119, the European Climate Law, demonstrating that even such a far reaching piece of legislation that touches on many other areas of competence and will have significant financial consequences can be adopted based on this provision alone. Other times, however, Article 192(1) TFEU is combined with other legal bases. Regulation 2023/955 creating a Social Climate Fund, for example, combines Article 91(1), point (d), Article 192(1) and Article 194(2), as well as Article 322(1), point (a) as joint legal bases.[271]

Article 194 TFEU has been used less frequently than Article 192 TFEU post-Lisbon. In this period, 64 legal acts were adopted based on Article 194(2) TFEU, 54 of which are still in force today. Of the acts adopted wholly or partially based on Article 194(2) TFEU, 11 were adopted in 2024, 7 in 2023, 5 in 2022, 2 in 2021 and 6 in 2020, showing an overall increase in recent years, in part connected to the Green Deal. Many of these measures are closely related to the core of the energy domain, for example dealing with the internal market for (renewable) gas or electricity. Even where these measures sometimes have a strong connection to energy (such as renewable gas) or the internal market, the EU legislator is comfortable with relying on the sole legal basis of Article 194(2) TFEU, without including either Article 114 or 192(1) TFEU.[272]

The legislation that has so far been adopted or proposed to meet the Green Deal and Fit for 55 objectives also shows the breadth of Articles 192 and 194 TFEU, and their capacity to seemingly support most of the necessary legislation envisioned. Of the 19 legal acts adopted so far, 11 rely solely on Article 192(1) TFEU, again for rather divergent issues and even though they also relate to other areas including transport, trade and the internal market:

[269] The figures for the other years are: 2018: 14 acts, 2017, 12 acts, 2016, 10 acts, 2015, 12 acts, 2014, 11 acts, 2013, 16 acts, 2012, 10 acts, 2011, 9 acts, and 2010 5 acts.

[270] Regulation 2024/1787 of the European Parliament and of the Council of 13 June 2024 on the reduction of methane emissions in the energy sector [2024] *OJ L, 2024/1787*.

[271] Regulation 2023/955 of the European Parliament and of the Council of 10 May 2023, establishing a Social Climate Fund [2023], p. 1.

[272] See for example Regulation 2024/1789 of the European Parliament and of the Council of 13 June 2024 on the internal markets for renewable gas, natural gas and hydrogen [2024] *OJ L, 2024/1789* and Decision (EU) 2017/684 [2024] *OJ L, 2024/1789*, or Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings [2024] *OJ L, 2024/1275*.

Table 1 : Fit for 55 legislation adopted based on Article 192(1) TFEU alone.

Legal acts adopted	Legal basis
Directive 2023/959 establishing a system for greenhouse gas emission allowance trading within the Union	192(1)TFEU
Directive 2023/958 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure	192(1)TFEU
Decision (EU) 2023/136 amending Directive 2003/87/EC as regards the notification of offsetting in respect of a global market-based measure for aircraft operators based in the Union	192(1)TFEU
Regulation (EU) 2023/957 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types	192(1)TFEU
Regulation (EU) 2023/857 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999	192(1)TFEU
Regulation (EU) 2023/839 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review	192(1)TFEU
Regulation (EU) 2023/851 amending Regulation (EU) 2019/631 as regards strengthening the CO2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition	192(1)TFEU
Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism	192(1)TFEU
Regulation (EU) 2024/1610 of the European Parliament and of the Council of 14 May 2024 amending Regulation (EU) 2019/1242 as regards strengthening the CO2 emission performance standards for new heavy-duty vehicles and integrating reporting obligations, amending Regulation (EU) 2018/858 and repealing Regulation (EU) 2018/956 (Text with EEA relevance)	192(1)TFEU
Regulation (EU) 2023/839 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review (Text with EEA relevance)	192(1)TFEU
Decision (EU) 2023/852 of the European Parliament and of the Council of 19 April 2023 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability reserve for the Union greenhouse gas emission trading system until 2030	192(1)TFEU

Of the 19 legal acts adopted so far, moreover, three acts are based solely on Article 194 TFEU:

Table 2 : Fit for 55 legislation adopted based on Article 194(2) TFEU alone.

Legal acts adopted	**Legal basis**
Directive (EU) 2023/1791 of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955	194(2)
Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings	194(2)
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	194(2)

As to joint legal bases, as far as the 19 legal acts adopted so far to realise the Fit for 55 objectives are concerned, two rely on multiple legal bases. These combine Articles 192 and 194 TFEU, but also add other legal bases. Three others depend on neither Article 192 or 194 TFEU, but other legal bases, being Articles 91 and 100(2) TFEU. One proposal is still pending, which relies on the combined legal bases of Article 192(2) with Article 113 TFEU on tax related measures.

Table 3 : Fit for 55 legislation adopted and proposals based on multiple or different legal bases

Legal acts adopted on joint legal bases	**Legal bases**
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	91(1)(d), 192(1), 194(2), and 322(1)(a) TFEU
Directive 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652	114, 192(1) and 194(2) TFEU
Legal acts adopted on other legal bases	**Legal bases**
Regulation 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU	91 TFEU
Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 ensuring a level playing field for sustainable air transport (ReFuelEU Aviation)	100(2) TFEU
Regulation 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC	100(2) TFEU
Pending proposals using multiple legal bases	**Legal bases**
Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity	113 192(2), first subparagraph, TFEU

As the overview above further demonstrates, Articles 192 and 194 TFEU appear to offer quite some legal space to the EU to achieve its climate ambitions. Where necessary, moreover, these provisions can be combined with other legal bases to create more legal space. At the same time, as also analysed above, there are limits to these legal bases, and creating a real Climate and Energy Union will require legislation that goes much further than the legal acts so far, and that will have an even greater impact on the laws, budgets and political systems of the Member States. For this reason, the next chapter further analyses some of the key gaps in the competences of the EU, as well as the ways in which these gaps might be addressed, either with or without (formal) Treaty change, and taking into account some of the lessons of the previous crises facing the EU.

4. GAPS, LIMITS AND THE NEED AND FEASIBILITY OF TREATY CHANGE

4.1. Expansive competences on climate and energy

As the overview above demonstrates, the EU possesses expansive, broadly formulated competences on the environment and energy under Articles 192 and 194 TFEU. These competences, separately and jointly, allow the EU to adopt legal acts on a very broad range of issues related to energy and climate. The flexibility and relatively open-ended nature of these legal bases, moreover, enables these competences to evolve over time as new challenges arise. This is in part due to the direct connection of these legal bases to the underlying, broadly formulated EU objectives concerning energy and the environment, including climate.

Article 192 TFEU may be used to take whatever action is required to achieve the objectives in Article 191 TFEU, which include preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. These objectives are very broad, and cover most aspects that will be relevant for a Climate and Energy Union. What is more, both the EU Treaties and the international agreements the EU is party to or bound by provide even more general climate objectives and obligations that can or even must be read into the objectives of Article 192 TFEU.[273] For example, Articles 191 and 192 TFEU have to be interpreted in line with the EU's commitment in Article 3 TEU to, inter alia, the sustainable development of the Earth. They also must be interpreted in line with the EU's obligation under the Paris Agreement and other international obligations to combat climate change and protect the environment.

Article 194 TFEU equally connects the EU's competences to an extensive list of objectives, namely to ensure the functioning of the energy market, the security of energy supply in the Union, 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. What is more, Article 194(1) explicitly links these objectives to the obligation to do so 'with regard to the need to preserve and improve the environment', connecting Article 194 TFEU to the even more expansive obligations on environment set out above.

The explicit connection to such expansive and open ended objectives in Articles 192 and 194 TFEU, and their connection to even broader and more fundamental EU objectives, values and international obligations, is particularly relevant in light of the way in which the CJEU determines the outer limits of EU competences. As set out above in section three, the CJEU usually follows a teleological approach, asking which competences the EU must have received to effectively realize the objectives set by the Member States. With broadly worded, ambitious and rather open-ended objectives such as the ones formulated in Articles 192 and 194 TFEU, this usually translates into expansive competences for the EU. Added to this is the fact that the CJEU will generally respect the assessment of the political institutions on the existence of a competence. Where the European Parliament and especially the Council agree, with the required majority, that the EU has the legal competence to adopt a certain act, the CJEU tends to respect this judgement.

[273] See the analysis in section 3.4 on the international obligations of the EU.

Consequently, Articles 192 and 194 TFEU, as interpreted by the CJEU, generally provide the EU with expansive and flexible competences to create an effective EU Climate and Energy Union. What is more, where these legal bases prove insufficient, other legal bases can be used to supplement or provide an alternative. As seen in the Fit for 55 package, other legal bases including Articles 113 and 114 TFEU can provide additional legal space, with Article 352 TFEU providing a final fall-back option, even though it does require unanimity and triggers more national scrutiny, particularly in Germany. Consequently, for most of the measures one needs to take to create an actual Energy and Climate Union, a competence can in principle be found in the current Treaties if the political will to do so can be found as well.

Moreover, the principles of subsidiarity and proportionality will usually not lead to any serious limits on the use of these EU competences for climate and energy purposes. When it comes to issues like climate change and energy security, it is usually quite obvious that action at the EU level (or even global level) is necessary to sufficiently guarantee the required outcome. The same applies to the principle of proportionality: the challenges created by climate change and the energy transition are of such an enormous scale that far-reaching, and often rapid action is called for.[274] Added to this is the fact that the CJEU gives tremendous leeway to the political institutions on these principles, virtually restricting itself to a procedural review that asks if these principles have been sufficiently taken into account. As a result, as long as the relevant legal acts explicitly consider subsidiarity and proportionality and justify to a sufficient extent why these principles have been satisfied, the creation of an effective Climate and Energy Union will not be limited by these principles.

At the same time, certain limits on the EU's legal space to create an Energy and Climate Union do exist. These limits in part derive from the limits imposed by Articles 192 and 194 TFEU themselves. Yet limits are also imposed by other factors, including the financial set-up of the EU, national constitutions and courts, procedural requirements concerning decision-making, fundamental rights as well as the existence of other EU obligations that may conflict with energy and climate objectives.

4.2. Potential limits to the legal space for a Climate and Energy Union

This section will outline some of the key potential limits to the legal space for creating an EU Climate and Energy Union, which will then inform the subsequent analysis if (informal) treaty change is possible and required to address these limits. These limits derive both from EU law and from national law, including the limits that certain national legal orders impose on EU action.

The first and most apparent limits are contained in Articles 192 and 194 TFEU themselves, as extensively discussed in section 3.4. In environmental policy, these limits are of a procedural nature. Under article 192(2) TFEU, a procedural limit is imposed for certain sensitive areas that require unanimity, being provisions primarily of a fiscal nature, measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources and measures affecting land use, with the exception of waste management. In energy policy, there are limits of both a procedural and substantive nature. Similar to Article 192(2) TFEU, Article 194(3) TFEU requires unanimity in Council for legal acts that are primarily of a fiscal nature, whilst only requiring consultation of the European Parliament for such acts. Article 194(2) TFEU imposes one substantive limit, as it prohibits the adoption of EU energy policy measures that 'affect a Member State's right to

[274] Note however that Article 192(5) TFEU explicitly requires the EU to take the financial impact of measures into account, and to address disproportionate costs for one or several Member States.

determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply (…).'

As indicated in section 3.4., the CJEU leaves significant leeway to Member States and EU institutions and so far does not seem to police these limits stringently, especially where the political institutions agree that the EU has a certain competence. This is especially the case so far with the substantive limits in Article 194(2) TFEU.[275] At the same time, these limits may become increasingly relevant and constrictive as in a true Energy and Climate Union ever more far reaching measures will become necessary that significantly affect Member States' energy sources and supply and will increasingly affect fiscal policy, water and land use and town planning. When this occurs, the factual impact of a substantive limit and a unanimity requirement may often be the same, since granting a veto to each Member State can either block the adoption of necessary acts, or require the watering down of such acts to a level that may threaten effective achievement of a Climate and Energy Union.

The procedural limits in Articles 192 and 194 TFEU, moreover, may be increasingly invoked in the future by Member States as the measures adopted have an ever greater impact on their economies and electorates, or as more nationalist parties enter government. Member States can then insist that a certain measure affects one of the 'protected' areas in Articles 192 and 194 TFEU, or push amendments to ensure that they do so, and then demand a special legislative procedure is followed giving them a veto. Of course the other Member States, with the Commission and European Parliament, can insist that the measure does not affect a protected area and adopt a measure via the ordinary legislative procedure, leaving the disagreeing Member State(s) to challenge the act in front of the CJEU.

A second and related limit on the legal space for an effective Climate and Energy Union concerns Article 4(2) TEU, and specifically the obligation of the Union to respect Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, as well as their essential State functions, including safeguarding national security. As discussed in section 3.4., the CJEU has so far given a highly restrictive interpretation to Article 4(2) TEU. This provision does not create a safe haven for certain Member State competences or areas of interest that cannot be affected by EU law. What is more, according to the CJEU it is not up to Member States or their courts to determine which areas of their national law are 'protected' from EU action under Article 4(2) TEU. Consequently, under the current case law of the CJEU, it does not seem likely that Article 4(2) TEU will pose a significant limit to the creation of a Climate and Energy Union, even if such a union will affect Member States significantly, including on points covered by Article 4(2) TEU such as security and respect for local and regional self-government.

The major potential limit to the legal space for a Climate and Energy Union from Article 4(2) TEU, however, does not seem to come from the CJEU, but from national courts, which form the third key limit. An increasing number of these courts are developing defensive lines against EU integration, trying to protect a certain minimum core of competences and autarky from the EU.[276] Important legal differences exist between these defensive lines, including on how they are formulated, why they are formulated and to what extent they are enforced. Broadly speaking, however, these national limits on EU integration usually focus on protection of fundamental rights, preventing the EU from acting *ultra vires*, and protecting some core of national (constitutional) identity. For these three limits on EU

[275] See section 3.4. above.

[276] See for example, in Denmark Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A, in France the judgement by the Conseil d'État of 14 October 2021 *Quadrature du Net*, case no. 39492, in Germany the BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 and the Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, and most vehemently but also in a category of its own, the Polish Constitutional Tribunal (PCT) judgement of 7 October 2021, K 3/21.

integration, moreover, national courts often rely on Article 4(2) TEU as an EU law anchor justifying their national case law. As a result, these national courts simply disagree with the CJEU on the correct interpretation of Article 4(2) TEU, arguing in different shades of intensity that this provision gives national courts the right to define their own constitutional identity, which the EU is then legally obligated to respect.

This study is not the place to further dissect this intensifying dialogue. The key point here, however, is that this national legal limit to EU integration should be taken seriously, especially where it may find increasing political support in many Member States.[277] As this limit to the legal space for a Climate and Energy Union does not solely *derive* from EU law, however, any solution to this limit can also not be solely *found* at the level of EU law. For now, it is clear that the CJEU simply refuses to accept any such national co-appropriations of Article 4(2) TEU, also to avoid abuse of this provision in, for instance, the rule of law crisis.[278] But with the far reaching measures that will be required to combat climate change and ensure energy independence, and the unequally distributed pain this will inflict across the Member States, a more structural and constructive solution is required.[279] Until that is found, it is important to keep these national limits in mind, and also ensure an open and forward-looking dialogue with national courts on how an EU Energy and Climate Union should be constructed so as to fit within the available national constitutional space.[280]

These national limits also touch on an important fourth limit to the legal space for a Climate and Energy Union: funding. As discussed above, an effective Climate and Energy Union will require enormous financial resources, both at the national and EU level. Combating climate change alone requires yearly funds that far outstrip the current budget of the EU. Under the current EU funding system, raising such funds would require drastically increasing direct Member State contributions to the EU. In addition to the political difficulties this raises, such an approach also runs into some of the other limits of the current EU system, including the rather rigid multiannual financial framework and yearly budget ceiling, as well as the, in principle, prohibition on EU deficits and borrowing. For these reasons, debates have been ongoing about increasing the EU's capacity to raise income itself or to borrow more freely to achieve its objectives.[281] Such modifications to the EU system, however, affect the very constitutional and political nature of the EU, and may often require Treaty change.[282] Consequently, the relatively limited funding available for an EU Climate and Energy Union, the relatively limited capacity of the EU to raise significant additional funds quickly or more structurally, including through its own resources, and the likely need for those Member States that currently have more fiscal capacity to shoulder a greater part of the burden, form some of the most acute and perhaps fundamental limits to the legal space for an EU Climate and Energy Union.

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277 See for an equivalent assessment in the context of EMU: Frederik Behre, 'A European Ministry of Finance? Charting and Testing the National Constitutional Limits to EU Fiscal Integration' (PhD thesis, Leiden University 2021).

278 See for example: Joined Cases C-357, 379, and 811/19 *Euro Box Promotion and Others* [2021] ECLI:EU:C:2021:1034, para 162; Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* [2022] ECLI:EU:C:2022:99; Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98; Case C-204/21 *Commission v Poland* [2023] ECLI:EU:C:2023:442.

279 Armin Cuyvers, 'Naar Een Symbiotisch Constitutioneel Recht voor de EU: De Conceptuele, Emotionele en Juridische Ruimte voor Legitieme Regionale Samenwerking' (Oratie uitgesproken bij de aanvaarding van het ambt van Hoogleraar Europees Recht aan de Universiteit Leiden op vrijdag 9 december 2022).

280 Behre (n 274).

281 See amongst many others for (critical) discussion: Ruffert and Leino-Sandberg (n 99); Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 Legal Issues of Economic Integration 337. cf De Witte (n 100).

282 See also the discussion on (informal) treaty change below.

What is more, effectively implementing all EU acts on climate and energy does not only require significant EU funds, but will also have a significant impact on the national budgets of Member States. As Article 192(4) TFEU even stresses specifically, 'the Member States shall finance and implement the environment policy.' As mentioned in section 3.5.3.b, the European Climate Law stipulates that the Member States and the Union must take the necessary measures to collectively achieve the climate-neutrality objective and that, in so doing, they must take account of solidarity and fairness between the Member States and cost-effectiveness. Reading *OPAL pipeline* together with earlier case law on Article 80 TFEU concerning similar wording would suggest that this reference to solidarity and fair burden-sharing could have legal effects. Notably, *OPAL pipeline* demonstrated that the collective Union interest does not always outweigh individual Member State interests, and that the interests of the relevant stakeholders must be taken into account and balanced, creating at least a procedural obligation that must be respected. It can be speculated that issues about the allocation of the burdens and the benefits of the green transition between Member States could translate into litigation before the Court.

Furthermore, as ongoing debates and protests in many Member States illustrate, including when expenditure on the environment means other programs or sectors are negatively affected, this will give rise to tensions and resistance, politically, societally and hence also legally as these conflicts will reach the courts. The enormous financial consequences of an EU Climate and Energy Union will, therefore, also run into national legal limits. This is especially the case as many national courts are imposing financial or fiscal limits on EU integration, which should respect national budgetary autonomy.[283] Consequently, creating sufficient financial resources for a Climate and Energy Union requires engaging both with the current limits at the EU and the national level.

A fifth limit to the legal space for a Climate and Energy Union may derive from the other obligations the EU is also legally obligated to realize. As discussed in sections two and three, the EU is legally obligated to pursue multiple objectives, all of which are legally binding at the same level. The EU, for example, has to create an internal market, ensure the welfare of its citizens as well as help guarantee the geostrategic security of its Member States. In some instances, these other objectives and obligations may conflict with each other, or compete for scarce resources, including funding. Despite its existential importance, a Climate and Energy Union must therefore also leave sufficient (legal) space for the EU to pursue its other objectives. Nevertheless, the CJEU leaves the political institutions significant leeway in prioritising the different objectives laid down by the Treaties, meaning this limit is unlikely to be legally policed.

A sixth, perhaps unexpected, legal limit to an effective Climate and Energy Union may arise from fundamental rights, including those laid down in the Charter of Fundamental Rights, the ECHR and national constitutions. As will be extensively discussed in section 5 below, fundamental rights can be an important driver and support for a Climate and Energy Union, including via positive obligations derived from the right to life and to private and family life. Other fundamental rights, however, may also limit the legal space for a Climate and Energy Union, or at least for certain measures such a union may wish to adopt. One example of such a limit is the right to property as, amongst others, protected by Article 1 protocol 1 of the ECHR.[284] Reaching the Fit for 55 targets may require measures that significantly affect the property of businesses and individuals, such as the prohibition of polluting

[283] See for an overview and assessment for example Martina Augustin-Zeitler, 'Balancing Budgetary Autonomy and Budgetary Control in Germany, Austria, Switzerland and the European Union: A Comparative Thesis' (PhD thesis, University of Vienna 2023).

[284] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms [1952].

activities central to certain industries, the development of crucial energy infrastructure through someone's backyard or the retraction of previously issued permits. Ensuring sufficiently swift climate action on an adequate scale will be complicated by the legal protection such private property enjoys. Even if this protection is far from absolute, it can in any event cause harmful delays. The same is true for the right to an effective remedy, which can lead to significant delays as parties opposing certain climate measures pursue the national and international remedies at their disposal.[285] The rule of law and effective judicial protection are foundational values of the EU, as the CJEU has forcefully and repeatedly reiterated in the previous years.[286] Hence, it will be complex, and perhaps also normatively undesirable, for the EU to limit legal protection to enable quick and effective climate action. At the same time, the cumulative effect of all these individual rights to legal protection may be to prevent effective climate action, which risks violating other fundamental rights, including the right to life. An effective Climate and Energy Union therefore also requires striking the right balance between the different rights involved.

A further potential clash between an effective Climate and Energy Union and fundamental rights, albeit at a more abstract constitutional level concerns democracy. On the one hand, the threat created by climate change is so urgent and existential that effective measures must be taken quickly. On the other hand, as recent political events and increasing push-back have proven, (national) democratic processes can significantly delay or block climate measures that, based on objective scientific data, are inevitable. The farmers' protests in France, Belgium, and the Netherlands in February 2024 provide one example of what can more broadly be referred to as a "Green Backlash."[287] It is important to note, however, that a major, though decreasing share of citizens — 88% — supports the Union's net-zero target. However, citizens' policy priorities are also shifting: while the group of citizens that include the "increased cost-of-living" within their country's top three challenges has nearly doubled to 68% of respondents, the "climate change" group has slightly shrunk to 39% of respondents,[288] which bolsters the narrative of a green backlash. However, this phenomenon might also be interpreted as suggesting that, rather than resisting climate ambitions *per se*, citizens are concerned about the costs of the transition — about their fair allocation and their potential to curtail purchasing power, which would support the reasoning behind instruments such as the Just Transition Fund.

Facing political pressure, national governments may therefore be tempted to backtrack on earlier (political) commitments (made at the international or EU levels) to tackle climate change. This is one manifestation of the "credible commitment" problem identified in Section 3.4.3.a. Law offers one solution: the enshrinement of climate change objectives into a constitution or supranational law limits the ability of political actors to abandon those commitments. With varying success, environmental activists have also used litigation to force political actors to take climate action towards the Paris Agreement objectives in order to meet certain public obligations or guarantee individual rights within the national legal system. Legislation can also be adopted to give legal effect to the Paris Agreement objectives and place an obligation on political actors to take action towards that end, as is the case with the European Climate Law discussed in Section 3.4.3.b. The law may therefore be used effectively in different ways to mandate climate action. However, as indicated above, this may also raise questions of democracy. Where constitutional law is concerned, questions of the separation of powers arise — in

[285] European Convention on Human Rights, art 13; EU Charter of Fundamental Rights, art 47.

[286] See e.g., Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.

[287] Karl Mathiesen and others, 'Bears, Cars and Angry Farmers Fuel Green Backlash' (*POLITICO*, 22 February 2024) <www.politico.eu/article/bears-cars-angry-farmers-fuel-green-deal-backlash-eu-agenda-european-commission-ursula-von-der-leyen/> accessed 26 February 2024.

[288] 'Bears, Cars and Angry Farmers Fuel Green Backlash' (n 284).

particular, the extent to which the court should limit or determine the policy choices of government.[289] Also, while legislation may legitimately give a scientific expert body an advisory role, questions of accountability may arise if such a technocratic body is given more executive powers.[290] Irrespective of whether these risks in fact materialise, there is always a risk of public perception of unwarranted judicial activism or technocratic overreach where the law is used to guide or constrain government policy.

These fundamental tensions arise in an even more complex fashion in a supranational construct such as the EU, and must be effectively addressed to create a stable, effective and legitimate EU Climate and Energy Union. Legislation should be carefully crafted, with considerations of accountability in mind. Consideration, too, should be given to how democratic participation or support could be strengthened. Here, the EU can connect national debates on the same challenge.[291] On a practical level, the EU may find it difficult to take action in circumstances of political backlash. In this context, the choice of legal basis is an especially salient issue; backlash within a single Member State may prevent legislative action based on Article 192(2) TFEU or Article 194(3) TFEU since Council unanimity is required.

A seventh and last limit mentioned here, which is linked to democracy and national constitutional identity, concerns enforcement. Even where the correct legal basis enables an EU environmental measure to be adopted by qualified majority voting in Council, this does not guarantee its subsequent implementation at the Member State or, indeed, regional level. Here, political backlash such as farmers' protests in capital cities may contribute to reluctance on the part of national governments to implement climate policy emanating from "Brussels". The question then becomes one of enforcement of EU law. Currently, the EU has a relatively advanced legal system for enforcing EU law, combining public enforcement by EU and national institutions with private enforcement of directly effective EU norms by individuals.[292] As we have seen, however, particularly in the rule of law crisis and the way in which some Member States deal with migration, effective enforcement of EU norms can become difficult where a national legal system is eroded or where a Member State is willing to openly ignore EU and national judicial decisions.[293] After all, as a Union of values based on the rule of law, the EU system is ill equipped to deal with blatant violations of the rule of law.

This reliance on law and sincere cooperation can become a limit to an effective Climate and Energy Union where some measures taken create so much resistance in one or multiple Member States that they, openly or more covertly, refuse to implement EU norms. As seen during the EMU crisis and the Rule of Law crisis, it can be very complex to effectively enforce EU norms in such situations, or to create instruments that ensure compliance, as demonstrated by the limited impact of the conditionality mechanism, the European Semester and the Fiscal Compact.[294] What is more, in the case of climate and energy measures, the green transition is likely to present asymmetric burdens across Member States

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289 Christina Eckes 'Constitutionalising Climate Mitigation Norms in Europe' in Ernst-Ulrich Petersmann and Armin Steinbach (eds.) *Constitutionalism and Transnational Governance Failures* (World Trade Institute Advanced Studies - 16, Brill 2024), ch. 4.

290 McHarg (n 197).

291 BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18. For discussion also see Armin Cuyvers, 'Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality' in Afshin Ellian and Raisa Blommestijn (eds), *Reflections on democracy in the European Union* (Eleven International Publishing 2022).

292 See also below the discussion in section 5.

293 With regard to the rule of law crisis, see for example Case C-204/21 *Commission v Poland* (n 275). In relation to migration, see *Relocation Decisions* (n 178) and the recent infringement proceedings against Hungary for failure to comply with the 2020 *Relocation Decisions* judgment, resulting in large lump sum fine and daily penalty payments: Case C-123/22 *Commission v Hungary (Accueil des demandeurs de protection internationale II)* [2024] ECLI:EU:C:2024:493.

294 See for an overview for example Alicia Hinarejos, 'Economic and Monetary Union: Evolution and Conflict' in Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law* (3rd edn, OUP 2021).

due to their diverse geographies and economies, with some more dependent on fossil fuels or polluting industries than others. If a sufficient number of Member States oppose an EU norm, this may actively prevent further enforcement or the imposition of sanctions. Consequently, a last, more indirect, limit on the legal space for a Climate and Energy Union concerns the relatively limited, or law-dependent, mechanisms of enforcement in the EU. A more holistic consideration of the legal space required for a Climate and Energy Union should, therefore, also include this dimension of enforcement and inevitable push-back.

4.3. Addressing the limits: (informal) Treaty change?

As discussed above, the current Treaties provide very broad and flexible competences to the EU to create a Climate and Energy Union. At the same time, multiple factors limit the legal space available for such a Union, especially if seen from a more holistic constitutional perspective, and not just the existing competences. This section will briefly explore to what extent these limits can be addressed, and if so, to what extent this may or should require treaty change. To this end, this section first sets out the process for treaty change as well as the concept of informal treaty change. It subsequently argues that formal treaty change may not be feasible or desirable in the available time, and that much can be achieved with informal treaty change, or via an improved dialogue and collaboration with the national legal level. It also zooms in on one key dimension — funding — and the lessons that can be derived on that point from the COVID-pandemic.

4.3.1. Formal Treaty change

As 'the masters of the Treaty', the Member States remain very much in the driver's seat when it comes to Treaty change. Article 48 TEU sets out the different ways in which the Treaties may be changed. The main procedure to do so is the ordinary revision procedure. This ordinary procedure can be initiated by any Member State, the European Parliament or the Commission. They can submit a proposal to the European Council, via the Council, informing all national parliaments.[295] The European Council then decides, by a simple majority, to proceed with the suggested amendment or not. If they proceed, in principle it is required to convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission to discuss proposed amendments and prepare a recommendation to be submitted to a conference of representatives of the governments of the Member States.[296]

Based on the recommendation, a conference of representatives of the governments of the Member States is then organized in which proposed amendments to the Treaty are negotiated and agreed upon by unanimity. If such amendments are agreed, they then have to be ratified by all Member States in accordance with their respective constitutional requirements.[297] Each Member State therefore has a veto at several stages of the ordinary process, but note that in multiple Member States such ratification

[295] TEU, art 48(2).

[296] ibid, art 48(3). Note that for relatively minor amendments a Convention may be waived.

[297] ibid, art 48(4).

also involves referenda, votes by sub-national parliaments and challenges in front of national courts, meaning any Treaty change has to run the gamut of challenges and obstacles.

Article 48 TFEU also provides for a 'simplified' revision procedure. Despite its name, however, this procedure is still very long and complicated. Just as the ordinary revision procedure, it can be initiated by the Government of any Member State, the European Parliament or the Commission. The proposed amendments, however, may only concern the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union (which includes the titles on the environment and energy, but not on other core issues including the EU budget), and they may not increase EU competences.[298] Based on this proposal, the European Council may then, by unanimity, adopt a decision to amend all or part of the provisions of Part Three of the TFEU. Subsequently, this decision has to be approved by the Member States in accordance with their respective constitutional requirements, just as with the ordinary revision procedure.

Both the ordinary and the 'simplified' revision procedure are therefore long, complicated and provide at least two veto-moments for any Member State. What is more, Treaty revision has become increasingly contested in many Member States, as demonstrated by the rejection of the Constitutional Treaty and the torturous ratification of the Lisbon Treaty *inter alia* due to referendum results.[299] The almost guaranteed involvement of national courts, including the German, Irish, Polish and Hungarian courts also means that all national constitutional limits discussed above will be brought to bear on any suggested amendments, potentially leading to a judicial veto on ratification. If the aim is to increase the EU's competences on climate, energy or own resources, moreover, even the simplified revision procedure may not be used.

For these legal reasons, and also in light of the present political configuration in the EU and the urgency of effective climate and energy action, it does not seem feasible to rely on formal treaty change to create more legal space for an effective Climate and Energy Union. Instead, it seems more fruitful to look at different solutions, including use of the passerelle clauses and informal treaty change, in addition to the opportunities offered by expanding positive obligations.

4.3.2. Moving to qualified majority on the environment and energy

As discussed previously, Article 192 TFEU imposes a procedural limit to its use, insofar as unanimity is required for environmental measures which affect certain sensitive areas of local planning and management, or significantly affect certain sovereign prerogatives. Further, unanimity is required for any measure primarily of a fiscal nature. The last sentence of Article 192(2) TFEU, however, contains a so-called passerelle clause allowing a shift towards QMV on these issues. Such a move to QMV can be decided by the Council, by unanimity, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. Contrary to Treaty revision, no further ratification of this change is necessary, as the Member States already satisfied this requirement when they ratified this passerelle clause.

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[298] TEU, art 48(6).

[299] For an overview of referenda in the EU and a discussion of the reasons behind the referendum results, see: Derek Beach, 'Referendums in the European Union' in William Thompson, *Oxford Research Encyclopedia of Politics* (Oxford University Press 2018) <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-503> accessed 23 September 2024.

While Article 194 TFEU apparently prohibits energy policy from affecting those same sovereign prerogatives, it does allow for energy policy measures primarily of a fiscal nature. Like in Article 192 TFEU, such fiscal measures must be adopted by unanimity. Unlike Article 192 TFEU, however, Article 194 TFEU does not contain such a specific passerelle clause. Nonetheless, it can benefit from the generic passerelle clause in Article 48(7) TEU which provides that, where the TFEU currently provides for legislative acts to be adopted with a special legislative procedure, as in the case of Article 194 TFEU, the European Council may adopt a decision, by unanimity, allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Such a decision by the European Council must then be notified to all national Parliaments, which then have six months to veto such a switch to the ordinary legislative procedure.

The use of these passerelle clauses, even if still far from simple, is far less cumbersome than a full Treaty revision, and specifically targets one of the key limits on the competences of the EU to create a Climate and Energy Union. Because of their limited and targeted nature, moreover, a debate on the use of the passerelle clauses also does not risk triggering a broader revision of the EU Treaties that may only delay and complicate the creation of an effective Climate and Energy Union. As a result, the use of these passerelle clauses for all or at least some of the currently 'protected' areas in Articles 192 and 194 TFEU seems like a logical priority in the creation of an effective Climate and Energy Union.

4.3.3. Informal constitutional change: the case of COVID

Partly due to the difficulties of formally changing the Treaties, the past decades have demonstrated that the EU can achieve significant constitutional change by other means. Be it during the empty chair crisis, the fall of the Berlin wall, the EMU crisis, COVID or the Russian invasion of Ukraine, time and again the constitutional and legal framework of the EU has proven to be capable of significant change and evolution without Treaty change.[300]

To a certain extent, the expansive use of Articles 192 and 194 TFEU since Lisbon, especially in the Fit for 55 package, already illustrates the scope for informal change within the EU in a way that enables the creation of a Climate and Energy Union. This evolution is in part allowed by the teleological, effectiveness-focused case law of the CJEU, allowing the EU to develop alongside the challenges facing it. This can for example be seen in the gradual limitation of the *Campus Oil* defence or more generally the defence of national (energy) security and the gradual development of a doctrine of European security, autarky and perhaps even sovereignty.[301]

As the EMU and COVID crises demonstrated, moreover, such informal constitutional change can also modify the budgetary and financial functioning of the EU in a significant manner. During the EMU and sovereign debt crisis, for example, many measures were adopted that might have previously seemed unimaginable, including the creation of the ESM and ESF, the financial assistance to Member States at unprecedented levels, the creation of increased supervision on Member State budgets with increased

[300] cf among many others, Vestert Borger, The Currency of Solidarity: Constitutional Transformation during the Euro Crisis (Cambridge University Press 2020); Luuk van Middelaar, The Passage to Europe: How a Continent Became a Union (Yale University Press 2020), chapter 3; Edoardo Chiti and Pedro Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 Common Market Law Review 683 Bruno de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 European Constitutional Law Review 434.

[301] See also the discussion in section 3.4.

enforcement mechanisms, and quantitative easing by the ECB injecting trillions of euros.[302] All of these measures were declared legal by the CJEU[303] and resulted in a fundamental reconfiguration of the Union's (economic and political) constitution.

COVID provides another clear example and potential model for informal constitutional change for a Climate and Energy Union. The Covid-19 pandemic was not only a health crisis but also an economic crisis, fuelled by the closure of businesses and the significant slowing of global trade. To alleviate the economic consequences from the pandemic and help Member States on their path to recovery, the EU adopted an unprecedented instrument of financial support, the so-called 'NextGenerationEU' (NGEU) recovery plan. It is a remarkable development both from a political and a legal perspective, and a good example of informal constitutional change in times of crisis, triggering a new understanding of the Union fiscal and economic competence.[304] It holds lessons for a potential use of EU powers to finance a Climate and Energy Union.

a. NGEU's legal architecture and compliance with the principle of conferral

NextGenerationEU was, at its inception, worth 750 billion euro. It is a complex legal construction based on three pillars: two new instruments, the European Union Recovery Instrument (EURI)[305] and the Recovery and Resilience Facility (RRF),[306] and a new Own Resources Decision (ORD).[307] The European Commission proposed these three components all at the same time, on the 28th of May, 2020.

The EURI is the formal instrument which allows the Union to finance measures to tackle the adverse economic consequences of the Covid-19 crisis. The EURI contains both loans and non-repayable subsidies. The measures themselves are carried out under specific Union programmes, mostly the newly created RRF, but existing Union programmes are also involved.[308]

The RRF is the main such programme, specifically created to support Member States in the Covid-19 context. However, the scope of the RRF is extremely wide and permits allocation of funds for six purposes: (i) *green transition*; (ii) digital transformation; (iii) smart, sustainable and inclusive growth, (iv) social and territorial cohesion; (v) health, and economic, social and institutional resilience, and (vi) policies for the next generation, children and the youth, such as education and skills.[309]

The ORD empowers the Commission to borrow funds on capital markets on behalf of the Union, for the specific purpose of financing the EURI.[310] The use of the ORD, rather than the EURI alone, can be justified

[302] Note that the creation of the ESM in the end was based on a 'surgical' Treaty amendment adding Article 136(3) allowing the creation of the ESM, even if this was not technically necessary in light of the case law of the CJEU.

[303] Case C-370/12 *Pringle v Government of Ireland and Others (Pringle)* [2012] ECLI:EU:C:2012:756; Case C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400; Case C-493/17 *Weiss and Others* [2018] ECLI:EU:C:2018:1000.

[304] Vincent Delhomme and Tamara Hervey, 'The European Union's Response to the Covid-19 Crisis and (the Legitimacy of) the Union's Legal Order' (2022) 41 Yearbook of European Law 48.

[305] 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 (EURI Regulation) [2020] OJ L433I/23.

[306] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (RRF Regulation) [2021] OJ L57/17.

[307] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (ORD) [2020] OJ L424/1.

[308] EURI Regulation, art 1.

[309] RRF Regulation, art 3. See also art 4.

[310] ORD, art 5.

in light of the large amount of € 750 billion borrowed as well as the need to temporarily increase the own resources ceiling in Article 6 ORD to cover the liabilities incurred by the Union.[311]

The compliance of NGEU with the current allocation of competences between the EU and its Member States is a hotly debated topic.[312] As explained above, the main question is actually not whether the EU can or cannot borrow on capital markets. Neither the TEU nor the TFEU foresee an explicit empowerment to do so, but they equally do not include a general prohibition. In this regard, a number of legal bases in the Treaties can be and have been used to finance specific expenditure through borrowings.[313] The real novelty introduced by the NGEU is twofold : (i) the large amount of € 750 billion and the need to temporarily increase the own resources ceiling in the ORD; (ii) the fact that the borrowings are not only used to finance back-to-back loans like most forms of previous financial assistance: € 390 billion will take the form of grants and thus constitute borrowing for spending.

Looking at these legal innovations, three main competence issues can be outlined. First, the EURI Regulation is based on Article 122 TFEU.[314] As described in Section 3.3.2, this Treaty provision is found in the TFEU Chapter on Economic Policy, and itself contains two legal bases. This provision is part of what might be called EU 'emergency law', powers which allow the Union to adopt measures in times of severe difficulties or exceptional circumstances.[315] As discussed already above, the characterisation of Article 122(2) TFEU, in particular, as "emergency" law is particularly apt. The use of Article 122 TFEU to create the EURI is, depending on the perspective taken, a welcome creative use of Union powers to meet a major societal challenge and pursue the EU's objectives, or an unlawful extension of EU powers which violates the principle of conferral. While Article 122 TFEU is meant to respond to emergency situations, NGEU is not *only* an emergency instrument: it is here to support 'recovery' and 'resilience', and the funds allocated will be used for long-term objectives that ostensibly have little to do with Covid-19, including the green and digital transitions sought for the Union's economy.[316] Arguably, though, any form of economic recovery plan post-pandemic can only be successful if it takes account of the broader economic contexts in which it must take place: the climate crisis and digitisation.

The second main competence issue is that the RRF, the vehicle used for the disbursement of the funds, is based on Article 175 TFEU, the legal basis for Union cohesion policy. Cohesion policy — which aims to assist less-developed parts of the Union and reduce economic disparities within the Union's territory — is normally conducted through the use of the structural funds, such as the European Social Fund (ESF) or the European Regional Development Fund (ERDF). However, Article 175(3) TFEU allows for action to be undertaken 'outside the Funds', if 'specific actions prove necessary'. The RRF was concluded under that third paragraph. This illustrates even more how NGEU is not a one-off, temporary construction, but rather pursues long-term goals that, at least on their face, do not directly flow from Covid-19, such as those of Union cohesion policy.[317] Further, many commentators have noted that the

[311] Bauerschmidt (n 92).

[312] For the more critical appraisal: Ruffert and Leino-Sandberg (n 99); Dermine (n 278). cf de Witte (n 100); De Witte (n 61).

[313] E.g. TFEU, arts 122, 143(2) and 212. See also Bauerschmidt (n 92).

[314] The Regulation does not specify on which paragraph it is based. According to the Council Legal Service, it is based on Article 122(1) TFEU. See 'Opinion of the legal service: Proposals on Next Generation EU' (n 96), para 119. Views on this differ, with a number of authors considering that the EURI is based on both paragraphs, see Delhomme and Hervey (n 301).

[315] De Witte (n 61).

[316] EURI Regulation, art 1 and recitals 5 and 7.

[317] TFEU, art174 . In particular, 70 percent of the funds available under the RRF are allocated on the basis of cohesion criteria, while only 30 percent depend on factors that can in principle be affected by the pandemic. See RRF Regulation, art 11.

RRF illustrates how cohesion policy is progressively losing its specific content to become a proxy for any economic policy, which was not its intended purpose. Cohesion, economic, social and territorial,[318] is necessarily a broad creature, but the six pillars of the RRF are very broad indeed, even by these standards. It seems, therefore, that any limits or 'contours' for Union competence in cohesion policies are almost entirely porous. Any measure involving Union funding could then count as 'cohesion'.[319]

The third and final competence issue concerns the specific use of debt. As mentioned, the major novelty of NGEU is its recourse to debt, with the Union borrowing money on markets to be later repaid. Part of the funds are grants and not only loans to Member States. This means that for these sums, the Union is the final debtor. This not only represents a fundamental change of practice.[320] Arguably, it also sits awkwardly with the letter of Article 310 TFEU which provides that '[t]he revenue and expenditure shown in the [Union] budget shall be in balance'. This provision has always been interpreted, until now, as precluding the Union from issuing debt to finance itself.[321] To overcome this hurdle, the money used for grants was given the status of 'external assigned revenue',[322] within the meaning of the Union's Financial Regulation.[323] To put it simply, the money was put 'off-budget'. This way, almost magically, an expenditure for the Union becomes a revenue, and there is no longer any problem of budgetary balance. While this approach may be defensible from a strictly formal legal perspective, it seems to undermine another principle of the EU budget, that of universality. The principle of universality requires that '[a]ll items of revenue and expenditure of the Union [...] shall be shown in the budget'.[324] The use of external assigned revenue is acceptable where it represents an accessory to the budget, but it is far more problematic where it concerns such a major proportion of the funds available to the Union.[325] Once again, the EU is therefore on rather 'thin ice' from a competence perspective.[326]

b. Lessons from NGEU for the financing of a Climate and Energy Union

In spite of the various reservations expressed above as to its compatibility with primary law, the architecture of NGEU has so far withstood legal challenges and allowed the EU to borrow a significant sum of money.[327] That money, however, can only be borrowed and used for the purpose of addressing the consequences of the COVID-19 crisis, through the EURI and the different Union programmes. What is more, partially because of the thin ice they are treading on, many EU actors, including the legal service of the Commission, have time and time again repeated that NGEU is a unique one-off. NGEU is intended to be a temporary emergency fix and does not create a stable fiscal capacity at the level of the Union. Despite this insistence, however, NGEU has created a precedent, and hence raises the

[318] TFEU, art174.

[319] Ruffert and Leino-Sandberg (n 99) 449. See also Dermine (n 278) 346; De Witte (n 100) 658.

[320] Ruffert and Leino-Sandberg (n 99) 452.

[321] ibid 450-451.

[322] EURI Regulation, art 3(1) and recital 9.

[323] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (EU Financial Regulation) [2018] OJ L193/1.

[324] TFEU, 310.

[325] Dermine (n 278) 348.

[326] ibid 349.

[327] The NGEU was not challenged before EU courts. A complaint against the German act ratifying the Union's Own Resources Decision (Eigenmittelbeschluss-Ratifizierungsgesetz – ERatG) has been filed in the German Federal Constitutional Court, which rejected it. See BVerfG, Judgment of 6 December 2022 - 2 BvR 547/21, 2 BvR 798/21.

question whether the same mechanism could be used for the purpose of financing an EU Climate and Energy Union. Since climate change can be said to pose an urgent crisis, at least at the level of Covid-19, this does not appear impossible. Yet extending or repeating the NGEU approach to an Energy and Climate Union, especially to generate the funding required, would raise further questions from a competence perspective and the limits of (legitimate) informal constitutional change in the EU.

Concretely looking at which parts of NGEU could be used as a model or precedent for a Climate and Energy Union, adopting a new vehicle similar to the RRF is the least problematic aspect. Since it would only relate to climate and energy matters, it could be based on Article 192(1) and 194(2) TFEU. Indeed, the EU has already created several funds on these legal bases to support, inter alia, green innovation,[328] large-scale energy projects,[329] and small-scale, targeted initiatives.[330] By combining Article 192(1) and/or Article 194(2) TFEU with Article 175 TFEU, the EU can incorporate broader objectives of economic, social and territorial cohesion. Indeed, the existing Just Transition Fund already takes this approach.[331] For other funds, an amendment would need to be brought to the ORD, with a new empowerment for the Commission to borrow money, this time for the purpose of financing the Climate and Energy Union, to be disbursed through a new instrument. A new increase in the own resources ceiling would also be needed.[332] To comply with Article 311 TFEU, the total amount of borrowed money would have to remain significantly below the amount of own resources in the EU budget.[333]

One important open question is, however, if such a new instrument formally allowing the disbursement of funds could again be based on Article 122 TFEU, like the EURI, or if another legal basis is more suitable and available.[334] Whether one considers that the EURI was based on Article 122 TFEU in its entirety,[335] or on Article 122(1) TFEU alone,[336] it is largely accepted that this provision presupposes the existence of a situation of urgency or of exceptionality leading to severe difficulties, and the measures adopted must be temporary.[337] Under Article 122(1) TFEU specifically, the Council may adopt 'measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy'. This legal basis has been used repeatedly in the context of Russia's war of aggression against Ukraine and the ensuing disruption to the EU's energy supply, in particular to address high energy prices.[338] As discussed further below, the legal concepts of 'temporary' and 'emergency' play an important role in setting the boundaries of when Article 122(1) TFEU may be used.

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328 Regulation (EU) 2021/783 of the European Parliament and of the Council of 29 April 2021 establishing a Programme for the Environment Climate Action (LIFE), and repealing Regulation (EU) No 1293/2013 [2021] OJ L172/53.

329 Regulation (EU) 2021/1153 of the European Parliament ad of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2013 [2021] OJ L249/38. This facility was adopted on the basis of Article 172 and 194 TFEU.

330 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 [2023] OJ L130/1. This fund was adopted on the basis of Articles 91(1)(d), 192(1), 194(2), and 322(1)(a) TFEU.

331 Just Transition Fund (n 85).

332 See ORD, art. 6.

333 Grund and Steinbach (n 92).

334 Regarding the use of alternative legal bases, see ibid 1006-1007.

335 De Witte (n 100) 654.

336 Bauerschmidt (n 92) 5.

337 'Opinion of the legal service: Proposals on Next Generation EU' (n 96), para 121.

338 See e.g. Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L261I/1; 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.

Legal arguments could be made to the effect that these concepts need not be a compulsory or overly formalistic restriction on the use of Article 122(1) TFEU. The concept of "emergency" can be fluid. A seemingly slow-burning, foreseeable crisis like climate change can have fast-burning phases. An exceptional event, such as the droughts of 2022, can be conceived as the sort of one-off event that justifies recourse to Article 122(1) TFEU. Yet, the more conventional approach is to consider these concepts as important legal limits to this competence. The REPowerEU legislation adopted on the basis of Article 122(1) TFEU was adopted to address the energy crisis precipitated by Russia's invasion of Ukraine, and to prepare for the very real risk of a complete halt of Russian fossil fuels, i.e. a further sudden, external shock. Certainly, the REPowerEU legislation adopted pursuant to Article 122(1) TFEU intends to contribute to the EU's long-term climate goals. It will have long-term consequences. Moreover, an initial temporary measure or institutional innovation may later be made permanent - as is the case with "AggregateEU", the demand aggregation and joint purchasing mechanism for natural gas and LNG. Even so, the use of Article 122(1) TFEU could be justified by reference to the truly exceptional circumstances. Moreover, the Court indicated in earlier case law that Article 122(1) TFEU cannot be used by the EU to provide financial assistance to Member State(s).[339] The need to (also) use Article 122(2) TFEU in such instances reinforces the need for temporariness and exceptionalism. In any case, Russia's invasion of Ukraine and the Covid-19 pandemic were both one-off events, unlike climate change. Even if the EURI funds were used for long-term purposes that transcended the Covid-19 crisis, there is no denying that the entire recovery plan was intrinsically linked to a single exceptional event, i.e. the economic disruption caused by Covid-19.

From this analysis it follows that one crucial question for the legal space for a Climate and Energy Union, and particularly the capacity for the EU to acquire the massive financial resources it requires, is if climate change in a broad sense can be considered not just an emergency, which it surely is,[340] but also an exceptional, one-off event, as required by Article 122 TFEU. The answer to this question in part depends on the perspective taken.

On the one hand, climate change is a one-off, exceptional event, that nevertheless unfolds over an extended period of time, although the window to address it before it reaches a point of no-return is shrinking swiftly. To a certain extent, moreover, the measures adopted to combat climate change can also be considered temporary. After all, the net-zero objective has a clear deadline in 2050. To be compared, some NGEU loans and grants may be repaid until 31 December 2058, meaning that NGEU has a longer horizon than the core aim underpinning a Climate and Energy Union.[341] Focussing in this manner on the exceptional emergency posed by climate change and the relatively short duration of the measures involved, one could argue that funding a Climate and Energy Union along the model of NGEU might stay within the, rather extensive and vague, limits created by this precedent.

On the other hand, several important distinctions can also be made between NGEU and a Climate and Energy Union. To begin with, the amount of money involved can be significantly larger. With €750 billion, NGEU involves a serious amount of money, but a full Climate and Energy Union may involve trillions over the coming decades. At some point, such an increase in the quantity of funds involved may also affect the legal quality and qualification of the funding measures, especially where the 'off-budget' expenditure of the EU would start to eclipse the 'on-the-books' budget of the EU by orders of magnitude. In addition, the climate crisis and the partially related but partially separate challenge of

[339] Pringle (n 300) para 116.

[340] Indeed, the European Parliament adopted a resolution declaring a climate and environmental emergency already in 2019. See European Parliament, 'Resolution of 28 November 2019 on the climate and environment emergency' 2019/2930(RSP).

[341] ORD, art 5(2).

energy independence form very different crises compared to the Covid-19 pandemic, already because they have much broader and longer causes. Climate change, moreover, has been long in the making, and can hardly be considered an unforeseen single event. What is more, NGEU has been explicitly justified by EU institutions as a one-off. Using the NGEU playbook, and even significantly expanding it for a Climate and Energy Union, runs counter to this argumentation, and may therefore even undermine the legality and legitimacy of NGEU itself.

Based on the analysis above, it can therefore be concluded that the Covid-19 crisis and the NGEU response to it may offer legal space for an EU Climate and Energy Union, particularly concerning its massive funding need. Utilizing Article 122 TFEU for this purpose would require a certain level of creative thinking as well as political will, and would certainly entail significant informal constitutional change in the EU.[342] Such creativity, however, does not seem beyond the realm of the possible in EU law, also taking into account the lessons from the EMU crisis and the EU's response to the Russian invasion of Ukraine so far. This means that it might be possible to severely reduce the financial limits that EU law poses on a Climate and Energy Union, at least if we understand legal space to mean the kind of acts that would be upheld by the CJEU if challenged.[343] This finding, however, also brings us to the last conclusion on addressing the legal limits to a Climate and Energy Union via (informal) treaty change: the legal space available at the national legal level.

4.3.4. The limits of EU informal constitutional change at the national level

As concluded above, it may be possible to create more legal and financial space for a Climate and Energy Union through further and extensive informal constitutional change in the EU. It should be realized that such informal constitutional change, as in the case of the EMU and Covid-19, requires the consent of all relevant parties. Usually this means unanimous political support by all Member States, as well as by the European Parliament, and the acceptance of the CJEU in the event of judicial review. Such informal change, therefore, is not inherently undemocratic or illegitimate, nor is it a secret coup perpetrated by EU judges and civil servants against national politicians. In fact, it is more often EU civil servants and judges trying their utmost to accommodate the wishes of national politicians within the confines of an EU legal framework that, for political reasons, cannot be amended.

At the same time, the increasing legal gymnastics required to squeeze politically necessary actions into the EU legal framework come at a price, both legally and in terms of legitimacy. Legally, successive feats of creativity gradually loosen the principles that guide and limit EU competences, raising the question whether any real limits remain. In turn, this can affect the long term legitimacy of the EU, as citizens may feel increasingly threatened by an EU that knows few limits, and hence become more susceptible to nationalist and populist perspectives.[344]

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[342] An alternative route, moreover, could be to try and base an NGEU type instrument not so much on Article 122 TFEU but on Articles 192 and 194 TFEU. This would shift the pressure from the question whether climate change is the kind of event that can be addressed under Article 122 TFEU, to the question of whether Articles 192 and 194 TFEU are capable of providing a legal basis for an instrument receiving and funnelling funds borrowed on the capital markets pursuant to an ORD, which might also cascade into similar instruments for other legal bases and objectives.

[343] cf. in this regard the kind of legal flexibility shown in *Pringle* (n 300).

[344] See for an interdisciplinary approach to this question, integrating insights from social psychology into EU law Eva Grosfeld, Daan Scheepers, Armin Cuyvers and Naomi Ellemers, 'The Integration of Subgroups at the Supranational Level:

Furthermore, even if the EU legal order is able to accommodate such rapid and far-reaching legal evolution, national legal orders may not be. As discussed above, national courts are increasingly formulating limits to EU integration so as to protect the core of their own constitutional order, sovereignty and national democratic process.[345] As a result, it is not just EU law that limits the legal space for a Climate and Energy Union, but also national constitutional law, as interpreted by the different national courts.

Consequently, the legal design of an effective Climate and Energy Union needs to find a balance between utilizing the legal space offered by EU law and respecting the limits imposed by national constitutional law and courts, even if these limits might not be legally valid or acceptable under EU law itself. The CJEU's strict stance on the legal validity of such national limits to EU law may function in a pluralist reality in which national and EU courts fruitfully collaborate in most cases. It is not tenable, however, to simply ignore the reality of such national limits, and the significant national political support they may have, in a field that will require as far-reaching, costly and disruptive measures as a Climate and Energy Union. For that reason, the legal space for a Climate and Energy Union must not merely be understood as a question of EU law, but also as a question of compound EU constitutional law comprising both the EU legal order and the 27 national legal orders that form part of the EU.

As indicated in the introduction, however, the debate on EU competences and funding only concerns one side of the coin. Another angle to approach the legal space for a Climate and Energy Union is that of individual (fundamental) rights. For instead of adopting further EU acts, one could also wonder if EU citizens can already claim certain individual rights, including an individual right to sustainable energy, that would help create a Climate and Energy Union 'from the bottom up'. It is to this last question that section 5 now turns.

The Relation Between Social Identity, National Threat, and Perceived Legitimacy of the EU' (2022) 10 Journal of Social and Political Psychology 607.

[345] Armin Cuyvers, 'What Chimpanzees Can Teach the EU: Or Why the EU Should Embrace Sovereignty as Part of Human Nature' (2021) 6(3) European Papers 1229 <https://www.europeanpapers.eu/en/europeanforum/what-chimpanzees-can-teach-eu-or-why-eu-should-embrace-sovereignty> accessed 20 September 2024.

5. AN INDIVIDUAL RIGHT TO ACCESSIBLE AND SUSTAINABLE ENERGY?

Any Effective Climate and Energy Union will have as one of its main objectives to transition to clean, renewable energy. As discussed so far, one way to achieve this is through top-down legislative, public actions, which require either EU competences or the coordination of Member State powers. Another potential avenue to legally boost sustainable energy, however, would be to grant individuals an enforceable right to clean energy. Such a strategy would create a bottom-up push for clean energy, which would then have to be realised. A parallel can be drawn here with the development of the internal market. During the period of euro sclerosis, there was very little top-down, public action to create an effective internal market. As a result, economic integration was not taking off. At this point, the CJEU stepped in, and held that the free movement clauses in the Treaties were actually directly effective rights held by individuals which they could enforce in national courts. As a result, individuals could directly challenge any national measures that restricted their free movement rights, leaving Member States with the duty to justify every last one of these restrictions or scrap them. The collective pressure created by all these individual cases not only granted individuals truly effective rights, but also prompted further EU legislative action to complete the EU internal market. Similarly, an individual right to sustainable energy could allow individuals to demand clean energy via their national courts. In turn, this could trigger intense public and regulatory action, as significant collective action would become necessary to be able to provide sufficient sustainable energy to respect all these individual rights.

This section discusses the potential of such an individual right to accessible and sustainable energy within the sphere of EU law. It contains two main parts, which are then further divided into sub-sections. The first main section presents a general theoretical overview of human rights protection and creation within the EU law mechanism — it discusses the basic practicalities, which are important to take into consideration when identifying existing or potential rights, namely sources of rights within EU law and the variable characteristics of rights and principles — particularly regarding the direct effect and direct applicability of certain provisions permitting enforcement. The second main section then uses the theoretical background of the first section to present an analysis of current EU law and tries to identify first, a right to accessible energy, and second, a right to sustainable energy, within the EU law sphere, taking into account the characteristics and sources presented in the first main section.

This section concludes that creating an individual right to sustainable or accessible energy, even though it has normative appeal, would be unworkable and goes far beyond the protection of positive rights as legally acknowledged so far. At the same time, the impressive though precarious growth of positive obligations in the context of the environment, especially on a more collective basis, does offer interesting opportunities to boost legislative action through a Climate and Energy Union.

5.1. Theoretical overview: human rights protection in the European Union

5.1.1. Sources of existing rights within EU law

There are multiple sources of human rights obligations within the framework of European Union law. They can be found in primary EU law, particularly the EU Charter of Fundamental Rights ("the EU Charter"), in secondary EU legislation, and can be developed by the CJEU on the basis of the "general principles of EU law" doctrine, which predates the EU Charter of Fundamental Rights. According to this doctrine and on the basis of Article 6(3) TEU, fundamental rights protected by the European Convention of Human Rights (ECHR) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[346] General principles bind EU institutions and Member States when they act within the scope of Union law. The ECHR plays another role in human rights protection in the EU: according to Article 52(3) of the Charter, in so far as Charter rights correspond to rights in the ECHR, the meaning and scope of former rights shall be the same or at least not lower than those in the ECHR. Last but not least, there are also multiple sources of non-binding human rights obligations in the EU legal order, such as the EU Pillar of Social Rights[347].

5.1.2. Enforcement of individual rights within EU law

Enforcement of human rights within the framework of European Union law depends on the actionability of a particular right, which can vary depending on the source of the right. Actionability of a right in the framework of European Union law requires the right to be directly applicable and to have direct effect.

Direct applicability exists where the human rights norm requires no implementing act to be legally binding in the legal order of a particular Member State. This criterion is automatically met in relation to EU primary law, such as the EU Charter, as well as regulations, but not provisions of directives. If a right were to be found in the latter, then the applicant would in principle have to rely on the national Member State act implementing the directive, unless the Member State had failed to implement the directive or implemented it in an incorrect manner and the implementation period had expired. Thus, whenever the Member State fails to implement the directive in national law by the end of the transposition period or where it fails to do so correctly, and provided that the provisions of a directive are unconditional and sufficiently precise, individuals may rely on those provisions against the Member State before a national court.[348]

Direct effect refers to the quality of a particular provision of EU law — it constitutes a right, which can be enforced by an individual in the court of a Member State. Direct effect of a particular right depends greatly on the source and the wording of the provision. Treaty provisions of primary EU law are directly

[346] TFEU, art 6(3).

[347] https://ec.europa.eu/social/main.jsp?catId=1606&langId=en.

[348] Case C-152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECLI:EU:C:1986:84, para 46 referring to Case C-8/81 Becker [1982] ECLI:EU:C:1982:7.

effective if they satisfy the criteria of being clear, precise and unconditional and allow no legislative discretion to the Member State.[349] The same applies to regulations.[350] General principles of EU law and provisions of the EU Charter can both be directly relied on by individuals in front of a national court, insofar as they do not need to be made more specific by provisions of EU or national law.[351] This can prove to be problematic with those provisions of the EU Charter that are termed as "principles" rather than rights (art. 52(5) EU Charter).

The main benefit of direct effect concerns enforcement. If a particular provision gives individuals a directly effective right, they can directly enforce these rights via the courts, both against public bodies and in many cases even against other individual parties (horizontal direct effect).[352] Of course there is always the remaining question on standing, especially where individuals want to bring a case before the CJEU, but the key point is that directly effective EU norms give all individual parties, citizens and companies alike, an extremely powerful legal tool that can be enforced against Member States and be used to neutralize any national laws that hinder the full enjoyment of this EU right.

5.1.3. Creation of a new right within EU law

Based on the legal sources of human rights obligations presented above, there are multiple ways that a new right could be introduced into the EU legal system. These possibilities are:

- amending primary EU law, specifically the EU Charter;
- establishing a human right as a general principle of EU law (on the basis of new CJEU case law by drawing inspiration from the EC(t)HR or constitutional traditions common to the Member States);
- extensive judicial interpretation of established principles by the CJEU, particularly through the 'positive obligations' doctrine;
- adopting secondary EU legislation that would create a new individual right.

Each of these options has its own advantages and disadvantages, the latter relating either to the difficulty of establishing the right or to its subsequent enforcement.

As the EU Charter represents the primary EU legal document on fundamental human rights, it would systematically make sense to amend and add a new human right to the already existing catalogue therein especially where this would be a structurally significant right with major impact. Embedding such a right at the level of primary law would also provide it with the highest level of legal status and protection against amendment or subsequent weakening. As the EU Charter forms part of primary EU law, it cannot be amended or weakened by secondary law. However, amending the Charter requires the ordinary revision procedure under Article 48 TEU.[353] As discussed in section 4 above, this takes a long time and requires the ratification by all Member States, meaning that once a fundamental right

[349] Case C-26/62 Van Gend en Loos v Administratie der Belastingen [1963] ECLI:EU:C:1963:1.

[350] TFEU, art 288; Case C-43/71 *Politi v Ministero delle finanze* [1971] ECLI:EU:C:1971:122.

[351] Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257.

[352] Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (7th edn, OUP 2020) 269.

[353] Marcus Klamert, 'Article 48 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019).

has been enshrined in the Charter, it is very hard to reduce or repeal. At the same time, the significant hurdles of amending the Charter clearly also make it hard to enshrine a new right in the Charter in the first place, certainly where this right may be particularly costly for multiple Member States that each wield a veto.[354]

The second possible source for a new right would be the unwritten General Principles of EU law.[355] As these principles need not be codified in the Treaties, the CJEU can invent, or find, new general principles. Article 6(3) TEU provides two possible 'sources of inspiration' for the CJEU to formulate such general principles: the EC(t)HR and national constitutional traditions common to the Member States. On the basis of either, or both, the CJEU can create a general principle of EU law, and this new principle can, potentially, give directly enforceable rights to individuals, such as a right to sustainable energy. There are multiple *caveats* that need to be mentioned in relation to this process, however. Firstly, by classifying both of the aforementioned sources as 'sources of inspiration', the CJEU is careful to maintain that both sources only provide guidance and are 'specifically significant'[356] in the process of the Court's ruling. They are not legally binding or determining under EU law as such, as finding a general principle of law in the ECHR or national constitutional traditions is not a mechanical but rather a hermeneutic exercise. As a result, the CJEU has significant leeway, both in qualifying something as a general principle and in formulating it.[357] Second, whilst the Court has elevated certain rights to general principles before,[358] such an outcome can therefore not be pre-determined and is far from a certainty, especially where rights are involved that will significantly impact the EU and national legislature. As the judicial branch, the CJEU has to be careful not to use general principles to start legislating from the bench which would undermine the principle of institutional balance, which can especially happen when providing individuals with rights that demand positive action, such as a right to clean energy. The CJEU will therefore be careful should it choose to develop such general principles and take a very gradual step-by-step approach.

Thirdly, it is important to stress that it will sometimes not be necessary to create a new general principle to grant a certain right to individuals, as a similar outcome can also be achieved through the expansive judicial interpretation of established principles. Such interpretations can broaden the material scope of existing provisions so as to cover additional situations. For example, declaring that the right to life gives rise to a right to a clean environment would not require the recognition of a new general principle, but merely extend the scope of the provision. Some examples of this 'strategy' will be discussed under the second subtitle of this chapter, particularly in relation to Article 7 and Article 36 of the EU Charter. It will also touch upon positive obligations — in particular, on the interpretative technique also known as the "positive obligations doctrine" whereby a court finds, often by virtue of the teleological method, that a certain provision (containing negative obligations) also gives rise to positive obligations. However, this approach presents similar challenges to the establishment of a new general principle. The CJEU may be hesitant to explore the limits of interpretation, particularly regarding positive obligations, out of respect for institutional balance and the sovereignty of the Member States. This gives rise to greater uncertainty and unpredictability regarding the potential of strategic litigation aiming to expand the scope of existing rights.

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354 Andras Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2022) 24 Cambridge Yearbook of European Legal Studies 239 249. For more information on Treaty change, please refer to Chapter 4 of this study.

355 For general principles laid down in primary law the same applies as to any other norm of primary law discussed above.

356 Craig and de Búrca (n 348) p 419 and footnotes 25 and 26.

357 See in this context also the discussion on the emerging principle of solidarity above, section 3.5.

358 See e.g. Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206 (the right to an effective remedy); Case C-144/04 *Mangold* [2005] EU:C:2005:709 (non-discrimination).

A fourth, and in practice extensively used, avenue for the creation of new rights under EU law is the adoption of binding secondary legislation. Regulations, Directives, Decisions can all grant rights to individuals, as long as these rights fit within the competence awarded to the EU by the specific legal bases relied on. As mentioned above, in order to enforce any rights derived from these instruments, direct effect of the specific provisions is needed, which can be particularly problematic for rights granted via directives and their enforcement against legal or natural persons.

Especially where the relevant legal bases 'only' require a qualified majority, it can be politically much easier to create rights via secondary legislation. At the same time, this also makes it easier to withdraw or reduce rights granted in secondary legislation. In addition, secondary legislation has to stay within the limits imposed by primary law, including principles such as conferral, proportionality, subsidiarity and the required respect for national constitutional identity, limits which are increasingly emphasised and even actively policed by national constitutional courts.[359]

As the above overview shows, EU law can give directly enforceable rights to individuals. These rights can be given through both primary and secondary law, and can be created by the EU legislator and/or construed by the CJEU. Now that these possible sources of current or potential future rights are clear, the next section assesses whether an enforceable right to accessible and sustainable energy already exists under EU law and whether there is legal space for its creation.

5.2. An analysis of current law: does the right to (accessible) and sustainable energy already exist?

5.2.1. The right to (accessible) energy

At present, there is no explicit binding, justiciable individual right to (accessible) energy in EU law. There are, however, rights and obligations related to energy poverty and access to energy services found in multiple overlapping legal instruments, each covering a slightly different aspect of (access to) energy, offering varying levels of legal protection. This next section will address the right to (accessible) energy by exploring the EU Charter, instruments of secondary legislation on energy governance, as well as the potential positive obligations leading to a right to access to energy as well as the possible role of rights as interpretative instruments applied to secondary legislation.[360]

[359] Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation', (2022) 7(2) European Papers507<https://www.europeanpapers.eu/en/europeanforum/constitutional-language-constitutional-limits-court-of-justice-dismisses-challenges-to-budgetary-regulation> accessed 20 September 2024.

[360] This refers to the possibility of reading a right to accessible energy into a piece of legislation, even though it does not mention it explicitly, based on a human rights-conform interpretation.

a. **Existing rights**

i. A right from the Charter?

The EU Charter of Fundamental Rights does not contain a right or principle ensuring access to energy. Article 36 of the Charter, which is to be found in Title IV of the Charter on 'Solidarity', however, provides that "the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union." This provision relates in general to access to services of general economic interest (SGEI) and not specifically to an individual right to (accessible) energy. Another limitation of Article 36 is "its ambiguous formulation and placement in the chapter with 'solidarity principles'".[361] The explanations of the EU Charter explicitly mention that "[…] this Article is fully in line with Article 14 of the Treaty on the Functioning of the European Union and does not create any new right. It merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law".[362] Article 14 TFEU provides that "[…]the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.[…]" and, together with Protocol no. 26 on services of general economic interest, has been interpreted by the Court as recognizing "[…]the essential role and the wide discretion of the authorities of the Member States in providing, commissioning and organising services of general economic interest"[363]. Thus, Article 36 of the Charter mostly highlights the space for Member States in organising these services and it "bars EU institutions from taking steps to curtail existing rights to SGEI under national law[…]"[364]

So far, Article 36 has been relied on only by governments (and not by individuals) in preliminary references, in order to justify their right to impose public service guarantees on private companies.[365] In case C-5/19, for example, the CJEU ruled that Article 3(1) to (3) of Directive 2009/73/EC on Common Rules for the Internal Market in Natural Gas, read in light of Article 36 of the Charter (and Article 38 of the Charter), did not preclude national law according to which "the costs associated with the natural gas storage obligations imposed on natural gas undertakings in order to ensure the security and regularity of natural gas supply in that Member State are to be borne entirely by those undertakings' customers, who may be private individuals, provided that that legislation pursues an objective of general economic interest, that it complies with the requirements of the principle of proportionality and that the public service obligations which it lays down are clearly defined, transparent, non-discriminatory, verifiable and guarantee equality of access for EU gas undertakings to national consumers."[366] Considerable leeway is thus given to Member States when it comes to services of general interest, as long as the principle of proportionality and other (fundamental) principles of EU law are respected. Similarly in the *Anode case,*[367] the CJEU ruled that the French rule on tariff regulation for natural gas supply to end users should be set in the new context following the entry into force of

[361] Marlies Hesselman, 'Governing Energy Poverty in the European Union: A Regional and International Human Rights Law Perspective' (2023) 10 European Journal of Comparative Law and Governance, p. 438-455.

[362] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[363] Case C-5/19 *Overgas Mrezhi and Balgarska gazova asotsiatsia*2020] ECLI:EU:C:2020:343, para 58.

[364] Hesselman (n 357) p 456.

[365] Ibid, p 457.

[366] Overgas Mrezhi and Balgarska gazova asotsiatsia (n 359), para 88.

[367] Case C-121/15 *ANODE* [2016] ECLI:EU:C:2016:637.

the Treaty of Lisbon and among other provisions, Article 36 of the Charter, by recognizing the right of Member States to find ways through SGEI to ensure continuity and accessibility of services.

Thus, from a systematic and textual interpretation of Article 36 of the Charter, one can conclude that this provision does not create an individual right to (accessible) energy. It rather guarantees the space for Member States to organize SGEI as they see fit, in compliance with fundamental principles of EU law. As such, Article 36 of the Charter, read together with article 14 TFEU, might even act as a limit to the capacity of EU law to provide for an individual right to accessible energy —let alone sustainable energy — where the creation of such a right would interfere with the power of Member States to organize access to SGEI as they see fit.

ii. A right to (accessible) energy deriving from secondary legislation?

As far as secondary legislation is concerned, the Electricity Directive[368] already refers to 'rights to energy'.[369] Article 27 of the Electricity Directive with the heading "Universal service" provides that "Member States shall ensure that all household customers, and, where Member States deem it to be appropriate, small enterprises, enjoy universal service, namely the right to be supplied with electricity of a specified quality within their territory at competitive, easily and clearly comparable, transparent and non-discriminatory prices...". This provision articulates a right to universal electricity service for all EU households. Article 28, on the other hand, under the heading "Vulnerable customers", provides that Member States "shall take appropriate measures to protect customers and shall ensure, in particular, that there are adequate safeguards to protect vulnerable customers." The definition of the concept of "vulnerable customer" is left to each Member State and it may refer to "energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times." Furthermore, article 28(1) provides that "[…] The concept of vulnerable customers may include income levels, the share of energy expenditure of disposable income, the energy efficiency of homes, critical dependence on electrical equipment for health reasons, age or other criteria. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take measures to protect customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms." Under Article 28(2), Member States shall take measures to address energy poverty by means of social security systems to ensure the necessary supply to vulnerable customers, or by providing support for energy efficiency improvements. Article 29 of the Electricity Directive requires Member States to establish and publish their criteria for assessing energy poverty.

Additionally, according to Article 3 of Regulation 2018/1999 on the Governance of the Energy Union and Climate Action,[370] each Member State has the obligation to notify the Commission of an integrated national energy and climate plan. The plan assesses, amongst other things, the number of households in energy poverty, and if it finds a (large) number of households in energy poverty, it needs to include policies and measures addressing energy poverty, although no specific targets are set.

None of the provisions of the Electricity Directive have been interpreted by the Court of Justice so far, so it has not yet been definitively determined if they could produce direct effect, allowing individuals to rely on them before national courts and invoke a right to (accessible) energy in case of a lack of

[368] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125.

[369] Hesselman (n 357) p 450.

[370] 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 [2018] OJ L328/1.

implementation or wrong implementation by the Member State concerned. As the provision leaves several elements that require further implementation choices by Member States, it may be difficult to infer direct effect from these provisions. But even if a directly effective minimum core right could be read into Article 27 of the Electricity Directive, this would not provide a right to sustainable energy, but merely a right to electricity under the conditions posed in the provision. Article 3 of Regulation 2018/1999, can be invoked against Member States in case they do not draft a plan with the policies and measures addressing energy poverty. Again, however, this does not create a right to energy, it merely obliges Member States to draft a plan.

b. **Creation of new rights**

i. A right to (accessible) energy construed in light of the positive obligations' doctrine?

A potential source for a right to accessible energy in current EU law would be to recognise a right to accessible energy through extensive interpretation of an EU Charter provision or a general principle of EU law.[371] Such an exercise would be in line with the impressive development and increasing use of the positive obligations doctrine over the past years, especially in the area of the environment.[372] For instance, we have seen this doctrine develop in the case law of the European Court of Human Rights (ECtHR) in the context of environmental rights: while the ECHR does not include an explicit right to a healthy and clean environment, the ECtHR has ruled that positive obligations under Article 2 ECHR (right to life), Article 8 ECHR (respect for private life and the home), and Article 1 of Protocol 1 (the right to property) entail duties on the state to take legislative and administrative measures to effectively prevent damage to the environment, if the effects of such damage could impact, inter alia, individual's quality of life and/or health.[373] While it has been argued that the doctrine of positive obligations under the EU Charter "is still in its infancy"[374], at least compared to the ECtHR, the CJEU has already construed the existence of positive obligations under the EU Charter, albeit not relating to the environment and energy.[375] While Article 36 of EU Charter provides for the access to SGEI, a closer reading, in light of Article 1 of the EU Charter on human dignity, could identify a right for all people to benefit from certain minimum service guarantees (regardless of their income, location), including, amongst others, access to energy services.[376] This seems a theoretical feat at best however, primarily because, as has been mentioned earlier, the Explanations to the Charter *explicitly* state that Article 36 of the Charter is not meant to create a new right. Moreover, the CJEU's case-law points to the fact that this provision is rather used to provide leeway for Member State actions in pursuit of guaranteeing access than to permit individuals to demand such action. Both of these arguments weigh heavily against an extensive teleological interpretation of these provisions to the effect that they give rise to positive obligations incumbent upon the Member States to guarantee a right to (accessible) energy.

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[371] This avenue was briefly introduced in section 5.1.3, 'Creation of a new right within EU law', above.

[372] For more information on the positive obligations doctrine, see section 5.2.2.b.i. 'A right to sustainable energy construed in light of the positive obligations' doctrine?', below, particularly 5.2.2.b.i.1. 'Article 8 ECHR – from the right to private life to a right to sustainable energy?'.

[373] e.g. *Lopez Ostra v. Spain*, App no. 16798/90 (ECtHR, 9 December 1994); *Öneryildiz v. Turkey*, App no. 48939/99 (ECtHR, 30 November 2004).

[374] Jasper Krommendijk and Dirk Sanderink, 'The role of fundamental rights in the environmental case law of the CJEU' [2023] European Law Open 2, 616–635, p. 628.

[375] e.g. Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net* [2020] ECLI:EU:C:2020:79; Krommendijk and Sanderink (n 369).

[376] Hesselman (n 357) pp 455-456.

ii. The potential of EU Charter rights as interpretative tools for the right to accessible energy in the Electricity Directive

Recital 91 of the Electricity Directive mentions that it should be "interpreted and applied in accordance" with the EU Charter. This points to the fact that energy-related issues, in this case particularly energy poverty relating to electricity, are being viewed through a human rights-lens by the EU legislator. While the directive does not provide any further guidance on how and which human rights relate to the area and issue of energy-electricity (poverty) within the Union,[377] the legislative memorandum to the proposal for the directive lists at least which human rights under EU law are relevant, namely:[378]

- The right to private and family life in Art. 7 EU Charter
- The right to protection of personal data in Art. 8 EU Charter
- The prohibition of discrimination in Art. 21 EU Charter
- The right to social assistance in Art. 34 EU Charter
- Respect for access to services of general economic interest in Art. 36 EU Charter
- The integration of a high level of environmental protection in Art. 37 EU Charter
- The fundamental right to an effective remedy in Art. 47 EU Charter.[379]

As evident from the list, the legislative proposal covers a wide range of human rights which could be affected by (the lack of) access to energy services and energy poverty. Thus, what can be suggested is that, especially for those provisions in the Charter which might not be justiciable on their own, such as for instance Article 36 of the Charter, they can guide the interpretation of secondary legislation. The CJEU adopted this approach with regards to the Birds Directive, interpreting it in a manner beneficial to animal welfare through Article 37 of the Charter.[380]

c. Interim conclusion

In short, several arguments can be advanced in favour of construing existing EU law as granting a right to accessible energy, although these arguments are currently untested. It is important to note that a right derived from Article 36 of the Charter would concern access to energy (services) in general, and that such an interpretation of the provision would run counter to existing case law. Moreover, a right derived from provisions of the Electricity Directive might be unenforceable due to the provisions' lack of direct effect. In sum, neither the positive obligations doctrine nor the expansive interpretation of secondary legislation appear particularly promising.

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[377] Hesselman (n 357) p 45.1

[378] European Commission, Proposal for a European Parliament and Council Directive on common rules for the internal market in electricity (recast) [2017] COM/2016/0864 final/2.

[379] Ibid.

[380] Krommendijk and Sanderink (n 369), referring to Case C-900/19 *Association One Voice and Ligue pour la protection des oiseaux* [2021] ECLI:EU:C:2021:211.

5.2.2. The right to sustainable energy

a. **Existing rights**

i. Existing rights in international and regional legal frameworks

On the 26th of July, 2022, the UN General Assembly (UNGA) unanimously passed a resolution in which it recognized the human right to a clean, healthy, and sustainable environment.[381] According to the Resolution, this right is related to other rights and existing international law. The UNGA calls on States and other actors (including private ones) to take measures and scale up their efforts to ensure a clean, healthy and sustainable environment for all.[382] In Europe, the Parliamentary Assembly of the Council of Europe (PACE) has continuously advocated for the inclusion in the ECHR of a right to a safe, clean, healthy and sustainable environment but with no success. In 2021, it recommended to the Committee of Ministers of the Council of Europe to draw up an additional protocol to the ECHR on the right to a safe, clean, healthy and sustainable environment. According to PACE, such an addition to the Convention, would establish *"the clear responsibility of member States to maintain a good state of the environment that is compatible with life in dignity and in good health and the full enjoyment of other fundamental rights; this would also support much more effective protection of a safe, clean, healthy and sustainable environment at national level, including for generations to come"*.[383] Despite these developments in international law, however, no explicit right to a healthy and sustainable environment, or to sustainable energy can be found in the ECHR or the EU Charter.

The Charter contains Article 37, which refers to the environment. However, it only establishes a rather general obligation incumbent on the Union to consider a high level of environmental protection in its policies, not an individual fundamental right. The Charter also contains Article 2(1) on the right to life and Article 7 on the right to private life on the basis of which one could try to extrapolate a positive obligation for the Union and the Member States to take measures to protect the environment and do so in a sustainable manner. By contrast, the ECHR does not contain an explicit right to a clean and healthy environment, nor an explicit right to sustainable and clean energy. However, both Article 2 and Article 8 of the Convention have been interpreted extensively by the ECtHR as containing positive obligations for Member States related to ensuring a healthy environment and countering climate change. All of this will be further discussed below.

ii. Article 37 of the EU Charter on a high level of environmental protection

Article 37 of the EU Charter provides that *"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."* This provision is to be found in title IV of the Charter on Solidarity. It is important to note that, in contrast to the ECHR, the Charter contains a provision related to the environment. Yet, its potential might be limited as will be shown in this section.

According to the Explanations relating to the EU Charter, the principles included in this provision are based on Article 3(3) TEU and Articles 11 and 191 TFEU, as well as on some national constitutions.[384] Two elements are remarkable about this provision: firstly, its open-ended nature reflected in the

[381] UNGA Resolution 76/300, (26 July 2022), A/RES/76/300.

[382] Ibid, para 4.

[383] See Parliamentary Assembly of the Council of Europe (PACE), Recommendation 2211 [2021]), para 3.1.

[384] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

expression "a high level of environmental protection" and "improvement of the quality of the environment"; secondly, the obligation that derives from this provision is for the Union and not for the Member States. The Union is required to integrate the high level of environmental protection and improvement of the quality of the environment as objectives into its policies and to achieve them in accordance with the principle of sustainable development.

There are several elements which reduce the impact of this provision for individuals, including the potential of this provision to act as a foundation for an enforceable individual right to sustainable energy. Firstly, it has been convincingly argued that Article 37 of the Charter is not a right but a principle.[385] The result of this is, as stipulated in Article 52(5) of the Charter, that this principle should be taken into account when adopting or implementing Union law, but it "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality." Following this, Article 37 of the Charter is not intended to be relied on by individuals nor to be enforced as a self-standing individual human right. It constitutes an objective to be implemented at the Union and national level and can act as an interpretative tool and standard of review for those acts. [386]

Article 37 has featured in a few cases before the CJEU. In *Associazione Italia Nostra Onlus*, the Court dealt with a question on the validity of Article 3(3) of Directive 2001/42[387] in light, *inter alia*, of Article 37 of the Charter. The Court did not elaborate separately on Article 37 of the Charter but it argued that since the principles in Article 37 are based on Article 3(3) TEU, Articles 11 and 191 TFEU, and considering that that provision of the Directive did not breach Article 191 TFEU, the validity of Article 3(3) of the said Directive could not be put in question in light of Article 37 of the Charter. Thus, the Court made clear the connection of Article 37 with the other Treaty provisions on environmental protection. In other cases, the Court has used Article 37 as an interpretative tool of EU secondary legislation[388] by favouring, inter alia, an interpretation that would best reflect the objectives in Article 37 of the Charter.

b. **Creation of new rights**

i. A right to sustainable energy construed in light of the positive obligations' doctrine?

As has been mentioned already, the ECHR does not yet contain a separate, explicit right to a healthy and sustainable environment. However, we propose that, provided that a link between sustainable energy/sustainability in general and a healthy environment is tenable, and, given that different existing rights in the Convention have been interpreted by the ECtHR as related to the protection of the environment,[389] an (indirect) environmental protection under the ECHR could, to some extent, require the implementation or an obligation to consider sustainable energy as well. Such an obligation for States[390] could possibly be developed based on the positive obligations doctrine. Furthermore, since

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385 Krommendijk and Sanderink (n 369), 631.

386 See Case C-557/15, *Commission v. Malta*, ECLI:EU:C:2017:613, Opinion of AG Sharpston, para 44 and 94.

387 Directive 2001/42/ECl of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197.

388 See Krommendijk and Sanderink (n 369), 633, and their references to cases C-900/19, *One Voice and League pour la protection des oiseaux* [2021] ECLI:EU:C:2021:211; Case C-24/19, *A. and others (Wind turbines at Aalter and Nevele)* [2020] ECLI:EU:C:2020:503.

389 Most prominently article 2 ECHR on the right to life and article 8 ECHR on the right to respect for private and family life, as will be discussed in this and the following section.

390 Countries that are parties to the ECHR are commonly referred to as 'High Contracting Parties' or 'States (parties)', as opposed to 'Member States' of the EU. As of now, all EU Member States are also High Contracting Parties to the ECHR,

climate change objectives could be linked to (future) healthy environment concerns, the nexus between climate change and energy use, as established by, i.e., Intergovernmental Panel on Climate Change (IPCC) reports, could be used to bolster an approach using the ECHR's doctrine of positive obligations.

The ECtHR has interpreted Articles 2 and 8 ECHR to the effect that they place positive obligations on States to create regulatory frameworks regarding environmental threats that could affect an individual's (quality of) life and well-being, as well as to follow-through on these frameworks with proper execution.[391] If, therefore, the operation of a particular energy source (nuclear power plant, thermal power station etc.) directly and severely affects a person's well-being, health or (quality of) life, that could amount to a violation under Article 2 and/or 8 ECHR due to environmental pollution or nuisance, potentially forcing the source to be closed. Even if this does not create a direct right to sustainable energy, legal options to force the closure of non-sustainable energy sources of course leaves sustainable sources as the only alternative, at least as long as a sufficient energy is desired and energy poverty avoided, *de facto* approaching the effect of an individual right to sustainable energy, even if it does not constitute an individual right *de iure*. Furthermore, if a dangerous impact could be predicted in advance, for instance through an environmental impact assessment,[392] this could halt the construction of the energy source. In such ways, the currently existing ECHR rights could be used in favour of sustainable energy, albeit only in specific individual cases.

Furthermore, a more general positive obligation on State parties to the ECHR could be established in relation to sustainable energy by virtue of the ECtHR's recent climate case-law, especially *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[393] The ECtHR held that States have positive obligations under Article 8 ECHR to create an appropriate regulatory framework in relation to climate change objectives, such as those determined within the United Nations Framework Convention on Climate Change (UNFCCC), and to properly execute this framework. If they do not do so sufficiently, they are in violation of the ECHR. If it can be established that sustainable energy forms an integral and inescapable part of addressing climate change and meeting these objectives, then States' positive obligations regarding climate change would include developing and executing a sustainable energy policy. Applicants may challenge States' inaction, although they would have to satisfy the admissibility criteria as clarified in *KlimaSeniorinnen*. Briefly put, the argument would be that a satisfactory sustainable energy policy, and its execution, is a necessary and ineluctable element of States' climate change policies, which they must adopt and execute in order to meet their obligations under Article 8 ECHR. If this connection is recognised within the ECHR framework, then this interpretation of Article 2 and Article 8 of the Convention must inform the interpretation of Article 2(1) and Article 7 of the EU Charter of Fundamental Rights because, as stated in Article 52(3) of the Charter, the meaning and scope of rights in the Charter should be the same as that of corresponding rights in the Convention. These arguments are further developed in the sections below.

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while the EU itself is not. For relevance of ECtHR case-law in the development of EU law, see section 5.1.1 'Sources of existing rights within EU law' and section 5.1.3 ' 'Creation of a new right within EU law' above.

391 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], App no. 53600/20, (ECtHR, 9 April 2024).

392 Environmental impact assessments are mandatory under EU law - e.g. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1 requires that major building or development projects in the EU be assessed for their impact on the environment. When required for energy-related development projects, environmental impact assessment could therefore filter in advance at least the environmental friendliness of potential projects.

393 Verein KlimaSeniorinnen (n 387).

Article 8 ECHR – from the right to private life to a right to sustainable energy?

Article 8 ECHR protects a person's private and family life, home and correspondence. It is, arguably, one of the ECHR rights with the 'widest' scope of application. It has been held to concern anything from interference with telephone correspondence to emissions from gold mines that impact people's home environment and health.[394] It is not an absolute right, however. Interference can be justified when it occurs in accordance with the law, if it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (art. 8(2) ECHR).

Particularly relevant for the protection of the environment and health are the positive obligations relating to article 8 ECHR. Contrary to negative obligations under the Convention, which prohibit States from certain actions and illegal interferences, positive obligations impose various duties on States, e.g. in the famous *Hatton* case, the Court ruled that the right to enjoy one's home includes State measures to protect the home from noise emissions.[395] Such positive obligations include both substantive and procedural aspects and range from the obligation of the State to set up an appropriate regulatory framework, which could satisfy the Convention obligations, take preventative measures in a situation of acute risk, as well as adequately inform the public of life-threatening emergencies.[396] Additionally, in case of positive obligations, it is the State that needs to convince the ECtHR that it has managed to perform a fair balance test between the public (legitimate) interests and the protected interests of an individual, if it wants to justify its interference.

Starting already in 1994 in the *Lopez Ostra* case,[397] the ECtHR decided that environmental pollution, by affecting an individual's well-being and preventing them from enjoying their home and private life, could trigger the protection under article 8 ECHR. The ECtHR subsequently found that it is not even necessary to show that an individual's health had been compromised,[398] but rather that there was an actual disturbance of the individual's life (e.g. noise pollution) that reached a sufficient level of severity, which could attest to the fact that it affected the applicant's quality of life.[399] This applies to situations where the environmental pollution was caused directly by the State as well as when the State failed to regulate the private sector activities properly, therefore triggering its responsibility.[400] This in turn creates a positive obligation to sufficiently regulate.

In order to constitute a potential violation of Article 8 ECHR, environmental damage must have a direct and sufficiently severe effect on the right to respect for the applicant's home, family life or private life. One could therefore think of a situation where a local power station could harm the environment and thus the private and home life of individuals, giving them an incentive and possibility to challenge the operation of this power station or the licence awarded to it based on their ECHR rights. In a similar vein,

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394 European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights' (*HUDOC KS*, 9 April 2024), <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng>, accessed 19 May 2024. See p.7.

395 Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights', (Human rights handbooks, No. 7, 2007) p. 10 and Hatton v. UK, App No(s). 36022/97 (ECtHR, 2 October 2001), para 96.

396 *Budayeva v Russia*, App no(s). 15339/02, (ECtHR, 20 March 2008), para 131.

397 *Lopez Ostra v. Spain*, App no. 16798/90 (ECtHR, 09 December 1994).

398 That being so, the fact that the severity threshold has been reached can be deduced even more easily where pollution or another nuisance had affected human health – 'Guide on Article 8 of the European Convention on Human Rights' (n 390), p. 27.

399 *Moreno Gomez v Spain*, App no. 4143/20, (ECtHR, 16 November 2004).

400 'Guide on Article 8 of the European Convention on Human Rights' (n 390), p.50.

the ECtHR has already ruled in cases where air pollution produced by a thermal power station affected the applicants' quality of life[401] as well as where exposure to water, air and soil polluted due to a coalmine and a coal processing factory amounted to damage to the applicant's well-being.[402]

In these cases concerning pollution or nuisance, the applicants needed to show they experienced the direct impact of the cause of the violation. However, the ECtHR has also ruled in cases relating to more generalised environmental threats. Notably, the ECtHR found that if an environmental impact assessment concluded there was a sufficiently close link between the dangerous effects of an activity and the individuals that would be exposed to such activity, then this could constitute a viable Article 8 claim.[403] This could also be the case if the State had not concluded a procedurally appropriate environmental impact assessment — since, while Article 8 ECHR does not explicitly contain any procedural obligations, the Court has held that a fair and publicly transparent decision-making process (environmental impact assessment, appropriate investigations and studies consulted etc.) is paramount to afford due respect for the interests of the individual.[404]

Beyond this well-established approach to environmental cases, the ECtHR has also recently handed down innovative judgments in cases concerning the climate. Particularly relevant is the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* case from April 2024.[405] In this case, the applicants — elderly Swiss women — argued that the Swiss authorities had failed in upholding their positive obligations under Articles 2 and 8 ECHR. In particular, they claimed that they had been, and will continue to, suffer from the effects of climate change, especially increasing global temperatures. They alleged Switzerland had not enacted appropriate legislation, which would tackle the mitigation of climate change, particularly in regard to national GHG emission limitations and carbon budget — both requirements under the UNFCCC.[406] The ECtHR found in favour of the applicants with regards to their claims pursuant to Article 8 ECHR. It decided that, in light of climate change being one of the most pressing current issues, Switzerland was obligated to adopt a regulatory framework, which would be appropriate enough to be able to mitigate the existing and potentially irreversible future effects of climate change. As Switzerland had not sufficiently done so, however, it had violated the rights of the victims under Article 8 ECHR.

There are two important substantive conclusions that can be drawn from the *Verein KlimaSeniorinnen Schweiz* case for the purposes of this study, namely the ECtHR's interpretation of the margin of appreciation and the sources of legal obligations in regard to climate change that the Court recognized in the judgement.

Firstly, the ECtHR made an important distinction concerning the margin of appreciation — the space for manoeuvre the ECtHR grants its High Contracting Parties when fulfilling their convention obligations.[407] In relation to climate change obligations, the ECtHR distinguished between the scope of

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401 *Jugheli and Others v. Georgia*, App no. 38342/05, (ECtHR, 13 July 2017).

402 *Dubetska and Others v. Ukraine*, App no. 30499/03, (ECtHR, 10 February 2011).

403 'Guide on Article 8 of the European Convention on Human Rights' (n 390) p 28 and *Taşkın and Others v. Turkey*, App no. 46117/99, (ECtHR, 10 November 2004), para 112-113.

404 Ibid.

405 *Verein KlimaSeniorinnen* (n 387). This is also the only case where the ECtHR found a substantive violation in.

406 Miranda Butler, 'Article 8 and climate change: a view of Verein Klimaseniorinnen Schweiz and Others v Switzerland (App no. 53600/20)' (*Landmark Chambers*, 3 May 2024). <https://www.landmarkchambers.co.uk/news-and-cases/article-8-and-climate-change-a-view-of-verein-klimaseniorinnen-schweiz-and-others-v-switzerland-app-no-53600-20> accessed on 20 June 2024.

407 Steven Greer, *The margin of appreciation: interpretation and discretion under the European convention on Human Rights* (Human rights files No 17.) (Council of Europe Publishing, 2000), p. 5.

the margin of appreciation States enjoy in determining the necessity of combating climate change, and the scope of the margin of appreciation they enjoy in choosing the means to do so.[408] Due to the nature and gravity of climate change, States have a more limited margin when it comes to the necessity of setting goals and objectives to combat climate change. States therefore have a significant (positive) obligation to set sufficient goals and objectives to combat climate change. When it comes to the choice of means to realise these goals and objectives however, States are left with a wider margin of appreciation.[409] In other words, the ECtHR is reluctant to force States to adopt certain specific measures to combat climate change. It could be argued that granting an individual right to sustainable energy constitutes such a specific measure, and that the ECtHR would therefore be unlikely to impose such an obligation at this time. The ECtHR instead demands that States set sufficient objectives, leaving the definition of and choice between specific measures to the national democratic process. Nevertheless, once States adopt the necessary objectives, they are required to adopt measures which would permit them to meet their targets. This means that the failure to adopt sufficient measures can constitute a breach of States' ECHR obligations. It is important to distinguish these obligations from the ECtHR imposing specific measures. Overall, this wide margin of appreciation regarding choice of means would be a significant hurdle for individuals to overcome in order to claim, specifically, a right to sustainable or clean energy.

Secondly, the ECtHR clarified the *source* of legal obligations relating to climate change under Article 8 ECHR as interpreted in *Verein KlimaSeniorinnen Schweiz*. The ECtHR makes it clear that it is only competent to rule upon legal obligations that stem from the ECHR.[410] Article 8 ECHR is engaged if the ECtHR finds that climate change can adversely affect applicants' health, well-being and/or quality of life of the applicants. This engages the State's positive duty to establish satisfactory regulatory frameworks and policies. However, in the process of determining whether and to what extent climate change can, in fact, affect human health, well-being and quality of life, the ECHR, as a living and dynamic instrument of law, is assessed in light of current scientific evidence on the matter, as well as the growing international consensus in the form of international law mechanisms, to which States voluntarily acceded, such as the UNFCCC and Paris Agreement.[411] In that way, the States' legal obligations under Article 8 ECHR can be (in)directly affected by scientific evidence and other international legal instruments, even if the obligation to act as such derives from the obligations under the Convention.[412]

As a result, other international obligations, including the Paris agreement, can influence the positive obligations of States to protect the environment under the ECHR. As the ECHR feeds into EU law via Article 6(3) TEU, moreover, this can also strengthen positive obligations under EU law, particularly when the EU and its Member States are themselves also a signatory to the relevant international law, such as the Paris Agreement. Building on this recent case law, therefore, one could imagine a rather creative and activist legal strategy to create a positive obligation for States to ensure access to sustainable energy as an inescapable part of their more general positive obligation to combat climate change. Such a strategy would at the very least require collecting sufficient scientific evidence and international legal instruments opted into by States, which show that sustainable energy forms an integral and inescapable part of any set of climate policies aimed at combating climate change. For where it can be established that the positive obligations under Article 8 ECHR cannot be met without including (a

[408] Sandra Arntz and Jasper Krommendijk, 'Historic and Unprecedented: Climate Justice in Strasbourg' *(VerfBlog,* 9 April 2024) <https://verfassungsblog.de/historic-and-unprecedented/> accessed on 10 May 2024.

[409] Verein KlimaSeniorinnen (n 387), para 543.

[410] ibid.), para 456.

[411] To read more on the legal status of the Paris Agreement and its interaction with EU law, see section 3.4.3.1 above.

[412] Verein KlimaSeniorinnen (n 387), para 465.

certain level of) sustainable energy, this would *de facto* reduce the margin of appreciation States enjoy in choosing their own cocktail of policies to combat climate change.

The nexus between energy (use and sources) and climate change has already been established by leading reports in the field, such as the IPCC reports. As unequal historical and ongoing contributions arising from unsustainable energy use have been observed as one of the main culprits for the rising GHG emissions, the 6th IPCC report, for example, advances that one of the most effective mitigation measures for reducing GHG emissions by 2030 would be to replace fossil fuels with *renewable*[413] *energy* and energy efficiency.[414]

The necessity to switch to renewable energy to achieve climate objectives has been further recognized in:

- The synthesis report made in preparation for COP28, which mentions in its key finding number 6 that "achieving net zero CO2 and GHG emissions requires systems transformations across all sectors and contexts, including *scaling up renewable energy* while phasing out all unabated fossil fuels, ending deforestation, reducing non-CO2 emissions and implementing both supply- and demand-side measures."[415]

- The 2019 Safe Climate report of the UN Special Rapporteur on the Environment (A/74/161), which mentions in paragraph 68 that "States have an obligation to cooperate to achieve a low-carbon, climate resilient and *sustainable future*, which means sharing information; the transfer of zero-carbon, low-carbon and high-efficiency technologies from wealthy to less wealthy States; building capacity; increasing spending on research and development related to the *clean energy transition*..."[416]

- The Committee on Economic, Social and Cultural Rights Statement on climate change and the Covenant of 8 October 2018, which noted in paragraph 8 that "Human rights mechanisms have an essential role to play in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. Such measures include accelerating the *shift to renewable sources of energy such as wind or solar*; slowing down deforestation and moving to agroecological farming allowing soils to function as carbon sinks; improving the insulation of buildings; and investing in public transport. *A fundamental shift in*

[413] It is important to address the terms of *renewable energy* as opposed to *sustainable energy*. *Renewable energy* is a term that is most commonly used in climate change-related reports and signifies energy sources that can naturally sustain or replenish themselves over time, such as wind, solar and hydropower as well as biomass and geothermal heat. *Sustainable energy*, on the other hand, refers to energy sources that can maintain current operations without jeopardising the energy needs of future generations, or climate in general. While most energy sources, such as wind, solar, hydropower and geothermal heat are all examples of both renewable and sustainable energy sources, there is a slight nuance when it comes to the collection and distribution of energy – in order for energy to also be sustainable, and not only renewable, it must be efficiently acquired and distributed, whilst renewable energy only looks at the way the source can maintain itself. In general, however, the terms do remain quite similar. See 'Renewable Energy vs Sustainable Energy: What's the Difference?' (*Johns Hopkins School of Advanced International Studies,* 2 July 2021). <https://energy.sais.jhu.edu/articles/renewable-energy-vs-sustainable-energy/> accessed on 4 May 2024.

[414] IPCC, *Climate Change 2023: Synthesis Report.* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC, Geneva, Switzerland, 2023), pp 35-115; and *Verein KlimaSeniorinnen* (n 387), para 404 and 405.

[415] IPCC (n 409) and *Verein KlimaSeniorinnen Schweiz* (n 387), para 139.

[416] UNGA, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (15 July 2019) A/74/16.

the global energy order is urgently required from hydrocarbon to renewable energy sources, in order to avoid dangerous anthropogenic interference with the climate system and the significant human rights..."[417]

- The EU's 2030 targets for energy and climate, as mentioned in the Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action set a 'Union-level binding target of at least 32% for the share of renewable energy consumed in the Union in 2030'[418], seemingly transforming the renewable energy objective into a goal in and of itself.

Based on such reports and legal obligations, it could be established that renewable energy forms an integral and necessary part of any strategy to prevent and mitigate climate change. Adopting the dynamic and evolutive interpretation of the Convention, the ECtHR could thus potentially establish that switching to renewable energy should be one of the main objectives under the heading of climate change, thus making it part of the States' duties under Article 8 ECHR. This would mean that States would be required to present an appropriate regulatory framework to ensure a sufficiently fast transition to renewable and sustainable energy, as well as sufficient concrete follow-up and actual implementation, as part of their positive obligations under Article 8 ECHR. In effect, this would reduce the margin of appreciation and policy space available to a State when it comes to ensuring access to sustainable energy, as any policy that does not ensure sufficient renewable energy is inherently unsuitable to prevent or mitigate climate change.

As indicated, however, this argument is speculative and far from certain to succeed. Multiple factors complicate such a line of argumentation, and therefore reduce the likelihood that national or European judges would take such a far-reaching stance and actually force certain specific policy measures on States.

Firstly, it needs to be sufficiently proven that the switch to renewable energy is an inevitable climate change objective and not *one of multiple* possible means of preventing or mitigating climate change. While the above mentioned sources show that the switch to renewable energy is crucial for mitigation efforts, so far it remains only one of the ways through which GHG emissions could be reduced, and the global temperature level kept at bay/reduced — the two goals which are largely seen as the main climate change objectives.[419] As long as States can argue that they want to achieve their climate goals through other means than renewable energy, it becomes much harder to create an enforceable positive obligation specifically to sustainable energy. Similarly, where sustainable energy is only one instrument in a larger cocktail of measures, it becomes harder to define a specific minimum of sustainable energy that must be guaranteed by a State, let alone an enforceable individual right to sustainable energy.[420]

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[417] Committee on Economic, Social and Cultural Rights, 'Statement on Climate change and the International Covenant on Economic, Social and Cultural Rights' (October 2018) E/C.12/2018/1.

[418] 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 [2018] OJ L 328.

[419] 'Facts about the climate emergency' (*UNEP*, undated) <https://www.unep.org/facts-about-climate-emergency?gad_source=1&gclid=CjwKCAjw65-zBhBkEiwAjrqRMLRpe55Ongmj3Efte3Id6JdUsyUKkFewYVIpj52m0ADWI8q4hox1zRoC4YQQAvD_BwE> accessed on 10 June 2024.

[420] Not to mention that the right to sustainable energy in this matter still would *not,* by itself, entail a right to access to energy (which was discussed in the previous sections).

Secondly, as has been proven by all of the three latest climate cases in front of the ECtHR,[421] including the *Verein KlimaSeniorinnen Schweiz* case, the issue of standing and the status of the victim under ECHR case-law are very stringent and contain a high threshold, particularly for an individual applicant. It is thus important to consider that for the ECtHR to firstly receive such a case, subsequently allow its admissibility and lastly decide in the applicants' favour, would be a highly speculative task. At the same time, we have seen that the standing requirements for interest organisations that bundle individual complaints, such as the *Verein KlimaSeniorinnen*, can be markedly more lenient than for individual applicants, perhaps because the ECtHR prefers such collective complaints. It can be expected that more organisations will be created to use this path to the ECHR and to further develop States' positive obligations regarding climate change.

Article 2 ECHR – from the right to life to a right to sustainable energy?

As mentioned earlier, the ECHR does not contain an explicit provision on environmental protection or a healthy and sustainable environment. However, the ECtHR has interpreted other provisions in the Convention, such as Article 2 ECHR on the right to life so as to include positive obligations relating to the provision of a healthy environment.

There have been several scenarios in which the right to life under Article 2 ECHR could have been undermined due to inaction of states in cases of dangerous industrial activities and natural disasters. For instance, in *Öneryıldız v. Turkey*, the ECtHR found that Turkey had violated Article 2 of the Convention because municipal authorities, despite the existence of an expert report, had not taken any measures to avoid an explosion during which nine family members of the applicant died. According to the Court, authorities knew or ought to have known about the dangers and did not take any measures. As such they had the (positive) obligation "[…]to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life."[422]

Concerning natural disasters, in *Budayeva v. Russia,*[423] the Court found a violation of Article 2 ECHR because Russian authorities had not taken measures to protect the lives of family members of applicants from mudslides. *Özel and Others v. Turkey* concerned the 1999 earthquake in Turkey and the deaths of the family members of the applicants.[424] Here, the Court found a violation of the procedural limb of Article 2 given that the Turkish authorities had not taken measures to determine the responsibilities for the events.[425]

In the most recent *Verein KlimaSeniorinnen Schweiz* case, Article 2 of the Convention was also relied on by the victims. They argued that Swiss authorities had failed to take measures to mitigate climate change, and in particular the effects of global warming, thereby violating the right to life of the applicants and of members of the applicant association. For the present study, it is especially worth

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[421] *Duarte Agostinho and others v. Portugal and 32 others*, App no. 39371/20 (ECtHR, 9 April 2024) and *Carême v. France*, App no. 7189/21 (ECtHR, 9 April 2024).

[422] *Öneryıldız v. Turkey*, App no. 48939/99, (ECtHR, 30 November 2004), para 89.

[423] Budayeva v. Russia (n 392).

[424] *Özel and Others v. Turkey*, App nos. 14350/05, 15245/05 and 16051/05 (ECtHR, 17 November 2015).

[425] Article 2 ECHR contains two general substantive obligations which arise from the text of the provision itself, namely the obligation to protect by law the right to life and the prohibition of intentional deprivation of life. Thirdly, however, the provision contains a procedural 'limb' as well, namely the obligation to carry out an effective investigation into alleged breaches of its substantive limb. See European Court of Human Rights, 'Guide on Article 2 of the European Convention on Human Rights' (HUDOC KS, 31 August 2023) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_eng> accessed on 10 September 2024.

noting that the Court clarified that for Article 2 ECHR to be invoked in complaints in the context of climate change, there needs to be a "real and imminent" risk to life.[426] According to the Court '...Thus, the "real and imminent" test may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant.'[427] This seems to raise the bar for individuals to bring a case based on Article 2 ECHR in order to argue for a positive obligation of states to take measures to mitigate climate change or eventually, to ensure renewable and/or sustainable energy.

Caveats relating to positive obligations doctrine in the ECHR context

Whilst theoretically an avenue to consider, it is however important to note the speculative nature of both, especially the latter, options presented above concerning positive obligations. It needs to be taken into account that court(s) are primarily the interpreters and applicators of the law, not legislators. Even if courts can impose general obligations to meet climate targets, and are increasingly pressing governments to do so, it is harder for courts to prescribe more specific measures to realise these climate objectives, such as specifically creating a right to sustainable energy. Imposing such specific measures reduces the policy space of the legislator, robbing them of choices on how to meet the climate targets, which undermines the democratic legitimacy of decisions made. What is more, courts are not equipped to synthesise and balance all information and competing interests that have to be considered when taking measures with such far-reaching and broad effects. This makes it particularly hard for courts to positively decide what must be done (e.g. provide all citizens with sustainable energy), as opposed to prohibiting government action that conflicts with climate obligations (e.g. exclusively funding new coal plants or granting licences to carbon-intensive and polluting activities). Even if courts are increasingly willing to sanction government inaction, since legislative discretion and democratic legitimacy are no excuse for violating binding legal obligations concerning climate change, there are limits to how far and how specific they can go in the foreseeable future, especially in imposing positive concrete measures on governments.

Last but not least, another reservation relates to the very distinct characteristic of the ECHR and its rights, namely its anthropocentric character.[428] While, as was shown, the ECHR does offer environmental protection, such protection is limited and focuses on the impacts of the environment on human beings, rather than on the environment itself.[429] For example, if due to a toxic factory leak, the local environment gets compromised and affected, this will only amount to a violation of Article 8 if the leak and consequential environmental damage affects the people living there and their health, rather than just the environment and its biodiversity. As a result, any ECHR rights, including any positive obligations that may derive from them, can only be triggered or 'activated' where there are concrete, identifiable human victims of the violations. Successful actions cannot be brought on behalf of the environment itself. Nor can they be based on generic claims that at some point climate change will affect humans. There must be a sufficiently specific connection between the failure of the state to act and a sufficiently specific and identifiable group of victims whose rights will be violated by the state's (in)action. In *Verein Klimaseniorinnen Schweiz*, these victims were older women in Switzerland who could prove that they were at higher risk of death and disease due to climate change. Of course the positive climate effects of a judgement forcing a government to act can benefit all citizens and the

[426] Verein KlimaSeniorinnen Schweiz (n 387), para 513.

[427] Ibid.

[428] Birgit Peters, 'The European Court of Human Rights and the Environment' in E Sobenes, S Mead and B Samson (eds), *International Courts and Tribunals and the Protection of the Environment* (Asser Press, 2022).

[429] *Kyrtatos v. Greece*, App No(s). 41666/98 (ECtHR, 22 May 2003), para 52.

environment as a whole: if Switzerland is forced to emit less C02 to protect female seniors, this will benefit the Swiss environment and population. Forcing any state, or the EU, to fulfil a positive obligation and hence emit less, via the ECtHR, however, can only be done where the link to specific human victims can be made.

ii. From Article 2 (right to life) and Article 7 (respect for private and family life) of the EU Charter to a right to sustainable energy?

As discussed earlier, Article 2 and Article 8 of the ECHR have been interpreted by the ECtHR as affording protection to individuals from governmental action that might have a negative effect on the environment or as requiring governments to take action to mitigate the effects of climate change. Of course, there is still a considerable leap to be made between this jurisprudential finding and the articulation of an enforceable right to sustainable or clean energy. Yet, these developments are already significant for the enforcement of rights under the Convention at the national level or before the ECtHR. Could this case law have any effect on the EU legal order and enforcement of rights under EU law?

Firstly, any positive obligation to combat climate change that would directly or indirectly help to construe a right to sustainable energy under Article 2 ECHR or Article 8 ECHR and the case law of the ECtHR, could then be used to shape the interpretation of Article 2 and Article 7 of the EU Charter to include such a right as well. This is mandated by Article 52(3) of the Charter which states "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and scope of those rights shall be the same as those laid down by the said Convention." Union law may go further than the Convention in terms of the level of protection of these rights. As a result, any positive obligation emerging under the ECHR would also offer additional avenues for individuals to enforce access to sustainable energy under the Charter, both at the national and the EU level. Such EU remedies, moreover, would have the force of primacy, and not suffer from the same standing restrictions as under the ECHR, although they would have to contend with the standing requirements under EU law and fall within the scope of the Charter — which is limited by Article 51(2) thereof.

Secondly, Article 2 and Article 7 of the EU Charter, in themselves, might have the potential to be relied on against Union institutions or Member States in order to invoke a higher level of environmental protection, the right to a healthy and sustainable environment and potentially a right to sustainable energy. It is for the CJEU to unleash the potential of these provisions through the positive obligations doctrine. As mentioned earlier, the doctrine of positive obligations under the EU Charter is still rather underdeveloped.[430] No positive obligations have been construed so far from Article 7 of the Charter in order to afford protection from environmental risks.[431] As for Article 2 of the Charter, it seems that this provision has only played a marginal role in the environmental case law of the CJEU.[432] For instance, in *Craeynest and JP* the Court did not engage in any discussion or interpretation of Article 2 in connection to the issue of air quality despite the avenue taken by AG Kokott who had argued that "...The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU"[433]. However, there could be space for the Court to construe the right to life in Article 2(1) of the

[430] Krommendijk and Sanderink (n 369).

[431] ibid 628.

[432] ibid. 619.

[433] Case C-723/17, *Lies Craeynest* [2019] ECLI:EU:C:2019:533, AG Kokott Opinion, para 53; as also discussed by Krommendijk and Sanderink (n 362), 628-629.

Charter as implying positive obligations for the Union and for Member States in order to ensure a healthy environment through sustainable energy in order to ultimately guarantee the right to life.

If such positive obligations were to be extrapolated from Article 2 and/or Article 7 of the Charter, they could constitute the basis for challenging Union or Member State policy that fails to sufficiently counter environmental risks or mitigate the negative effects of climate change. Yet, one limitation here could be the issue of competence. Article 51(2) of the Charter clearly stipulates that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." Thus, in principle there can be no positive obligations under the Charter in those policy areas in which the Union does not have the power to act according to the Treaty.[434] However, in the area of environmental law, competence is shared between the EU and Member States, and in addition, the Union has already acted by legislating in some aspects of environmental policy relating to the reduction of greenhouse gas emissions and climate neutrality.[435] The Regulation on binding annual greenhouse gas emission, for example, lays out obligations on Member States for the reduction of greenhouse gas emissions by 30% below 2005 levels in 2030. In case a Member State is not taking adequate measures to comply with these obligations, Article 2 of the Charter (right to life), could serve as the anchor for an argument based on the Charter according to which Member State inaction may be challenged as violating a positive obligation to take measures in order to guarantee the right to life. However, both Regulations referred to here seem to leave discretion to Member States on how they will achieve the goals of greenhouse gas reductions determined there and how they will comply with objectives of climate neutrality. As will be discussed below, both Regulations in their recitals refer to "sustainable energy" but they seem to leave it up to Member States how they want to achieve those agreed objectives. This might make it difficult to link any interpretation of positive obligations under Article 2 or Article 7 of the Charter to a right to sustainable energy which is sufficiently clear and precise for enforcement.

iii. A right to a sustainable energy deriving from EU secondary law?

While there are no secondary EU legal sources which would mention or legislate for a right to sustainable energy, the Union's overarching objectives, which point in a similar direction, can be found in the recital in some of these sources. For example, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018[436] mentions in its recital (7) that "*The transition to clean energy requires changes in investment behaviour and incentives across the entire policy spectrum. It is a key Union priority to establish a resilient Energy Union to provide secure, sustainable, competitive and affordable energy to its citizens...*" Furthermore, the European Climate Law[437] mentions in its recital (11) that " *In light of the importance of energy production and consumption for the level of greenhouse gas emissions, it is essential to ensure a transition to a safe, sustainable, affordable and secure energy system relying on the deployment of renewables, a well-functioning internal energy market and the improvement of energy efficiency, while reducing energy poverty*," and mentions that the Regulation respects the fundamental rights and principles of the EU Charter, with specific reference to Article 37 thereof. Thus,

[434] Verein KlimaSeniorinnen (n 387), para 629.

[435] See e.g. Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement [2018] *OJ L 156* and Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality ('European Climate Law') [2021] *OJ L 243*.

[436] Ibid.

[437] Ibid.

it can be concluded despite the mentions of 'sustainable energy' and 'sustainability' in secondary EU legislation, that it is not possible to identify a potentially enforceable right to sustainable energy based on secondary legislation as it stands right now.

5.3. Conclusion: no individual right — but a decreasing space for inaction

Based on the analysis above, it can be concluded that there currently is no enforceable individual right to sustainable energy under EU or ECHR law, although there is a basis for developing the law so as to achieve greater protection for the climate through sustainable energy. Overall, it seems unlikely that a specific right to sustainable energy would be created via the doctrine of positive obligations, notwithstanding the major developments in this field over the last couple of years. To a large extent, this is due to the understandable hesitation of national and European courts to step in and dictate to governments which acts they should specifically take to achieve their (binding) climate and energy objectives. Consequently, courts are increasingly forcing States to take sufficient actions to meet their climate objectives, but for now leave the precise policy measures to be deployed to the democratically elected officials. In the case of access to sustainable energy, this approach has the added benefit that a sudden individual right to sustainable energy would be impossible to meet, creating a situation where States are forced to violate such an individual right.

Nevertheless, individual rights and positive obligations can play an important role in the creation of an effective Climate and Energy Union. To begin with, the legislator can define more limited and practicable rights to clean energy via EU secondary legislation, building on the competences offered by amongst others Article 192 and 194 TFEU, as discussed in sections 3 and 4. In addition, the increasingly far reaching positive obligations imposed on governments by courts, coupled with the apparent relaxation of standing requirements for interest groups at the ECtHR can be used by private parties to put pressure on governments and challenge national and EU measures that do not do enough to reach the binding climate objectives or even actively go against these objectives. By actively opposing the use or expansion of non-sustainable energy, individuals can *de facto* leave sustainable energy sources as the only legally viable alternative for States, if the objective of the States would be to evade energy poverty. When that happens, those States will also have an increased incentive to collaborate at the EU level to create an effective Climate and Energy Union that can deliver the necessary sustainable energy.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, considers the legal space for an EU Climate and Energy Union. It assesses the major limits at the EU and national level, as well as the question if (informal) Treaty change is possible and necessary to create the space needed. It also assesses if an individual right to clean energy exists, or can and should be legally construed. It pays special attention to the challenge of funding and the role that the emerging principle of solidarity might play.

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