

Article 122 TFEU as a Legal Basis for Energy Emergency Measures

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The EU has recently relied on Article 122 of the Treaty on the Functioning of the European Union (“TFEU”) as a legal basis to adopt expedited measures aimed at addressing the current energy disruptions.¹ In previous exceptional circumstances, the EU had already used Article 122 TFEU to adopt measures of solidarity between Member States hit by a crisis. In particular, Article 122 was used as legal basis for the European Financial Stabilization Mechanism Regulation during the eurozone crisis², the Emergency Support Instrument Regulation during the refugee crisis³, the SURE Regulation⁴ and the Regulation establishing an EU Recovery Instrument during the Covid-19 crisis.⁵

This memorandum sets out the main conditions of Article 122 TFEU and its current and potential future application in the ongoing energy crisis.

Scope of application

Article 122 is part of the TFEU’s chapter on economic policy. It allows, by way of a derogatory legislative procedure, the Council to adopt economic policy “measures” (including regulations) based on qualified majority voting (“QMV”) based on a Commission proposal. The Council may amend the Commission proposal only by acting unanimously.⁶ Contrary to the ordinary legislative procedure, the European Parliament is merely informed.⁷

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¹ See Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas and Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices, 6 October 2022 (see also Cleary Gottlieb’s alert memo on Regulation 2022/1854).

² Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism.

³ Council Regulation (EU) 2016/369 on the provisions of emergency support within the Union.

⁴ Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

⁵ 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.

⁶ Article 293, Treaty on the Functioning of the EU (TFEU)

⁷ Article 294, Treaty on the Functioning of the EU (TFEU).

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As a result, regulations under Article 122 TFEU can generally be adopted much faster than regulations under the ordinary legislative procedure.

Measures under Article 122 TFEU may be adopted only in two cases:

- Art. 122(1) TFEU provides that the Council may take “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”;
- Art. 122(2) TFEU provides that Council may grant “Union 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”.

The two paragraphs cater for different situations and allow for different kind of measures to be taken. Article 122(1) TFEU is designed for general economic policy decisions taken in a “spirit of solidarity”. It notes that a Council measure may be warranted where severe difficulties arise in the supply of energy products (such as those experienced in 2022) but does not set out an exhaustive list of situations.⁸ The Council enjoys a wide margin of discretion on the kind and the legal form of measures it may take under Article 122(1), although such measures must be economic in nature, as Article 122 TFEU sits in the TFEU’s chapter on economic policy.⁹

Article 122(2) TFEU provides for more specific measures, as it only mentions Union financial assistance, provided either a “natural disaster” or “exceptional occurrences beyond the control” of the Member State arise.

In general, the Commission considers that the use of Article 122 TFEU “may not undermine or circumvent

the use of other legal basis laid down in the Treaties for use in “normal times”.¹⁰ Accordingly, Article 122 TFEU assumes the existence of an emergency situation and requires adoption of measures having a temporary nature.

Application to the energy crisis

In the context of the ongoing energy crisis, the EU has adopted:

- Council Regulation (EU) 2022/1369 on coordinated demand-reduction measures for gas; and
- Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.

Council Regulation (EU) 2022/1369 was adopted with the aim to increase security of energy supply, by reducing gas demand voluntarily by 15% between August 2022 and March 2023. In the case of a severe gas supply disruption, the regulation foresees the possibility for the Council to make the gas demand reduction compulsory by declaring a “Union alert” on the security of supply.

Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices is based on Article 122(1) TFEU: “The current disruptions of gas supplies, reduced availability of certain power generating plants, and the resulting impacts on gas and electricity prices, constitute a severe difficulty in the supply of gas and electricity energy products within the meaning of Article 122(1)”.¹¹ The regulation underlines that the context of its adoption is one of a “crisis situation which requires the adoption of a set of urgent, temporary, exceptional measures of economic nature to address the unbearable effects on consumers

⁸ *Idem.*, para. 120.

⁹ *Idem.*, para. 121.

¹⁰ Opinion of the Commission legal service on proposals on Next Generation EU, 24 June 2020, para. 121, *see*:

<https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf>.

¹¹ Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices, 6 October 2022, para. 7

and companies”.¹² The latter paragraph was added to “better clarify the need for the proposed measures under Article 122”.¹³

Likewise, the Commission Proposal for a Council Regulation enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks is based on Article 122(1) TFEU. The Commission explains that “the urgency situation fully justifies the use of Article 122 TFEU in order to establish an entity as soon as possible by contracting the necessary services from existing entities”.¹⁴ The explanatory memorandum stresses the need to “establish the tenets of joint purchasing under Article 122 as soon as possible, and therefore a number of these elements should apply on a provisional basis”.¹⁵

The European Council conclusions of 20-21 October mention that the EU will “take the necessary measures as a matter of urgency”¹⁶, which suggests that it is likely that future measures will adopt Article 122 TFEU as a legal basis in the future.

Would Article 122 allow to derogate from normal quorum required to adopt a legal act under EU law?

The need for an emergency intervention was used to justify the establishment of a special and temporary contribution on taxable surplus profits made in the fiscal year 2022: “The solidarity contribution and the Union legal framework governing it should be of a temporary nature to address the exceptional and urgent situation that has emerged in the Union with respect to the soaring energy prices”.¹⁷

The application of Article 122 TFEU to a solidarity contribution thus allows the EU to adopt a decision that might otherwise be considered as falling in the

field of fiscal policy and requiring unanimity voting under Article 113 TFEU for the harmonisation of legislation concerning indirect taxation. It remains to be seen whether this precedent, which grants the EU a form an exceptional and temporary taxation competence, will be followed by others and further extended in time in the context of the energy crisis.

Several EU Member States have expressed concerns on the legal basis for energy emergency regulations. On October 6, 2022, Hungary expressed its concerns about the proposed regulation 2022/1854: “The Hungarian delegation expresses its reservation on the choice of the legal basis of this Regulation, as article 122 of the TFEU cannot be the sole legal basis for the solidarity contribution, which includes provisions of a fiscal nature, that should be discussed and adopted accordingly with unanimity. Poland also disputes the legal basis of the Regulation: “The Republic of Poland takes the view that, during the negotiations in the Council of the EU on the draft Council Regulation on an emergency intervention to address high energy prices, the European Commission failed to provide sufficient justification for its conclusion that its proposed new measures, and in particular the ‘solidarity levy’, did not constitute measures of a fiscal nature”.¹⁸

Challenging the regulation

Article 263 TFEU allows non-privileged applicants, such as undertakings, within two months of the publication, to challenge the legality of an EU “act”, such as a Council Regulation. Under Article 263(4) TFEU, a non-privileged applicant can prove *locus standi* where (i) the applicant is the addressee of the act; (ii) where the applicant is not the direct addressee of the act but nonetheless proves “direct and individual concern”; and (iii) where a regulatory act, which does

¹² *Idem.*, para. 8

¹³ Council of the EU, Letter from General Secretariat of the Council to the Permanent Representatives Committee, 19 September 2022, para.

¹⁴ Commission Proposal for a Council Regulation enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks, 18 October 2022

¹⁵ *Idem.*, para. 1(a)

¹⁶ European Council meeting (20 and 21 October 2022) – Conclusions, para. 17

¹⁷ *Idem.*, para. 56.

¹⁸ See: <https://data.consilium.europa.eu/doc/document/CM-4715-2022-INIT/en/pdf>

not entail implementing measures, is of direct concern to the applicant, who does not have to prove individual concern. An indirect challenge to the Regulation is also open under Article 267 TFEU.

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