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What are the limits of the European Union's energy emergency law?

Jakie są ograniczenia unijnego prawa dotyczącego sytuacji nadzwyczajnych w sektorze energetycznym?

Abstract

Sudden and difficult-to-predict events, such as the financial crisis, COVID-19, and the war in Ukraine, made it necessary for Member States as well as EU institutions to counter them. The legal system proved unprepared and it was necessary to resort to special emergency law procedures, which have existed since the beginning of the EU, but were rarely used. The legal framework points out conditions that should be considered (emergency, temporary nature and solidarity). This raises questions – which this article seeks to answer – of the limits to the application of the EU emergency law in the energy sector, particularly in connection with the Lisbon Treaty's creation of a separate EU energy policy.

Keywords: EU energy policy, emergency law, energy solidarity, security of supply

Streszczenie

Nagłe i trudne do przewidzenia wydarzenia, takie jak kryzys finansowy, pandemia COVID-19 oraz wojna w Ukrainie, wymusiły konieczność podjęcia działań przez państwa członkowskie oraz instytucje UE. System prawny okazał się nieprzygotowany, co sprawiło, że konieczne stało się odwołanie do specjalnych procedur prawnych dotyczących sytuacji nadzwyczajnych, które istniały od początku istnienia UE, lecz były rzadko stosowane. Ramy prawne wskazują na warunki, które powinny być brane pod uwagę (stan nadzwyczajny, tymczasowy charakter oraz solidarność). To rodzi pytania – na które niniejszy artykuł stara się odpowiedzieć – o granice stosowania prawa nadzwyczajnego UE w sektorze energetycznym, zwłaszcza w kontekście ustanowienia odrębnej polityki energetycznej UE na mocy Traktatu z Lizbony.

Słowa kluczowe: polityka energetyczna UE, prawo nadzwyczajne, solidarność energetyczna, bezpieczeństwo dostaw

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Introduction

Emergency law refers to regulations adopted to effectively counter a crisis or other emergency, such as natural disasters, civil unrest, armed conflict, terrorist attacks or other threats to public safety and health. The executive branch of the State is given additional powers to take action to counter a crisis that would normally be restricted or prohibited. It may temporarily upset the principle of the separation of powers, and it is possible to suspend or modify certain rights, including constitutional rights or civil liberties. These solutions are time-limited in nature and are intended only to counteract the crisis.

Emergency laws are part of the European Union (EU) legal order, where they have a dual character. On the one hand, they are part of the legal solutions governing the respective fields of law, where, in addition to regulating business-as-usual situations, they regulate the emergency situations, creating a long-term framework but adapted to particularities of specific sector. On the other hand, where the existing legal framework becomes insufficient and new solutions need to be quickly created, it provides appropriate emergency mechanism, currently contained in Article 122 of the Treaty on the Functioning of the European Union (TFEU), the prototype of which already existed in the 1957 Treaty of Rome (EEC Treaty).

Until the financial crisis (2007–2009), the COVID-19 health crisis (2019–2022) and the energy crisis related to the war in Ukraine (2022+), the provision of Article 122 TFEU was relatively rarely used. Only recent years show an increased interest in this provision as a legal basis for acts created in emergency situations. This is particularly relevant in the energy sector, where, because of the war in Ukraine, several measures have been introduced to protect consumers, stabilise prices, simplify administrative procedures, or ensure continuity of supply. Emergency law involves a consent to broader executive powers of the State and restrictions on constitutional rights, to the extent necessary to ensure the effectiveness of anti-crisis measures. The restrictions must be considered in their historical context, as changing legal, political and social circumstances alter the scope of accepted restrictions.

Against this background, the fundamental question I seek to answer in this article arises, as what are the limits of the EU's energy emergency law? Based on it my more specific scientific research questions are: (1) How does emergency law differ from standard legal regulations and what are the defining features of it? (2) How does emergency law interact with the EU's long-term energy policies and legal framework? (3) How do the principles of necessity, proportionality, and temporariness constrain emergency measures in the energy sector? And finally: (4) What reforms could ensure that energy emergency measures remain effective, legally sound, and aligned with long-term EU energy goals?

To answer this question, I first introduce what a crisis is and how the emergency prevention is organized from the legal perspective in the EU. This is followed by an analysis of the evolution of the regulations adopted in the EU as emergency law since the current Article 122 TFEU and how the evolution of this legal basis itself has been since 1957. This will allow me to find the key elements that distinguish emergency law from regulations adopted in business-as-usual circumstances in their historical context. This will provide a point for proposing a rationale to characterise this type of regulation. The above will form the basis for an analysis of what changes in the perception of emergency law have been brought about by recent crises, especially the war in Ukraine. Consequently, I will show what changes should be proposed in the regulation of energy emergency law to meet the expectations of our time.

The emergency law topic is not new to EU law doctrine, but it is relatively underdeveloped in energy sector analysis. The publications identified below focus for the most part on other branches of law or on the analysis of general crisis conditions. My contribution is an attempt to propose changes to emergency law in the energy sector, considering its vulnerability and regulatory considerations.

The article employs several scientific research methods to analyse the application of EU emergency law in the energy sector. It primarily uses legal analysis (dogmatic method) to examine EU legal provisions, particularly those related to emergency law and energy policy under the Lisbon Treaty. Additionally, it applies the comparative method by assessing different emergency measures taken by the EU in response to crises such as the financial crisis, COVID-19, and the war in Ukraine. The case study method is used to analyse specific instances where emergency law has been applied in the EU energy sector, providing practical insights into its implementation. Furthermore, the article conducts a systematic review of legal texts, EU treaties, regulations, and past applications of emergency provisions to establish a comprehensive understanding of the legal framework. Finally, it adopts an interdisciplinary approach by integrating legal, economic, and political perspectives to evaluate the effectiveness and limitations of EU emergency law in the energy sector. These methods collectively allow for a thorough investigation of the scope, conditions, and constraints of emergency measures within the EU's legal and energy framework.

The nature of the crisis and anti-crisis regulation in the EU

To properly define the place of emergency law, one would have to start by analysing what a crisis is in legal terms. There is no uniform definition of a crisis and no uniform parameters to determine the existence of a situation of emergency (Tsourdi, 2019). In practice, a crisis has a certain specificity. It is a sudden event that could not have been foreseen or prevented with due diligence. It may take the form of a natural disaster, armed conflict or any other type of event that threatens the livelihood or interests of a community. Sometimes, however, such crises are not sudden, but a kind of "creeping" crisis that suddenly acquires intensity (Seabrooke & Tsingou, 2019). However, it is the abruptness and intensity of the crisis and its social impact that requires effective anti-crisis measures to be taken.

In this context, the lack of a uniform legal definition of a crisis and the rationale that determines it should not be judged negatively, because such an approach gives a certain flexibility to the executive in responding to situations that are deemed to be crises at a given moment. Such situations may have different characteristics and conditions. Creating a universal definition could make it difficult to counteract a crisis, which is, after all, the key role of these regulations.

When looking at the doctrinal positions, two possibilities for regulating anti-crisis actions are indicated (de Witte, 2022). According to one, the creation of *ex ante* mechanisms is possible, so anti-crisis actions should take place within the powers that are used within the constitutional order. The State is completely constituted by law and it is possible to exercise power through law in a way that sustains the aspirations of legality. It thus means that the authority of the State is not prior to law. If the law does not constrain anti-crisis action, two risks arise: firstly, the law ceases to be an authority for those exercising power and a kind of additional justification for the actions taken; secondly, power is not constrained by law (Dyzenhaus, 2008; Bastos et al., 2019). Such an approach has the effect of limiting the role of the executive, whose actions must be within the existing legal order and preserving the existing checks-and-balances model within the legal system. This position is supported by the conviction that models of anti-crisis action may be similar in different factual situations, because each crisis is characterised by similar elements. According to the latter, the characteristics of crises make it necessary for emergency powers to be used beyond the legal order (Gross, 2008). In line with this line of thinking, crises are difficult to predict in terms of their scope and impact, so some flexibility in the legal system is needed so that the executive can meet the challenges of addressing crises in the short term. This may mean a broader range of powers for this authority, going beyond the existing constitutional order, but retaining limits (e.g. *ex post* ratification). Central to this model of thinking is the conviction that every crisis has a specificity, and for anti-crisis measures to be effective and economically efficient, they must be an accurate response to demand. As these issues are difficult to predict, some greater flexibility in executive action is necessary, but on the assumption that these are exceptional and temporary situations and that there is *ex post* control of the decisions taken through either acceptance or rejection by the public.

EU law demonstrates that we have in practice both models applied simultaneously. In those areas where anti-emergency mechanisms are well-established, separate procedures have been introduced as part of normal non-emergency legislation. These allow for greater flexibility of action by the executive with checks-and-balances within the constitutional system. Examples include migration law, countering natural disasters. In situations where such solutions are lacking or the crisis has completely different characteristics, such as the EU energy crisis triggered by the war in Ukraine, there is a legal basis for *ad hoc* action, which is precisely the current Article 122 TFEU.

EU law further demonstrates that the creation of a single legal framework for crisis response is necessary for EU law to be effective. Crisis clauses in most constitutions grant the executive authorities, wide-ranging powers with limited parliamentary control, activated through simplified procedures suited to emergencies. While their use is legitimate, it must be guided by prudence and exceptionality to prevent them from eroding the constitutional order for political gain (de Gregorio Merino, 2023). Since it is the duty of States to manage crises and States can diagnose the particular needs of their own society, it seems natural that competence in this area should remain with the Member States and not be transferred to the EU level (Fossum & Menéndez, 2015; Beukers, 2015). Allowing such individual action by the State, without appropriate control, could jeopardise solidarity within the EU, breaking up unity (Zajdler, 2024). Indeed, according to existing case law, Member States can withhold the application of certain regulations as there is a crisis, on grounds of public security or public order. Although such derogations should be interpreted narrowly, there is still an important margin of discretion. Harmonisation of measures at EU level preserves greater consistency in the legal order and avoids arbitrary derogations at the level of the Member State concerned. This does not, of course, preclude Member States from taking additional and supportive measures, but it does preserve the limits for the introduction of such measures. Crucial from an EU perspective is therefore preventing Member States from arbitrarily and unilaterally derogating from EU rules due to an emergency (Rodríguez, 2016).

Evolution of EU emergency law

The basis for the EU's *ad hoc* anti-crisis action is the current Article 122 TFEU and in particular its paragraph 1, which has undergone significant evolution. The prototype of emergency law was Article 103(4) EEC Treaty (1957), according to which "The procedures laid down in this Article shall also apply in the event of difficulties in the supply of certain products." This provision was contained in the chapter on "Conjunctural Policy," the purpose of which was to coordinate economic policies, which were at that time the domain of the States. (Carreau, 1992; Storr & Wallner, 2023). Until the Maasticht Treaty (1992), this provision was used 143 times but as an element of policy coordination in areas such as energy, fisheries, economic and monetary policy and free movement of capital, external relations, and agriculture, mainly in the late 1970s and early 1980s. As an emergency law, or in practice Article 103(4) EEC Treaty, it has been used only 4 times.[1] Due to its current wording: "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."

Table 1 highlights the key changes to this article, notably the introduction of the solidarity principle and emphasis on the energy sector in recent years.

The first application of Article 103 EEC in the energy sector was a regulation that formed the framework of today's model for managing oil and liquid fuels in emergencies. In 1968, a concerted effort was made to create a model for common stocks of oil and liquid fuels and to implement these obligations jointly through agreements between Member States.[2] These provisions were supplemented by regulations to mitigate the effects of difficulties in the supply of crude oil and petroleum products.[3] These regulations were intended to provide a model to counter the threat to security of supply during the low winter air temperatures and subsequently in response to the so-called first oil crisis (1973). These regulations were not created under the pressure of a happening crisis, but as a kind of long-term anti-crisis solution. It is likely that the Suez crisis of 1956 led the Treaty-makers to recognise that this kind of anti-crisis coordination might be needed in the future (Carreau, 1992). These actions can be seen as a regulatory response to the so-called "slow-burning crisis" (Seabrooke & Tsingou, 2019). The use of this legal basis was convenient in the absence of other legal bases for energy policy regulation. It was only in countering the second wave of the oil crisis (1979–1982) that Article 103(4) EEC Treaty, an emergency

Table 1
Introduction of the solidarity principle and emphasis on the energy sector in recent years

Treaty	Key provision
1957 EEC Treaty (Article 103)	Procedures apply in the event of supply difficulties for certain products
1992 Maastricht Treaty (Article 103a) 1997 EC Treaty (after the Amsterdam Treaty) (Article 100)	Council, acting unanimously, may adopt measures for severe supply difficulties. Emergency procedures must respect any other procedures provided for in the Treaty
2001 Nice Treaty (Article 100)	Council, acting by qualified majority, may adopt measures for severe supply difficulties. Emergency procedures must respect any other procedures provided for in the Treaty
2007 Lisbon Treaty (Article 122 TFEU)	Council may adopt measures for severe supply difficulties, in the spirit of solidarity between Member States, especially in the energy sector. Emergency procedures must respect any other procedures provided for in the Treaty

Source: own work.

law measure, was used. The legislation adopted in this area concerned the management of the availability and marketing of oil and liquid fuels,[4] but also the use of natural gas in power stations, since during this period when natural gas reserves were of an insufficient level with regard to the security of supplies of this source of energy.[5]

The above demonstrates a clear separation of anti-crisis activity characterised by abruptness from long-term energy policy regulation, albeit as part of sustained long-term anti-crisis action. It is also characteristic for this period that there was no different legal basis for energy regulation and no willingness of the Member States to delegate powers in this regard to the then EU level. Hence, using the oil crisis to introduce "anti-crisis" solutions was a way of giving an EU dimension to future energy policy.

The above provision of Article 103 EEC Treaty was substantially amended by Article 103a of the Maastricht Treaty (1992) (Martucci, 2010). This provision was in the chapter on economic policy regulation. It was used only 4 times as a basis for emergency law. Each time as an amendment to previously adopted emergency arrangements for the supply and use of oil and liquid fuels or the use of fossil fuels at thermal power stations.[6] All of the above changes, with two exception (Directive 68/414/EEC, Directive 98/93/EC) consisted of the repeal of previously adopted provisions, which was justified on the grounds that there was no longer any need to apply them due to changing market conditions. The provision of Article 103a of the EEC Treaty (1992) retained its wording after the change to Article 100 introduced by the provisions by the Treaty of Amsterdam (1997), only the Treaty of Nice (2001) changed the mode of decision-making from unanimity to qualified majority in the Council, leaving the other provisions unchanged (Martucci, 2010; Nowak-Far, 2009). This provision was the basis for 2 pieces of legislation: one amending once again the 1968 oil stocks regulation (Directive 2006/67),[7] the other introducing a new natural gas safety regulation (Directive 2004/67).[8]

An analysis of the application of this provision highlights several important issues. At the time, there were no extraordinary circumstances indicating an emergency role of these rules. Rather, it was a way to adopt legal solutions more efficiently, although it cannot be ruled out that the long-range goal was to counter creeping crises. However, a rigorous procedure for its application was introduced. It was primarily a back-up procedure. Its application could not violate obligations under other procedures provided for in the Treaty. Its application required the existence of "severe difficulties" and not, as before, simply difficulties in the supply of goods. It is not clear whether these difficulties had to be EU-wide or could also occur in one Member State but potentially affect others, but it can be assumed that the EU impact was important (Martucci, 2010). This showed that Member States were quite restrictive about the possibility of *ad hoc* EU crisis action (Léger, 2000).

The Explanatory Memorandum to Directive 2006/67 regulating stocks of crude oil and petroleum products shows, the choice of this legal basis was not justified by any crisis events, but simply by the codification of the provisions of Directive 68/414/EEC, which had been amended several times, in the interests of clarity and transparency. Likewise, as the Explanatory Memorandum to Directive 2004/67 on security of natural gas supply shows, at the time of its adoption on the above legal basis, there were no conditions that could be considered a crisis but the introduction of another second stage of liberalisation of the natural gas market (2003) and the need to coordinate the actions of the Member States. The above shows that this legal basis is used for long-term policymaking and it confirms that Article 100 EC was treated as a rather capacious legal basis, not necessarily related to emergency law, but more to the regulation of one area of energy policy.

The final changes to the wording of this provision were introduced by the Lisbon Treaty (Nowak-Far, 2012). According to the wording of Article 122 TFEU, which replaced Article 100 EC, "a spirit of solidarity between

Member States'" was introduced and the specific importance of this provision in the event of severe difficulties in the supply in the area of energy was indicated. This means that solidarity became an explicit key rationale for taking action in crisis situations, and a key application of this provision is the energy sector (Martucci, 2010; Huhta & Reins, 2023; Zajdler, 2024).

The application of Article 122 TFEU in crisis situations has increased substantially after the entry into force of the Lisbon Treaty. Emergency law has been used as a legal basis for 17 acts in the last several years. Historically, this provision has been used primarily in the fuel and energy sector, it is only with the financial crisis, COVID-19 and the war in Ukraine that this provision has been extended.

The first application was in response to the global financial crisis.[9] The solutions proposed were generally of the anti-crisis nature of temporary character.[10] A further application was during the COVID-19 epidemic, where regardless of the temporary measures, long-term solutions were introduced.[11] Doubts were raised among the doctrine's representatives, for example, about the system of redistribution of financial resources under the Next Generation EU program, which, under the cover of an emergency and temporary measure, had long-term consequences by circumventing the constitutional safety vents contained in the Treaties (Leino-Sandberg & Ruffert, 2022). It seems that despite the legal changes, the previous broad understanding and application of this provision still resonates. The third and most extensive use of this provision was in the energy crises triggered by Russia's aggression against Ukraine.[12] They confirm the urgency and temporary character. The urgency steamed from the risk of a complete stoppage of Russian gas supplies by the end of 2022, insufficient gas in storage during the period of increased consumption in winter 2022/2023, or spikes in energy prices to socially unacceptable levels. That could jeopardise security of supply in Member States, and place additional burden on EU industry and consumers. Regulations contained the revision clause based on which the European Commission will analyse the situation, report back to the Council and, on this basis, propose further action, such as an extension of the existing mechanism or a new one. There is a certain difference in the regulation of support for renewable energy sources.[13] Given the security rationale (reducing market volatility and lowering energy prices), administrative simplifications are introduced for renewable sources of energy development to accelerate investments. They consist in speeding up the permitting process for the establishment of a generation source, its connection to the grid and the preparation of environmental impact assessments. These provisions are temporary with the possibility to be extended by the Council on a proposal from the Commission.

An analysis of the historical conditions of emergency law in the energy sector leads to several conclusions. Firstly, historical energy emergency law regulations did not always meet the premise of suddenness. These acts were adopted as part of a long-term anti-crisis policy and not as a response to a sudden event. It was therefore a kind of substitute legal basis for EU energy policymaking rather than an anti-crisis measure in the strict sense. Secondly, the temporary character of these solutions was also treated rather flexibly. Regulations adopted were repealed after many years, more as an element of cleaning up the legal system than as a legal requirement inherent in the creation of acts of this kind. There was no established methodology for action in this regard. Thirdly, given the limited role of the European Parliament at the time, no specific coordination procedures were envisaged (Storr & Wallner, 2023). This was important to ensure an adequate standard of protection for the democratic legal order, particularly in terms of legal certainty and legitimate expectations. Indeed, it gave the executive a broad mandate of discretionary powers. This was justified by the nature of energy policy, which was still primarily the domain of the Member States. However, in the harmonised aspect at EU level, these guarantees were not clearly recorded. Fourthly, emergency law has to cause the least possible disturbance to the functioning of the common market. The fulfilment of this premise is difficult to assess in the pre-Lisbon legal order, as the regulation of the internal energy market was still at a rather framework level. However, the above is relevant for the current period.

The Treaty of Lisbon introduced two additional factors of relevance for emergency law solutions, i.e., energy solidarity and a separate legal basis for EU energy policy-making (Article 194 TFEU). Their significance will be explored below. In addition, the war in Ukraine and the resulting EU regulations adopted as emergency law show some additional considerations that should be considered when constructing such legislation.

Emergency law in the spirit of solidarity

The provisions of Article 122 TFEU (emergency law) and Article 194 TFEU (EU energy policy) have a common feature. The solutions need to be "a spirit of solidarity between Member States" (Barcz et al., 2003; Sangiovanni, 2013, Storr & Wallner, 2023).

Solidarity is a multidimensional concept in which social, political and legal aspects intertwine. It lies at the heart of the EU legal system and is the basis of the European integration project (Saracino, 2024; Rosamond, 2000; Kotzur, 2017; Hilpold, 2015; Biondi et al., 2018; Zajdler, 2024). In the Robert Schuman Declaration of 1950, it was noted that "Europe will not be made all once, or according to a single plan. It will be built through concrete achievements, which first create a de facto solidarity". Despite the long existence of solidarity in the EU legal system, its application still raises several questions (Ross, 2007; Dagilyte, 2018).

To act in accordance with this principle is not only the responsibility of the EU, but of the Member States (Küçük, 2018). It balances the interests of the Member States and the EU in the process of making and applying laws. The principle of solidarity is closely related to the principle of loyal cooperation (4(3) TEU), which obliges Member States to ensure the validity and effectiveness of EU law and EU institutions and to cooperate loyally with Member States (Saracino, 2024; de Witte, 2000). It contains a commitment by the EU and Member States to take into account the interests of other actors in the exercise of their respective competences. Solidarity is thus closely linked to the concept of justice (Hinarejos, 2015; Hilpold, 2015; Barnard, 2006; Ross, 2013; Klamert, 2014). There have also been views giving this principle a certain legal dimension as part of a combination of intergovernmental and supranational regimes, which has the effect of going beyond strictly intergovernmental arrangements towards the construction of certain constitutional values within the EU (Braun, 2011; Ciornei & Recchi, 2017). From the perspective of European society, solidarity is shaped by collective national experiences and shared historical narratives. The EU still lacks the strong collective identity that underpins the political authority and legitimacy of nation-states. While citizens across Europe are willing to act in solidarity, they expect a fair distribution of actions carried out in the spirit of solidarity (Egner et al., 2024).

Energy solidarity was a factor in the creation of the EU energy market, initially as a means of countering energy crises and later as an element integrating the internal energy market. However, it was never an explicitly expressed principle of EU law, but rather infiltrated most of the regulations created. It was not until the Lisbon Treaty that the "spirit of solidarity" was introduced as a rationale for EU energy policy (Article 194 TFEU).

It seemed that the importance of energy solidarity was limited in Article 194 TFEU to a purely political premise. Based on this, Member States and European institutions would – as before – create legal solutions. The Court of Justice of the European Union (CJEU) changed this approach in the OPAL judgment (C-848/19P), where it recognised that the energy solidarity contained in Article 194 TFEU is a fundamental legal principle of the EU that should be applied across the entire spectrum of EU and Member State policies and actions in this area (Huhta & Reins, 2023; Zajdler, 2024). This changes the approach to the regulation of energy markets. It means that legal solutions for climate protection, the promotion of renewables, the circular economy, market integration, must be implemented according to the principle of solidarity. Solidarity is no longer just linked to energy security and security of supply, but to the whole spectrum of EU energy policy considerations.

Regarding the application of emergency law in the energy sector, energy solidarity creates an obligatory additional layer of assessment for the legal solutions adopted on this basis. It contains a commitment by the EU and Member States to take into account the interests of other actors in adopted legal solutions. In this respect, it is also a level of scrutiny as to the extent to which the solutions adopted cause the least possible disturbance to the functioning of the common market and ensure an adequate standard of protection of the democratic legal order, in terms of legal certainty and legitimate expectations (Saracino, 2024; Huhta & Reins, 2023; Zajdler, 2024).

Choice of legal basis between Article 194 TFEU and Article 122 TFEU

Until the entry into force of the Lisbon Treaty, EU energy regulation was primarily adopted as part of internal market regulation, although it was adopted as emergency law on several occasions. The provision of Article 194(1) TFEU introduced a separate EU energy policy, indicating that: "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."

It enables to distinguish which of the legal acts serve to create long-term energy policy solutions and which are typical anti-crisis measures (Nowak-Far, 2012). The provision of Article 194 TFEU refers to energy security in its EU aspect and measures adopted in this regard must build solidarity between Member States. The provision of Article 122 TFEU speaks of a severe security threat that requires additional beyond-normal action (Storr &Wallner, 2023). The difference also concerns the impact of the threat on the EU. Article 194 TFEU indicates a threat to the energy supply in the Union, whereas Article 122 TFEU does not contain any limitation in this respect. As a minimum, however, it can be considered that there must be an impact that goes beyond the borders of the Member State concerned and could potentially affect the internal market to some extent.

Some areas of EU law have permanent and elaborated crisis management mechanisms (e.g. migration policy), therefore the use of *ad hoc* solutions provided by Article 122 TFEU is not needed, although not excluded, as the provisions adopted as a remedy to COVID-19 show. EU energy policy is a relatively young policy and is still building common crisis management mechanisms. Hence, the use of Article 122 TFEU is reasonably justified. However, this article is not an in-built crisis management tool but an *ad hoc* solution. It needs to fulfil certain conditions. Recourse to Article 122 TFEU must be subject to strict limitations, governed by a broader principle of prudence and self-restraint, to ensure that the Union's legal framework, based on the principle of attribution of competences, remains intact. This provision should be employed exclusively in exceptional circumstances where severe economic difficulties arise in Member States that cannot be resolved through ordinary EU measures, with the gravity of the situation being particularly acute. Furthermore, the situation must exhibit a systemic nature, affecting or threatening the fundamental economic stability of the EU or its Member States. Additionally, any use of Article 122 TFEU must be temporary (de Gregorio Merino, 2023).

Simplification of procedures and protection of the democratic order

The above distinction is important for the sustainability of the legal solutions adopted on its basis. As experience with legal acts adopted as an anti-crisis measure related to the war in Ukraine shows, these acts were adopted, as indicated above, on the basis of Article 122 TFEU and not Article 194 TFEU. They were therefore adopted as a temporary measure to counter a crisis that was ongoing. The content of the acts confirmed their time-limited nature. There were strict limitations designed to minimise their impact on long-term economic stability (Martucci, 2023).[14] In addition, they contained review clauses, which required re-confirmation of the acts' continued application after a specified period (e.g. 1 year). The above considerations are important because Article 122 TFEU gives a great deal of autonomy to the Council of the EU and thus to the representatives of the executive authorities of the Member States to adopt anti-crisis legislation. Above all, this provision makes it possible to significantly shorten the process of adopting legislation at EU level, which is crucial in adopting anti-crisis solutions. The process of adopting an EU legal act under the so-called ordinary legislative procedure (OLP), the basic procedure for creating EU legislation, takes approximately two years. Such a long process is not a solution for crisis situations hence Article 122 TFEU allows to shorten the process to a few weeks. However, it raises certain risks. One is that the European Commission does not have to prepare an impact assessment of such an act. This reduces the time it takes to prepare such a draft act but limits the possibility for broader scrutiny of the advisability of the solutions adopted. In the case of an extension, there is also no need for such a full impact assessment, even though some experience has been gained and there has been time to prepare it. Arguably, it is assumed that the impact assessment is assessed in practice, because if there is a need to extend the act it means that it is needed. This limits the possibility of looking for alternative solutions and paves a certain way of thinking indicating the presumed best effectiveness of *ad hoc* measures adopted. The risk that arises here is also the creeping permanence of such adopted solutions. Accepting *ad hoc* solutions creates the perception that they are the best possible and therefore the temptation to turn them into permanent measures. An inadequate impact assessment may support such a line of thinking and action. What therefore seems necessary is an additional analysis of the effectiveness and need for such solutions, at a stage when they are still a temporary measure.

Another risk is that the European Parliament is excluded from this procedure. A proposal for the adoption of a legal act is proposed by the European Commission and agreed by the Council. This reduces the democratic element in the law-making process. The above may be justified by the urgency of the solutions introduced, as well as by the fact that they are of a temporary nature. However, the question arises as to whether, despite these considerations, some form of interaction with the European Parliament should not apply. This could be a form of *ex ante* or *ex post* interaction. However, such a form should be predictable in nature. A guarantee of such predictable character is, for example, the uniform formula contained in the content of legal acts adopted based on Article 122 TFEU for interaction with the European Parliament (Nicolosi, 2021).[15] The absence of these arrangements does not mean that the European Parliament cannot take part in the procedure for the adoption of a legislative act on the basis of Article 122 TFEU. Indeed, pursuant to Article 225 TFEU, the European Parliament may request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is necessary for the purpose of implementing the Treaties. The European Parliament may request such consultation, but it may also even include in a resolution addressed to the Commission a draft act which it considers necessary for adoption. There are no formal impediments to this act subsequently being processed under Article 122 TFEU. However, the use of this mechanism may face difficulties due to the lack of sufficient background and competence to propose and adopt anti-crisis measures. These competences are usually with the executive. Therefore, extending democratic control of energy emergency law under Article 122 TFEU, by obliging the Commission or the Council to interact with the European Parliament, seems preferable.

Conclusions and policy implications

Historically, energy emergency situations have moved the process of European integration in the field of energy forward. The key legal solutions adopted in the 1960s–70s, or in 2009, 2014 and now, were in response to energy crises. They were the reason for creating new legal solutions, building new security models, which were based on the devolution of powers of the Member States and the building of a common security model within the EU. Each time, it required political compromise and a rational approach that gives flexibility in adapting new solutions in the spirit of solidarity.

The legal basis of the EU energy emergency law (Article 122 TFEU) gave Member States and EU institutions the considerable flexibility, which the entry into force of the Lisbon Treaty and the experience of the recent energy crises requires rethinking. By introducing a separate legal basis for EU energy policy (Article 194 TFEU), the Lisbon Treaty seems to creepily forces emergency situations to be regulated under normal legislative procedures, in which constitutional values and citizens' rights are protected and the powers of the executive are curtailed. It therefore should limit the use of Article 122 TFEU as a legal basis for emergency law in the future, although there is a risk that further crises will give rise to the continued use of Article 122 TFEU as a flexible mechanism for changes in the law, similar to what Leino-Sandber & Ruffert (2022) noted with regard to the use of COVID-19 for changes in the EU financial policy. However, it is to be expected that future recourse to it must adhere to strict limitations, guided by temporary nature, prudence, self-restraint, and the principle of attributed competences. It is reserved for exceptional circumstances causing severe economic difficulties that threat to the economic stability of Member States that cannot be addressed by ordinary EU measures. This should trigger an evolution in the regulation of emergencies, by creating a separate and based on Article 194 TFEU legal framework for emergency response within long-term mechanisms of a more general nature.

Insofar as an emergency situation necessitates emergency action, and Article 122 TFEU should be designed for such situations, it seems reasonable to involve the European Parliament more extensively in the process. It might be a natural element of legal acts created under Article 122 TFEU that the European Parliament is consulted *ex post* if it is not possible to do so at an earlier stage. A similar impact assessment of such an act would seem to be a necessary element even at the *ex post* stage, in order to be able to objectively assess the legal solutions adopted under the emergency procedure and decide on their further shape on the basis of rational premises.

In the discussion about building a new energy security model, a new variable has emerged – energy solidarity. Historically energy solidarity was neither explicitly expressed in binding EU acts nor in practice as a principle of EU energy law or policy. The Lisbon Treaty confirmed that solidarity is an underlying legal principle of the EU energy policy, thus also energy emergency law. It requires the introduction of appropriate procedures to ensure that these solutions are fully effective. The legal solutions being implemented in the energy sector as an antidote to the problems in the electricity and natural gas market show that it is still difficult to speak of a single EU internal energy market. This market functions in a business-as-usual situation but faces difficulties in a crisis situation such as we faced in 2022. Member States taking the initiative to protect their own market, within the framework of emergency law solutions at EU level, showed that there is still a need to build effective solidarity mechanisms. However, this is not about *ad hoc* solidarity, but about systemic solidarity solutions based on common mechanisms to address crises.

While the public accepts the building of solidarity mechanisms between Member States, with the involvement of EU institutions, it is important to ensure that the common values underpinning the EU are respected by those asking for help and that the mechanisms created ensure a fair distribution of support. Emergency law mechanisms, in order to be effective, must be socially acceptable, so they should also take this aspect into account.

Notes/Przypisy

[1] The above calculation was made using the search engine: https://eur-lex.europa.eu/collection/eu-law/legislation/recent.html, indicating the respective limitations to the legal act and legal basis.

[2] Council Directive 68/414/EEC; Council Decision 68/416/EEC.

[3] Council Directive 73/238/EEC.

[4] Council Decision 77/186/EEC; Council Decision 77/706/EEC; Council Decision 79/879/EEC.

[5] Council Directive 75/404/EEC; Council Directive 91/148/EEC.

[6] Council Directive 98/93/EC; Council Decision 97/374/EC; Council Decision 97/8/EC; Council Decision 97/7/EC.

[7] Council Directive 2006/67/EC.

[8] Council Directive 2004/67/EC.

[9] Council Regulation (EU) No 407/2010; Council Regulation (EU) 2015/1360; Decision 2010/624/EU; Decision (EU) 2022/485.

[10] After a certain period, the European Commission was to scrutinize the situation and propose a solution to the Council, which could consist of an extension of the current solutions or the introduction of others that would address the problem more effectively. However, some of the solutions were permanent, strengthening the institutional framework, see: Council Regulation (EU) 2016/369.

[11] Council Regulation (EU) 2022/2372; Council Regulation (EU) 2020/2094; Council Regulation (EU) 2020/672; Council Regulation (EU) 2020/521.

[12] Council Regulation (EU) 2022/1369; Council Regulation (EU) 2023/706; Council Regulation (EU) 2022/2576; Council Regulation (EU) 2022/2578; Council Regulation (EU) 2022/1854.

[13] Council Regulation (EU) 2022/2577 of 22.

[14] Notwithstanding these intentions, their introduction has led to litigations in which several European companies questioned the EU's right to implement them. See: Case T-795/22 Vermilion Exploration and Production Ireland and Vermilion Energy Ireland v Council; Case T-775/22 Vermilion Energy Netherlands e.a. v Council; Case T-802/22 ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council; Case T-803/22 Petrogas E&P Netherlands v Council; Case T-759/22 Electrawinds Shabla South v Council.

[15] An example is migration and asylum policy, where there is an obligation to consult the EP (Article 78(3)TFEU).

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