INSIGHT

THE RUSSIAN WAR AGAINST UKRAINE
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CHANGING THE FLOW: THE EUROPEAN RESPONSE TO THE RUSSIAN WEAPONIZATION OF GAS

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ABSTRACT: This *Insight* offers an overview of the EU's evolving energy policy in the face of the energy crisis which followed the Russian illegal invasion of Ukraine, highlighting the critical interplay between legal measures, market dynamics, and geopolitical strategy. In the first section, the *Insight* will examine the history of the EU policy on gas and its inherent risks, presenting the supply shock which occurred after the invasion February 2022. In the second section, the *Insight* details the legislative measures adopted under RepowerEU in the field of gas, describing the various approaches such as reducing consumption, ensuring storage, and fostering interstate solidarity, highlighting how the political debates between member states have contributed to shape the Regulations on the matter. In the third section, the *Insight* also explores the complex dynamics of market interventions, particularly the debated Market Correction Mechanism (MCM) and its implications for EU energy markets. In the final section, the *Insight* examines the impact of these measures, noting the mixed outcomes highlighted in the EU commissioned reports and presenting the criticism of other stakeholders, highlighting the legal challenges in implementing coordinated energy policies among Member States with diverse interests. Moreover, reflecting on the post-crisis landscape, the *Insight* advocates for a transition from emergency measures to strategic foresight in energy policy. It argues for the EU's need to balance national autonomy with collective energy security, suggesting a shift towards more integrated energy policies also in light of preserving the EU's strategic autonomy in response to emerging geopolitical challenges.

KEYWORDS: energy security – supply of gas – EU response to energy crisis – decoupling from Russia – price cap – gas solidarity.

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I. The complexity of the geopolitical matter

The European Union (EU) faces significant challenges regarding natural resources and raw materials, vital for its industries and infrastructure. A key resource, natural gas, has been largely imported, with Russia as the primary supplier for decades. This dependence has subjected the EU to risks like political instability, price volatility, and supply disruptions, impacting energy security and geopolitical interests. Likewise, the legislation on gas was also part of various legal disputes and discussions in the scholarship on the topic. The energy crisis following the 2022 escalation of the Ukraine war is a clear example of the risks to which the EU is subjected. This *Insight* carries out a study of the EU's legal response to the Russian weaponization of gas flows, and, by contextualizing the European legal framework on gas supply with policy papers and institutional documents, this *Insight* argues that the EU underestimated the likelihood of such a disruption. Moreover, the *Insight* also argues that while the EU's emergency response was swift and legally sound, significant challenges remain in crafting permanent policies allowing the diversification of its gas supply and the improvement of its energetic resilience. In this first section this insight will briefly describe the evolution of the EU policy on gas focusing on the changes after the invasion of 2022.

In the second section the *Insight* will categorise the legislation on gas supply put forward to cope with the emergency, describing also its formation process.

The final section calls for more coordinated European policies to enhance energy sovereignty and security, highlighting how the emergency legislation in response to this crisis reflects a broader policy shift towards foreign economic actors, also describing the potential legal challenges in the establishment of more permanent gas security measures.

I.1. EU gas policy before 2022

Post-World War II, gas was a minor player in European political agendas, overshadowed by cheap, readily available coal and oil.[1] From the 1970s to the 1980s, however, natural gas grew in importance due to two shifts: first, the oil crises of 1973 and 1979 reduced oil availability; secondly, growing environmental concerns in Europe cast oil as finite and coal as polluting.[2] These developments drove some EEC members to source gas from the Soviet Union, resulting in the opening of several pipelines.[3]

After the fall of the Soviet Union, the markets experienced an increasing openness, and it is in the 90's that Russia became the main supplier of Europe's natural gas. In the context of openness of the times, it is interesting to note that the Commission envisaged

[1] D Wertlen and L Mokrá, 'The Europeanisation of Energy Policy – What Scenario for Effective Institutionalism?' (2020) European Studies 154.

[2] *Ibid.*

[3] R Kandiyoti, *Powering Europe: Russia, Ukraine, and the Energy Squeeze* (Palgrave Macmillan 2015).

Russia as a main strategic partner in order to reduce the dependence from oil of the continent.[4]

Despite its importance, Europe's gas reliance was also seen as a strategic vulnerability, prompting calls for a more coordinated Energy Policy since 1995.[5] Nevertheless, in the development of the European policy on energy, Member States (MS) have always reclaimed a strong degree of autonomy, rejecting laws and provisions who they believed infringed on the right of the states to choose their own energy mix.[6]

Serious considerations for mitigating gas supply disruptions emerged post the 2006 and 2009 "gas wars" between Russia and Ukraine. The EU's first steps towards gas security, influenced by deteriorating relations with Russia, involved the promotion of market liberalization measures like "unbundling" (separation between network operator and energy supplier) and "third party access" (the obligation of the operator to provide any supplier or generator the use of the network, subject to certain condition and fees).[7] The measures were introduced during the construction of the South Stream Pipeline, and were strongly contested by Gazprom, who challenged the measures in front of the Court of Justice, who rejected the pleas, and ultimately led to the termination of the project.

The 2014 Ukraine crisis further led to a comprehensive gas security regulation which introduced a "solidarity mechanism" for gas sharing among countries to safeguard "protected customers" – aimed at ensuring gas availability for households and essential social services during shortages.[8]

The concept of solidarity was already mentioned in a proposal by Poland in 2006 to create an "energy security" treaty, which would have established various cooperation mechanisms and provisions of energy interconnections.[9] Nevertheless, the Polish initiative failed due to the relative lack of interests of the other MS, as well as the unclear framework of

[4] See Green Paper COM(2000) 769 final from the Commission of 29 November 2000 on the security of energy supply; Communication COM(2007) 1 final from the Commission to the European Council and the European Parliament of 10 January 2007, An energy policy for Europe, 12.

[5] White Paper COM(95) 682 final from the Commission of 13 December 1995, An Energy Policy for the European Union.

[6] Since the 80s, the treaties have included a clause which protects the right, dubbed "energy mix" clause: in the TFEU this clause is now present in art. 192 on environmental protection and art. 194 on energy; See the full account in K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFUE and the Evolution Of Eu Competences In The Energy Sector' (2021) ICLQ 991.

[7] While such measures were introduced in the context of 2009, similar measures of liberalization have been discussed since the '90s; K Talus, *EU Energy Law and Policy: A Critical Account* (OUP 2013).

[8] 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.

[9] Council, Proposal for a European Energy Security Treaty – presentation by the Polish delegation, Doc 7160/06 of 6 March 2006.

such agreement. Still, it has been said that such initiative encouraged the inclusion of the term solidarity in what would become art. 194 TFEU.[10]

1.2. The Russian retaliation after the invasion

The escalation of the conflict in Ukraine by Russia came as a watershed moment for the EU energy policy, which was already undergoing discussions during the Green New Deal implementation phase.[11] The international community reacted with shock, and the US quickly condemned the aggression and imposed comprehensive sanctions. The EU, supporting Ukraine, adopted a new round of political, diplomatic, and economic sanctions against Russia. In response, the Russian government threatened retaliatory moves, and subsequently Russian state-controlled Gazprom temporarily halted gas supplies to Poland and Bulgaria.[12]

As such, the supply of natural gas immediately came at the forefront of the EU agenda, as testified by the Council conclusions of the 24th and 25th March, which gave mandate to the Commission to ensure the steady reduction of dependence from the Russian fossil fuels and to implement new mechanisms of solidarity between member states.[13]

The disruption in gas supply led to soaring gas prices across member states, impacting consumer and industrial utility costs and threatening economic stability, with concerns about heating availability in winter 2022. In response, the Commission introduced the RepowerEU package, focusing on energy saving, diversification, and specifically targeting the elimination of dependency on Russian energy sources.[14]

II. The measures adopted in response (and their opposers)

After the communication, the Commission quickly started to draft various legislative proposals dealing with the various aspects of RepowerEU. The measures combined strategies focusing both the internal side, with provisions aimed to reduce the internal gas demand, with measures addressing the broader global market. Nearly all measures were adopted under art. 122(1) TFEU, requiring only a vote in the Council. The measures adopted covered a broad scope, and the Commission faced criticism by MS and private entities, who highlighted that some of the measures were not appropriately covered by the chosen legal basis.

[10] M Roth, 'Poland as a Policy Entrepreneur in European External Energy Policy: Towards Greater Energy Solidarity vis-à-vis Russia?' (2011) Geopolitics 600.

[11] L Hancher, 'EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead' (SIEPS European Policy Analysis 1-2024) www.sieps.se.

[12] Press statement by President von der Leyen of 27 April 2022 following the announcement by Gazprom on the disruption of gas deliveries to certain EU Member States. ec.europa.eu

[13] European Council Conclusions of 24-25 March 2022.

[14] Communication COM (2022) 230 final from the Commission of 18 May 2022, 'RePowerEU Plan'.

II.1. The first steps: saving gas

In June 2022, the first measure introduced was Regulation 2022/1032 which mandated MS to fill their underground gas storages to at least 80 per cent by November 2022, and 90 per cent in subsequent years until 2025. The regulation also established a certification mechanism for storage operators to certify their compliance with the parameters of Regulation (EC) No 715/2009, to prevent control by risky third-country entities, and providing a fast-track certification for large sites over 3.5 TWh.[15]

Then, with Regulation (EU) 2022/1369, the gas security directive was amended introducing a plan to reduce gas demand by 15 per cent in winter 2022. The reduction measures are voluntary, but the regulation also introduces a “Union Alert” that can be triggered by a Council decision - either due to a substantial risk of gas shortage, exceptionally high demand, or upon request from five or more Member States - that renders the 15 per cent reduction mandatory.[16]

Despite some Member States' reservations about this mandatory reduction, Hungary was the only country to vote against in the Council. Poland later contested the legal basis of the act, arguing it should fall under art. 192(2)(c) TFEU in conjunction with the second subparagraph of art. 194(2), which require unanimity.[17] Such opposition during discussions among MS influenced a procedural change from the initial proposal, which originally empowered the Commission to activate the “Union Alert”.[18]

To further combat rising prices, the Commission released a proposal for a comprehensive regulation including diverse strategies: pooling resources for price transparency, emergency gas sharing, and a “Market Correction Mechanism” (MCM) to cap gas transactions over a certain price.

II.2. Gently steering the market

As a first approach, the resulting Regulation 2022/2576 aims to enhance the coordination and transparency of the EU's natural gas market with the aim of ensuring lower prices. Art. 3 requires entities involved in significant natural gas transactions (over 5 TWh/year) to notify the European Commission and relevant Member States about key details of

[15] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage.

[16] Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

[17] Case C-675/22 *Republic of Poland v Council of the European Union* (action brought on 2 November 2022 pending). In its submission, the Polish Government alleges that the measures significantly affect its energy choices. Poland also challenged the mechanism of the Union alert, deeming the conferral of powers to the EU institutions against the principle of legal certainty; Finally, Poland alleges the measures breach of the principle of energy solidarity.

[18] Proposal for a Council Regulation COM (2022) 250 final of 20 July 2022 on coordinated demand-reduction measures for gas.

these transactions, including partner identity, transaction volumes, and dates, in order to assess potential impacts on the internal market, supply security or energy solidarity dynamics.

Similarly, the regulation introduces transparency measures for Liquified Natural Gas (LNG) markets, mandating the EU Agency for Cooperation of Energy Regulators (ACER) to publish daily price assessments and benchmarks for LNG and requiring market participants to provide detailed transaction information to ACER.[19] The Commission believed that the lack of a reliable price indicator led in fact to competitive tensions among EU Member States, inadvertently escalating prices. This initiative combats the excessive influence of hub-indexed pricing and potential external manipulations, particularly by Russia, ensuring stable and predictable pricing for LNG imports. [20]

The demand aggregation operations and joint natural gas purchasing are managed by an ad hoc Steering Board composed of representatives from each Member State and the Commission established by art. 4 of the regulation.

II.3. Joint purchases of gas

The idea of steering the markets is also reflected in the creation of a new EU Energy Purchase Platform for the common purchase of gas, Liquified Natural Gas and hydrogen from external suppliers which aims to coordinate the action of private sector. This platform is managed collaboratively by a consortium of MS and gas companies under the supervision of ACER.

While the involvement in the platform is principally voluntary, the Regulation, introduces a mandatory component for Member States, who are required to ensure that their respective natural gas undertakings and entities consuming gas participate in the process of demand aggregation organized by the service provider, with the stipulated volume being at least 15 per cent of the total necessary to meet their gas storage filling targets as outlined in the amended Regulation 2017/1938.[21]

The Regulation also details the procedural framework for the platform's operation, including the criteria for selecting the service provider and the mechanisms for joint purchasing. Notably, arts 8 and 9 of the Regulation imposes specific restrictions on participation, particularly targeting entities with connections to Russian-owned firms.[22]

[19] 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, art. 18.

[20] Hub index pricing in natural gas markets reflects real-time supply and demand at hubs like Europe's TTF in the Netherlands, contrasting with oil-indexed pricing. This method has gained prominence with Europe's shift from long-term, oil-linked contracts to flexible, short-term market-based ones, aligning with the liberalization of the gas market and the increase in spot market trading. This change enables immediate gas transactions, marking a significant evolution in pricing dynamics.

[21] Art. 10 Regulation (EU) 2022/2576 cit.

[22] Arts 8-9 Regulation (EU) 2022/2576 cit.

II.4. Enforcing solidarity

Finally, the regulation also introduces a default solidarity mechanism to cover potential crisis of supply in a single MS. Such mechanism can be called when a MS faces a severe gas shortage that threatens essential services like electricity supply and cannot meet the gas supply needs of their "protected customers" or maintain necessary volumes for electricity security, despite having implemented the crisis measures of Regulation 2017/1938.[23] MS with LNG facilities are also included in the solidarity obligations, broadening the potential support base during a crisis.[24]

In situations without pre-existing gas solidarity agreements, a MS facing a gas crisis can formally request help, specifying needed gas volumes, delivery timeframe, and interconnection points to other Member States, the European Commission, and crisis managers, who ensure a coordinated response within three days.[25] Member States can refuse to assist only if they lack sufficient gas for their own needs or have limited interconnection capacity.[26]

The proposal also presented an additional "gas allocation mechanism" which would have distributed gas between the various MS in case of crisis, however, the details of such instrument have never been specified[27] and such measure has been dropped from the final regulation.[28]

III. The most debated aspect: what limits to market intervention?

In the political debate, various politicians and states required a stronger action on the price regulation of energy transactions. In order to realize such aim: the second chapter of Regulation 2022/2576 introduces a "intra-day volatility management mechanism" (IVMM) which requires each trading venue to set up a mechanism, comprising upper and lower price boundaries that define the prices above and below which orders cannot be executed, with the goal of preventing extreme price movements and ensure the formation of reliable end-of-day closing prices. The price boundaries are to be calculated by the venues based on opening and closing prices at certain intervals and are to be adjusted according to characteristics of each derivative, such as liquidity and volatility profile. Trading venues are also required to adhere to various rules of transparency and are supervised by national authorities who oversee the implementation of the mechanisms.[29]

[23] Art. 23(1)(a)(b) Regulation (EU) 2022/2576 cit.

[24] Art. 26(1) Regulation (EU) 2022/2576 cit.

[25] Art. 28 Regulation (EU) 2022/2576 cit.

[26] Art. 27(6)(a)(b) Regulation (EU) 2022/2576 cit.

[27] A Barnes, 'EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment' (2022) OIES Paper NG 176 www.oxfordenergy.org, 23.

[28] The reason for the elimination might be rooted in the limitations of art. 122 TFEU, see *infra* section IV.3.

[29] Arts 15 ff. Regulation (EU) 2022/2576 cit.

The proposal of regulation also presented a Market Correction Mechanism (MCM) which was the answer to various calls for a "price cap" over the profits made by gas companies during the crisis.[30] Nevertheless, such MCM proved itself to be politically controversial and is not present in the final regulation, as in fact, it has been decided to separate the discussions on the issue to another specific one.

III.1. Regulation 2022/2578: another round of the price cap debate

The exclusion of the previous provisions can be explained by the strong skepticism expressed by some states and stakeholders on their capacity to specifically address the high prices without creating a grave distortion of market flows or require measures such as rationing.[31]

Thus, the ideas of mandatory MCMs were eliminated from the text of the proposal previously discussed: nevertheless, the debate on a price cap continued, with various states, particularly the ones of the Southern area, vouching for a similar mechanism. As such, the Commission released another specific proposal.[32]

The proposal was strongly debated and criticized, as states like Germany or the Netherlands believed that the measure would have been ineffective and could have negative effects on the supply.[33] Some analysts question whether this price limiting could amount to a breach of competition law, nevertheless the Commission approved a similar scheme put in place by Spain, deeming it compatible with art. 107 TFEU.[34]

The final version of the MCM in Regulation 2022/2578 thus limits the prices of gas derivatives at the Title Transfer Facility (TTF) market and other Virtual Trading Points (VTPs)[35] in the EU when the TTF front-month derivative settlement price surpasses EUR 180/MWh for three consecutive working days and is at least EUR 35 higher than a reference price reflecting world market prices. Upon activation, the MCM caps the maximum price that gas traders can charge for contracts expiring within one year, setting it at the

[30] Proposal for a Council Regulation COM(2022) 549 final of 18 October 2022, Enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks, arts 23 and 24.

[31] A Barnes, 'EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment' cit.

[32] Proposal for a Council Regulation COM(2022) 668 final of 22 November 2022, Establishing a market correction mechanism to protect citizens and the economy against excessively high prices.

[33] Politico, *EU agrees on gas price cap, skeptics denounce it as an 'illusion'* www.politico.eu.

[34] Energy Nordic, *EU parliament approves electricity price reductions in Spain* energynordic.com.

[35] Virtual Trading Points are non-physical locations where natural gas is traded and contracts are exchanged among market participants. Unlike physical trading points where actual gas flows are involved, VTPs are purely financial platforms that allow for the buying, selling, and transfer of gas rights or contracts. VTPs play a crucial role in the natural gas market by enabling a flexible and efficient mechanism for trading gas across different regions, contributing to market liquidity and price transparency.

reference price plus a EUR 35 margin. The European Commission, informed by the monitoring of the ACER, the European Securities and Markets Authority (ESMA), and other relevant bodies, has the authority to stop or pause the MCM if it leads to undesirable market disturbances or jeopardizes the security of gas supply.[36]

III.2. A balancing solution?

The key difference between the original proposal and the final regulation is the introduction of a “dynamic bidding limit” which replaces a fix EUR 275 cap mentioned in the proposal. This dynamic limit adjusts according to the reference price, providing a more responsive mechanism to market conditions, preventing the acceptance of orders for derivatives which significantly exceed the reference price, curbing extreme price spikes and providing stability to the gas market.

This MCM differs moreover from the IVVM in the previous regulation because they cover different mechanisms. The first is set up by trading venues to manage price volatility within a trading day for energy-related commodity derivatives, and prevents the execution of orders that would lead to excessive price movements. The second is more of a macro-prudential tool aimed at the broader energy market to combat periods of sustained high prices, acting as an “emergency brake” for the market, whereas the intra-day mechanism is a micro-prudential tool, aimed at preventing excessive volatility within a single trading day.

This change has probably been the result of the accommodation of the opposing states, who did not agree to a potential blocking of transactions, and elaborated a more flexible cap. Nevertheless, the MCM has remained controversial, even so that various states have provided a statement in the Annexes of their written procedures highlighting their criticism, even if some have still voted in favour for a spirit of solidarity.[37]

IV. The effectivity of the measures: the impact assessments and the comments

As 2023 concludes, initial impact assessments of the regulations' measures are emerging, allowing for preliminary conclusions and evaluations of their effectiveness. The reports show mixed outcomes: some measures are praised and deemed valuable, but others haven't produced significant results and are considered unworthy of extension. Additionally, industry stakeholders have criticized certain measures as ineffective and cumbersome, advocating for their discontinuation and challenging them in front of the European Court of Justice.

[36] 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, art. 3 ff.

[37] End of the written procedure CM 5890/22 of Proposal COM(2022) 668 final of 22 December 2022 – Annex I.

While permanent mechanisms are being discussed, the Commission proposed an extension of the measures for one year, deliberating again under art. 122.[38]

IV.1. After the emergency: the situation after one year

After one year, the mechanism of Regulation 2576 has been put in place: the service provider Prisma has been contracted under art. 5 of the regulation, and coordinating with the Commission, created the platform AggregateEU.[39] The platform, launched on 25 April 2023, has been defined as a “demand aggregation platform” and has organized various joint tenders. As of October 2023, the mandatory target of 13.5 bcm established by the Regulation has been reached, with a yield of 44.75 billion cubic meters of aggregated demand against 52 bcm of bids, with 34.78 bcm successfully matched. Discussions to prolong AggregateEU's operation beyond 2024 are underway, with proposals to include in the Hydrogen and Decarbonized Gas Market Package a permanent mechanism encompassing also renewable hydrogen and other renewable gases.[40]

In its report, the EU assessments deem AggregateEU successful and endorse the idea of a permanent mechanism.[41] Nevertheless, the stakeholders in the gas industry remain quite colder to the idea, with Eurogas supporting only a one year extension to assess whether the instrument can foster the development of other markets such as methane,[42] or with the International Organization of Gas Producers which instead posits that “existing commercial channels / energy exchanges remain preferred by experienced market participants”.[43] The platform has been ultimately extended, but notably art. 10 on mandatory participation has been struck down by the Council.[44] Still, the fact that this experience will be used as a basis to set up a purchasing platform under the Critical Raw Materials act further may be considered an highlight of a relative success of the measure.[45] Another mechanism the EU aims to extend are art. 25's default solidarity

[38] DG ENER, *Commission prolongs energy emergency measures by 12 months* energy.ec.europa.eu.

[39] Remarks by Vice-President Maroš Šefčovič of 16 May 2023 on launch of first tender for joint gas purchases under the EU Energy Platform. ec.europa.eu

[40] IOGP Europe, *Letter: Industry views regarding the proposal to establish a permanent demand aggregation and joint purchasing mechanism through the Recast Gas Regulation* iogpeurope.org.

[41] Report COM(2023) 547 final from the Commission to the Council of 28 September 2023 on the main findings of the review of Council Regulation (EU) 2022/2576 of 19 December 2022, in view of the general situation of the gas supply to the Union.

[42] Eurogas, *Industry views regarding the prolongation of the joint purchasing demand aggregation mechanism* www.eurogas.org.

[43] IOGP Europe, *Industry views regarding the prolongation of the joint purchasing demand aggregation mechanism*, cit.

[44] Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application.

[45] A Tidey, ‘EU should replicate joint gas purchases for hydrogen, critical raw materials – Commissioner’ (13 July 2023) Euronews www.euronews.com.

measures, which, despite not being activated, were positively assessed in a "dry run test" for crisis effectiveness. The same tests have shown that extending these mechanisms to LNG is crucial for resilience in similar future crises.[46]

As for the mechanisms to control prices, the picture seems to be more blurred: ESMA already highlighted that the mechanism had a marginal effect in reducing energy prices at the beginning of 2023, and has refrained to express an opinion on the opportunity of an extension, deeming the establishment of a MCM a political decision.[47] The ACER assessment was even more critical, and deemed the mechanism as not appropriate to deal with shock of demand.[48] While the ESMA's assessment of the IVVM is more nuanced, the opinion still finds no compelling reason for an extension of the measure.[49] While "Price caps" were probably the subject of the most time consuming and acrimonious political debates: commentators have highlighted how such political confrontation may have been an overall "opportunity cost" paid by the EU, which could have instead directed more time and resources to more active measures of support, such as direct cash transfer to the most affected people and enterprises.[50]

IV.2. The energy community (was) now: was the EU prepared?

While this crisis seems to have subsided, the whole situation opens a broader question on whether the Union is ready to experience shocks as this one, as initiatives like the "energy security treaty" testify, this doctrine is not new.[51] Despite this, the EU has never really considered the risk of a total cut of supply from its market: it is striking how the amongst the scenarios of crisis of the last stress tests run by the European Network of Transmission System Operators for Gas (ENTSOG) until 2021, there was no plan for a complete cut of Russian supply, all despite the already tense situation following the invasion of Crimea.[52]

The EU's energy policy reveals a paradox: while the Commission emphasizes that energy issues, including sustainability and climate concerns, are optimally managed at the EU level, individual Member States often craft more effective policies, driven by diverse

[46] Report COM(2023) 547 final cit 22

[47] ESMA, *Effects Assessment of the impact of the market correction mechanism on financial markets* www.esma.europa.eu 49.

[48] ACER, *Market Correction Mechanism – Effect Assesment report* acer.europa.eu 43

[49] ESMA, *Final Report on the implementation and functioning of the Intra-day Volatility Management Mechanism* www.esma.europa.eu

[50] A Barnes, 'EU Commission proposal for joint gas purchasing, price caps and collective allocation of gas: an assessment' cit.

[51] Communication COM(95) 478 final from the Commission of 18 October 1995, European gas Supply and Prospects.

[52] See ENTSOG, *Union-wide simulation of gas supply and infrastructure disruption scenarios (SoS simulation)* www.entsog.eu.

interests.[53] It is interesting to notice that despite the EU's objective to reduce dependence on Russia, Russian LNG exports to the EU increased by 40 per cent compared to 2021. This increase is primarily attributable to Spain, which increased its Russian LNG imports to meet energy needs. This occurred even though some analysts assert that the EU can navigate the energy crisis without additional Russian sources.[54]

What is more striking is that most of the measures discussed have already been proposed before either by the Commission, the Parliament or some member states, but were often sidelined because of a lack of political will, or the opposition of a specific country.[55] The "Energy Union is now" was the title of a policy paper released in 2010 by the Delors Centre, where the think tank argued for an interconnection of energy grids, a centralization of energy policies and, most especially, mutual solidarity mechanisms between MS and common gas purchases.[56] Nevertheless, confirming Jean Monnet's old adage, it is only with this crisis in 2022 that the EU moved to implement such measures, which were before left to the discretion of MS.

IV.3. The legal issues

The delayed action can also be attributed to the potential legal hurdles posed by the architecture of the Treaties. While this crisis has shown the potential perils of leaving too much power to individual states, energy remains a shared competence, but the treaties leave a strong autonomy to MS, particularly on fiscal matters, and in the choice of energy mix.[57] During the discussions on the amendment of the Treaties following the Conference on the Future of Europe, this led some MEPs to propose a resolution amending arts 192 and 194 TFEU eliminating their special procedures requiring unanimity and their clause on the energy mix.[58] Notably, the Parliament Energy committee took a more con-

[53] M Mišík and A Nosko, 'Each one for themselves: Exploring the energy security paradox of the European Union' (2023) Energy Research & Social Science 103074.

[54] Bruegel, *The EU can manage without Russian liquified natural gas* www.bruegel.org.

[55] An example of that is the idea of joint purchases of gas, which was opposed by Germany, allegedly because Russia could have not differentiated the prices offered to the various countries providers; S Płóciennik, 'Poland's Policy towards Germany' in Polish institute of international affairs (ed.), *Yearbook of Polish Foreign Policy 2011–2015* (The Polish Institute of International Affairs 2020) 171.

[56] Institute Delors, *The European Energy Community Is Now!* institutdelors.eu.

[57] The extent of the clause is debated by the scholarship, while there is still no case law on art. 194, some have considered the case law on art. 192 by analogy to specify that the exception should have a narrow interpretation, and prohibit only measures who have a specific intent of imposing or prohibiting the use of a certain resource See on this K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFUE and the Evolution of EU Competences in the Energy Sector' cit.

[58] European Parliament resolution of on proposals of the European Parliament for the amendment of the Treaties, T9-0427/2023, 22 November 2023.

servative position, amending the clause specifying that the laws should not "have a *significant* affect" on the energy choices of a MS.[59] Still, it is worth stressing that the Court of Justice of the European Union (CJEU) clarified in its case law that the discretion has to be considered in light of the objectives stated and the "spirit of solidarity" mentioned in art. 194.[60]

In light of this, art. 122(1) TFEU represented a useful tool for the Commission to solve such conundrum and ensure a rapid legal action, similarly to what happened for the establishment of the ESM during the 2010's financial crisis, or the SURE mechanism during the pandemic. The width of the actions that can be undertaken however has been put into question, particularly in regard to how much obligations can this legal basis impose to other MS.[61] All things considered, the challenge to Regulation 2022/1369 proposed by Poland, if deemed admissible, could better clarify the scope and objectives of art. 194 TFEU.[62]

The measures adopted under art. 122(1) TFEU, however, can only be temporary, thus, to be better prepared for the challenges and crises of the future, both the EU and its MS would benefit from exiting from such "emergency mindset". The new geopolitical situation would in fact require the EU to adopt more "strategic foresight" – a concept which is introduced in the context of the "better regulation initiative"[63] – to ascertain what are the potential future risks and opportunities of a policy also keeping in the mind its international economic and (geo)political ramifications.

IV.4. The return of geopolitics and the future of an open(?) strategic autonomy

The situation faced by the EU, albeit unprecedented, was in fact not unpredictable: on the other hand, together with the issues faced in the pandemic, this crisis can also serve

[59] Letter of the Committee on Industry Research and Energy, ITRE-AL-740662, 24 January 2023 www.europarl.europa.eu

[60] L Hancher, 'EU Energy Market Regulation after the 2022 Energy Crisis: the reforms so far and the challenges ahead' cit. On the issue of solidarity, in the Opal ruling the Court annulled the granting of an exemption for the rules established in the Third Energy Package on the grounds that potential harms to Polish energy security were not adequately considered: it is clearly established that this duty of care falls on both the EU and the MS, case C-848/19 *Germany v Poland* ECLI:EU:C:2021:218 para. 71.

[61] M Chamon, 'The rise of Article 122 TFEU: On crisis measures and the paradigm change' (1 February 2023) Verfassungsblog verfassungsblog.de, on the relation between this concept of solidarity and the one of art. 194, see K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFUE and the Evolution of EU Competences in the Energy Sector' cit.

[62] Another RepowerEU measure challenged for similar reasons by private parties was a solidarity contributions established on the windfalls of electric companies, nevertheless, the admissibility of the plead is questionable, as the companies would have to pass the threshold to have locus standi as "non-privileged" applicants See on this L Hancher, 'Solidarity on Solidarity Levies and a Choice of Energy Mix: A Sound Legal Basis for Emergency Action in the EU's Energy Markets' (8 February 2023) Verfassungsblog verfassungsblog.de.

[63] Anticipates trends, risks, emerging issues, and their potential implications and opportunities in order to draw useful insights for strategic planning, policy-making and preparedness.

as a strategic lesson for Europe. Since the 90's in fact, the main doctrine of the EU has been expanding its reach with commerce and interdependence, fostering multilateralism and common understanding. While the policy has shown a great effectivity, the Commission itself has recognized a shift in the geopolitical trends.

This *Insight*, however, has tracked how EU law morphed to reflect this new geopolitical reality. The idea of excluding "Russian" providers represents an interesting evolution, because it shows that the EU has recognized explicitly a strategic adversary to counter in a legal act. This change is in line with the new "nationality based" sanctions introduced as a response to the invasion.[64] Similarly, the wariness of other economic actors is reflected in acts ideas like the "anti-coercion instrument".[65] In this new context, thus, instruments such as the security of supply tests should be updated including potential coercion attempts or retaliatory acts from specific states.[66]

Similarly, as testified by the increasing use of purchasing platforms, coordination between the energy policies of the MS is of crucial importance because, as the events have shown, the lines between the exercise of economic activities, even by private individuals, and foreign policy are getting more blurred: thus, for instance, choosing a state as a partner for gas is in itself a strongly political act, and if the EU recognizes such freedom to the MS, they have at least to be mindful of the implications for the others and the Union.

[64] S Poli and F Finelli, 'Context specific and structural changes in EU restrictive measures adopted in reaction to Russia's aggression on Ukraine' (2023) Eurojus 19.

[65] A Nguyen, 'Questioning the EU Anti-Coercion Instrument – Conflating the Curtailment of 'Strategic Autonomy' with the Erosion of Sovereignty?' (10 October 2023) EJIL: Talk www.ejiltalk.org.

[66] The ENTSOG SOS tests only contemplated scenarios of disruptions of supply considering the states of transit (disruption of all supply through Ukraine/Belarus etc..), moreover, the scenarios considered were also tested on a limited two-week timeframe, without considering a more sustained and hostile disruption.