ISSN 2384-9169
Fascicolo n. 2 - 2024
rivista.eurojus.it

Beyond Unanimity: EU Taxes as «appropriate measures»

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1. Introduction

In recent times, Article 122 TFEU has gained a centrality in the EU law discourse it had never experienced before.[1] During the pandemic, the norm was among the backbones of *Next*

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[1] M. CHAMON, *The rise of Article 122 TFEU: On crisis measures and the paradigm change*, in *Verfassungsblog*, 1 February 2023. *Cf.* also P. DERMINE, *Article 122 TFEU and the future of the Union's emergency powers*, in *EU Law Live*, 23 January 2024. See M. CHAMON, *The use of Article 122 TFEU. Institutional implication and impact on democratic accountability*, Study requested by the European Parliament's Committee on Constitutional Affairs (AFCO), PE-753.307, 11 September 2023, pp. 17-18 for an overview on past use of Art. 122, including its previous versions.

For an account of the historical evolution of Art. 122 wording throughout the subsequent versions of the EU Treaties, see the insightful table arranged by M. CHAMON, *The use of Article 122 TFEU*, cit., pp. 14-16. For a historical perspective, see furthermore B. DE WITTE, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, in *Common Market Law Review*, 2021, p. 635 ff., 646; A. MIGLIO, *The*

Generation EU (NGEU). Then, when it came to responding to the first blows of the energy crisis, Art. 122(1) made the adoption of EU taxes by qualified majority voting ("QMV") possible, being the legal basis for Reg. (EU) 2022/1854 ("Reg. 2022/1854" or "the Regulation").[2] These two developments would have been unimaginable just a few years ago, in the EU Fiscal Policy area least of all.

Much has been written already about NGEU and Art. 122 TFEU,[3] and some attention has been paid to the use of Art. 122(1) in the context of Reg. 2022/1854, too.[4] It is easy to see how the latter represents a real breakthrough for the EU Tax Policy. Consequently, this research aims to dig deeper into the appropriateness of the Regulation legal basis, assessing whether Art. 122(1) was in fact the legally most sound option. So far, the quest for an alternative to the

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Regulation on the Provision of Emergency Support within the Union: Humanitarian Assistance and Financial Solidarity in the Refugee Crisis, in *European Papers*, 2016, p. 1171 ff.

[2] Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, http://data.europa.eu/eli/reg/2022/1854/oj.

The Regulation introduces, along with an Electricity Demand Reduction (EDR) tool, two taxes: the Market Revenues Cap (MRC) and the Temporary Solidarity Contribution (TSC), which is a windfall profits tax. A broader analysis of the Regulation content, including a Tax Law perspective, is available in F. BERTOCCO, *EU Taxes in The Aftermath of The Energy Crisis: A Breach in The Unanimity Wall?*, in *Riv. dir. fin.*, 2023, No. 3 [pre-pub.], together with a first legal assessment of the Regulation legal basis, which is the subject the following pages deal with more in depth.

On the Regulation, see also A. WILSON, *Emergency intervention to address high energy prices in the EU*, EPRS Briefing, 12 October 2022; C. HEUSSAFF *et al.*, *An assessment of Europe's options for addressing the crisis in energy markets*, Bruegel Policy Contribution No. 17/22, September 2022; S. SCHWIND, G. REICHERT, J. S. VOßWINKEL, *EU Emergency Intervention in the Electricity Market. How the EU Commission Wants to Mitigate the Impact of High Energy Prices*, cepAdhoc No. 10/2022, 20 September 2022; K. NICOLAY *et al.*, *The effectiveness and distributional consequences of excess profit taxes or windfall taxes in light of the Commission's recommendation to Member States*, Study requested by the European Parliament's Subcommittee on Tax Matters (FISC), PE-740.076, 29 March 2023.

The act represents the first example ever of an EU tax regulation adopted without abiding by the so-called "consultation procedure" – according to which the Council has to unanimously pass the act, after having consulted the European Parliament – traditionally deemed an unescapable procedural hurdle in fiscal matters, see M. KELLERBAUER, *Article 113 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford, 2019, p. 1228 ff.; ID., *Article 115 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1256 ff.

[3] See, *e.g.*, P. DERMINE, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture*, in *Legal Issues of Economic Integration*, 2020, p. 337 ff.; B B. DE WITTE, *The European Union's COVID-19 recovery plan*, cit. More recently, M. CHAMON, *The use of Article 122 TFEU*, cit.; A. DE GREGORIO MERINO, *Follow the Money, Follow the Values*, in R. WEBER (ed.), *The Financial Constitution of European Integration. Follow the Money?*, Oxford-Portland, 2023, p. 113 ff.; P. LEINO-SANDBERG, *Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU*, in R. WEBER (ed.), *op. cit.*, p. 161 ff. As reported by M. CHAMON, *The rise of Article 122 TFEU*, cit., a more extensive reference to the literature concerning NGEU (and Art. 122 TFEU) is made by the *Bundesverfassungsgericht*, in a judgment of the 6th of December 2022, at para. 154.

In particular on the significance of this programme for the EMU as a whole, see F. FABBRINI, *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine*, Oxford, 2022, p. 67 ff.; S. BARONCELLI, *Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU*, in *European Papers*, 2022, p. 867 ff.

[4] A. WILSON, *Emergency intervention to address high energy prices in the EU*, cit., p. 10 (note 1); G. ERDŐS, G. CZOBOLY, *New Legislative Tool for Introducing EU-Wide Windfall Taxes*, in *European Taxation*, 2023, p. 36 ff.; L. HANCHER, *A sound legal basis for emergency action in the EU's energy markets*, in *Verfassungsblog*, 8 February 2023; J. LAMMERS, B. KUŹNIACKI, *The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law*, in *Intertax*, 2023, p. 451 ff., 453; M. CHAMON, *The use of Article 122 TFEU*, cit.; A. DE GREGORIO MERINO, *op. cit*.; P. LEINO-SANDBERG, *op. cit*.

consultation procedure in fiscal matters had never been successful.[5] This explains why one can hardly overstate the significance of Reg. 2022/1854 for EU Tax Law and, by consequence, for the furtherance of the European project as a whole. Paraphrasing what Prof. Leino-Sandberg has written about NGEU, also the Regulation could be seen as a «constitutional change without a constitutional change»,[6] although this would not actually be the case, as long as it is possible to ground in legal terms – as this research tries – the recourse to the straightforward decision-making procedure provided for by Art. 122(1) TFEU. In fact, *status quo* and tradition are aspects to be taken into account, but they are not legal parameters, strictly speaking.[7]

Predictably, adopting the Regulation under Art. 122(1) has been far from uncontroversial. The choice was contested within the Council, during the negotiations already.[8] Afterwards, once the Regulation has entered into force, five[9] actions pleading for the annulment of the act have been filed[10] by non-privileged claimants before the General Court, four out of five putting into question the Regulation legal basis.[11]

In fact, investigating the legal soundness of the Regulation legal basis, the next section does advance some legal arguments backing the recourse to Art. 122(1) TFEU.[12] Once framed the research question and methodology, it searches for the applicable *lex specialis* between the latter norm and Arts. 194(3) – in section II.1 – and 194(2) TFEU, in section II.2., finding that

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[5] R. SZUDOCZKY, D. WEBER, *Constitutional Foundations: EU Tax Competences; Legal Basis for Tax Integration; Sources and Enactment of EU Tax Law*, in P. J. WATTEL, O. MARRES, H. VERMEULEN (eds.), *Terra/Wattel – European Tax Law* (Abridged Student Edition), Vol. I, Alphen aan den Rijn, 2019, VII ed., p. 9 ff., 18-21; G. ERDŐS, G. CZOBOLY, *New Legislative Tool for Introducing EU-Wide Windfall Taxes*, cit., section 3.

Both the European Commission and the doctrine have already tried to overcome the Council unanimity requirement in fiscal matters, yet unsuccessfully. Among the proposed alternatives, one of the most interesting, notwithstanding the reservations that emerged amongst scholars, has been the recourse to Art. 116 TFEU. See J. ENGLISCH, *Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?*, in *EC Tax Review*, 2020, p. 58 ff., and M. NOUWEN, *The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?*, in *Intertax*, 2021, p. 14 ff. Generally, on Art. 116 TFEU see M. KELLERBAUER, *Article 116 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1258 ff.

[6] P. LEINO-SANDBERG, *op. cit.*, p. 179.

[7] M. CHAMON, *The rise of Article 122 TFEU*, cit.

[8] Concerns were voiced by three distinct Member States, namely Poland, Hungary and Estonia. Poland eventually – together with Slovakia – even voted against the Regulation (see the written procedure available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:CM_4715_2022_INIT).

[9] The exact number of lawsuits brought against the Regulation is available on the EUR-LEX webpage dedicated to the Regulation itself.

[10] On the action for annulment time-limit under Art. 263 TFEU, *cf.* Art. 263(6) thereof (on which see B. SCHIMA, *Article 263 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1798 ff.), along with the Rules of Procedure of the General Court, http://data.europa.eu/eli/proc_rules/2015/423/oj (namely Arts. 58-62 thereof, granting to the Court some room of manoeuvre), and the Practice rules for the implementation of the Rules of Procedure of the General Court, http://data.europa.eu/eli/proc_rules/2015/618(1)/oj, parr. 63-67.

On the Rules of Procedure of the General Court in general, see P. BIAVATI, *The General Court's New Rules of Procedure*, in E. GUINCHARD, M. GRANGER (eds.), *The New EU Judiciary. An Analysis of Current Judicial Reforms*, Alphen aan den Rijn, 2018, p. 293 ff.

[11] See Action brought on 2 December 2022, Case T-759/22, *Electrawinds Shabla South EAD v Council*; Action brought on 12 December 2022, Case T-775/22, *TJ and Others v Council*; Action brought on 28 December 2022, Case T-802/22, *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council*, (this being the most high-profile case, see https://www.politico.eu/article/exxon-sues-european-council-over-eu-fossil-fuel-windfall-tax/); Action brought on 30 December 2022, Case T-803/22, *TZ v Council*.

[12] Which is not to say that Reg. 2022/1854 is completely consistent with the EU Treaties, see *infra* notes 25 and 101.

Art. 122(1) derogates both of them with regard to the Regulation. Section II.2, in particular, contends that – despite the majority of the commentators having indicated Art. 194(3) as the alternative to Art. 122(1) – a legally accurate interpretation should have rather identified this alternative in Art. 194(2). Such a conclusion is based on a minority – yet more faithful – reading of the «primarily of a fiscal nature» clause contained in Art. 194(3).[13] Section III identifies the shortcomings implied in the adoption of the Regulation under Art. 122(1), namely the resulting democratic deficit, and it explores possible solutions, considering both a non-reformed and a reformed TFEU. It is maintained that only the latter scenario would allow to involve the European Parliament (EP) in the decision-making process without losing the benefit of the straightforward procedure envisaged by Art. 122(1). Section 4 summarises the results of the research.

It goes without saying that the final say on the matter dealt with by the following pages is the Court's.[14] The attempt here is to speculate on possible lines of reasoning the General Court could uphold, assuming it will decide to tackle the merit of the issue, which is far from a given,[15]

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[13] E. SCUDERI, *"Provisions Primarily of a Fiscal Nature": Time to Dispel Doubts*, in *EC Tax Review*, 2022, p. 273 ff.

[14] P. LEINO-SANDBERG, *op. cit.*, p. 162.

[15] *Cf.* M. CHAMON, *The use of Article 122 TFEU*, cit., p. 34.

Setting political considerations aside, one has to consider that the threshold for non-privileged claimants to prove *locus standi* under Art. 263 TFEU is set very high by the CJEU, see L. HANCHER, *A sound legal basis for emergency action in the EU's energy markets*, cit. Under Art. 263(4) TFEU, to be granted *locus standi* by the CJEU a non-privileged claimant has to prove a «direct and individual concern» coming from the challenged act.

Generally, on the "individual concern" requirement see G. CONWAY, *Legal Reasoning at the Court of Justice in the Context of the Treaty of Lisbon*, in E. GUINCHARD, M. GRANGER (eds.), *op. cit*., p. 357 ff., 360-361. Both Hancher and Conway underline the CJEU's tendency towards a restrictive interpretation of this standing requirement, sanctified in the *Plaumann formula*, see Court of Justice, 15 July 1963, Case 25-62, *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17, p. 107. Useful and more detailed indications on the application of the *formula* to the present case come from Court of Justice, 18 May 1994, Case C-309/89, *Codorníu SA v Council of the European Union*, ECLI:EU:C:1994:197, paras. 14-15, 18-21; Court of Justice, 24 November 2016, Joined Cases C-408/15 P and C-409/15 P, *Ackermann Saatzucht GmbH & Co.KG and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2016:893, paras. 30-32, 39. Briefly, for a natural or legal person to be *individually* concerned by an EU act within the meaning of the aforementioned par. 4 of Art. 263 TFEU it is not enough to fall within the scope of the concerned act. The person has to bear some peculiarities that characterise a subset, which could even count that sole individual as a member. The subset has to be identifiable at the moment of the adoption of the act, at the very last. In other words, it has to be a close circle, not subject to enlargements after the approval of the act. Whether it is possible to highlight one or more similar subsets among the energy industry operators affected by the Regulation is to be seen. It cannot be excluded that it will require a case-by-case analysis, to be carried out for every action brought before the General Court. On the surface, however, it is not possible to isolate any fossil businesses carrying an "individual concern" (the fossil industry is targeted by the TSC). As far as the so-called «inframarginal generators» targeted by the MRC (on which see F. BERTOCCO, *EU Taxes in The Aftermath of The Energy Crisis*, cit., section 2) are concerned, the single categories of energy businesses (*e.g.* solar power businesses, wind power businesses, nuclear power ones, etc.) may be considered subsets as described above.

As CHAMON, M., *The use of Article 122 TFEU*, cit., p. 30 contends, however, even admitting the "individual concern" requirement is met, it is hard to conceive how the non-privileged claimants at hand could prove to be directly concerned by the Regulation, given the wide margin of discretion the Regulation itself leaves to Member States in the application phase. On the aforementioned wide margin of discretion, which is peculiar for a Regulation, see F. BERTOCCO, *EU Taxes in The Aftermath of The Energy Crisis*, cit., notes 10 and 37; G. ERDŐS, G. CZOBOLY, *New Legislative Tool for Introducing EU-Wide Windfall Taxes*, cit.; G. RIEKELES, P. LAUSBERG, *Tackling the energy crisis: 8 considerations on how Europe can get through this winter*, EPC Commentary, 8 September 2022; M. GREGGI, A. MIOTTO, *Windfall Profit Taxation in Europe (and Beyond)*, in *Laws*, 2024, No. 1, p. 6: «[…] in other words, forms and substance do not coincide in this situation[,] as the regulation adopted (self-executing by design) demands further (national) rules to be actually applicable.»).

considering how sensible is the matter. Would it be the case, the judges in Luxembourg would also have the opportunity to shine some deeply needed light on the «primarily of a fiscal nature» clause.[16] By taking position on the latter aspect, even more than on the former, the Court could pave a completely new path for the future of EU Tax Law and, more broadly, for EU Fiscal Policy. Depending on the EU judiciary decision, European integration in these fields could in fact make a huge step forward, or it could remain as weak as ever.

2. Putting Reg. (EU) 2022/1854 Legal Basis to the Test

Art. 122(1) TFEU entrusts the Council with autonomous powers[17] via the provision of a non-legislative decision-making procedure,[18] which allows the assembly of the 27 Member States' Ministers to adopt measures[19] «appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy», deciding by QMV,[20] without any involvement of the EP. Notably, measures adopted under Art. 122(1) should not be confused with those enacted pursuant to the following paragraph 2, whose crucial role during the Eurocrisis is well-known.[21]

The Introduction has provided an overview of the many scepticisms raised by the legal basis chosen by the European Commission (EC), later upheld by the Council. This section reflects on the legal soundness of that choice, exploring possible alternatives, namely paragraphs 2 and 3 of Art. 194 TFEU.

On non-privileged applicants' standing, see also P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2020, VII ed., p. 463 ff., 546-564.

[16] M. CHAMON, *The use of Article 122 TFEU*, cit., p. 31.

[17] *Cf. id.*, p. 9-10.

[18] See *id.*, pp. 9-12, on the difference between legislative and non-legislative procedures (and acts).

[19] On the wide range of measures among which the Council can choose, acting under this provision, see *e.g.*, A. MIGLIO, *The Regulation on the Provision of Emergency Support within the Union*, cit., pp. 1172-1173, but also Court of Justice, 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756, especially para. 116; Court of Justice, 12 September 2017, Case C-589/15 P, *Alexios Anagnostakis v European Commission*, ECLI:EU:C:2017:663, particularly para. 70; Note, however, that the collocation of Art. 122 in the Economic Chapter of the EMU Title (see *infra* in this section) should be read, according to A. DE GREGORIO MERINO, *op. cit.*, p. 123, as a limitation on the measures the Council can adopt under this provision, in the sense that these have to be *economic* measures (see *infra* section II.2 on how to define the *nature* of a given measure).

[20] The text of the norm does not make any reference to the voting system, therefore qualified majority applies, as provided for by Art. 16(3) TEU. For a reference to the case-law see A. ENGEL, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation*, Cham, 2018, p. 77.

[21] This paper is indeed a demonstration of the assessment made by M. CHAMON, *The use of Article 122 TFEU*, cit., p. 23, according to which: «Compared to paragraph 1, the second paragraph of Article 122 TFEU presents much less interpretative problems» (notwithstanding the vast discussion that, during the Eurocrisis, has involved Art. 122(2) TFEU, too; as recalled by P. DERMINE, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe*, cit., p. 345, for instance, under Art. 122(2) the 2010 European Financial Stability Mechanism – on which see the recent work by F. MARTUCCI, *The Solidarity Framework: Towards a New Pillar of the EMU?*, in R. WEBER (ed.), *op. cit.*, p. 145 ff. – was approved).

As for the difference between Arts. 122(1) and 122(2), consider that while the latter allows the EU to provide financial assistance to Member States suffering from «exceptional occurrences beyond [their] control», EU action under par. 1 is not limited to financial assistance, see *supra* note 19.

To begin with, it is appropriate to recall the legal consequences an EU act incurs if the legal basis on which it has been adopted is not the correct one. That act is invalid, hence exposed to actions for annulment under Art. 263 TFEU.[22] The act invalidity, besides, can be invoked by any defendant before the CJEU, pursuant to Art. 277 TFEU.[23] Finally, under Art. 267 TFEU the CJEU can receive references for preliminary ruling concerning the validity of the act.[24] Whereas the first remedy is subject to time-limit, the other two are not.[25] [26]

Now, throughout the decades, the CJEU jurisprudence has crystalised a set of rules to identify the appropriate legal basis for an EU act.[27] First of all, the Court has made clear that

[22] Generally, on Art. 263 TFEU, see B. SCHIMA, *Article 263 TFEU*, *op. cit*.; in particular on the effects of the Regulation invalidity, see P. CRAIG, G. DE BÚRCA, *op. cit*., pp. 612-614.

[23] See *id*., pp. 483, 571-574. In general, on Art. 277 see also B. SCHIMA, *Article 277 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit.*, p. 1867 ff.

[24] See P. CRAIG, G. DE BÚRCA, *op. cit*., pp. 564-565; on Art. 267 TFEU in general, see B. SCHIMA, *Article 267 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1822 ff.

[25] See *supra* note 10. It is to be underlined, however, that a Court decision on a reference for preliminary ruling concerning the validity of an EU has binding value *erga omnes*, see, *e.g.*, B. SCHIMA, *Article 267 TFEU*, *op. cit.*, paras. 61-62. In this view, it is also to be borne in mind the rule established by the Court of Justice since its renowned *Foto-Frost* judgment (Court of Justice, 22 October 1987, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452).

[26] Regardless of whether the Council has adopted the Regulation under the appropriate legal basis or not, in any event the CJEU could also annul the act pursuant to Art. 296(2) TFEU, as the legislator failed to comply with the duty of state reasons enshrined therein. According to the consolidated reading of that provision, «[w]here a decision follows a well-established line of decisions, the reasons on which it is based may be given in a summary manner. By contrast, if a decision goes appreciably further than previous decisions, explicit reasoning must be given to support that decision.» (P. LOEWENTHAL, *Article 296 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1947 ff.). The latter is indisputably the case of the Regulation, as proven by this very research, whose efforts to motivate the Council's choice also reflect the fact that neither the Council nor the Commission have offered any explicit justification for the non-conventional strategy pursued. Other than the Regulation Preamble, the Commission Proposal for a Council Regulation on an emergency intervention to address high energy prices, COM(2022) 473 final, 14 September 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0473, is quite illustrative in this sense.

As far as the Commission is concerned, besides, its lack of reasoning amounts to a breach of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, http://data.europa.eu/eli/agree_interinstit/2020/1222/oj, par. 25.

Beyond the legal grounds, the EU legislator behaviour is censurable from a democratic perspective, too, for its lack of transparency. As a matter of fact, the Commission and the Council have postponed to may-be-litigation the effort – and the risks – of explicitly explaining their choice, leaving the interpret to make conjectures about the reasons backing the Regulation legal basis, postponing.

On the lack of adequate reasoning with regard to the Regulation legal basis, see, *mutatis mutandis*, M. CHAMON, *The use of Article 122 TFEU*, cit., pp. 32, 34.

Paraphrasing, P. LEINO-SANDBERG, *op. cit.* pp. 180-181, it is unlikely that the CJEU will annul the Regulation on the grounds exposed above, given the Court's historical deference toward EU Institutions' choices pertaining particularly technical issues, or taken in times of crisis (related to this aspect, *cf.* A. BOBIĆ, *The Individual in the Economic and Monetary Union: A Study of Legal Accountability*, Cambridge, 2024, pp. 48-81, tackling judicial review in the context of the EMU in general; *cf.* also the commentators of the *Gauweiler* case, *infra* note 87). Notwithstanding that this could be good news for the ones celebrating the potentialities in integration of Art. 122(1) TFEU, in general terms it would be regrettable were the Court not to sanction the failure to state reasons, being the latter an aspect sanctified by the Treaties, too.

[27] According to M. NOUWEN, *The Market Distortion Provisions of Articles 116-117 TFEU*, cit., p. 23, the Court of Justice has explicitly laid out these rules for the first time in the landmark *Titanium dioxide* judgment, Court of Justice, 11 June 1991, Case C-300/89, *Commission of the European Communities v Council of the European Communities* [hereinafter *Titanium dioxide*], ECLI:EU:C:1991:244. For a recent summary of these rules by the Grand Chamber, see Court of Justice, 3 December 2019, Case C-482/17, *Czech Republic v European Parliament and Council of the European Union*, ECLI:EU:C:2019:1035, paras. 31-32.

what matters is the act's content and aim, to be inferred from objective elements featured by the act itself, being irrelevant the meaning attached to the latter by the EU legislature.[28]

As to Reg. 2022/1854 content, this has been summarised above: the Regulation is composed of three measures, two of them being taxes.[29] As for its objective, the instrument is undoubtedly aimed at energy affordability, whose macroeconomic implications carry an overwhelming weight in any given economy. The Regulation implications with respect to the Internal Market, by contrast, are merely incidental.[30]

The hint to macroeconomic concerns given above already foreshadows why, although linking the Regulation to the energy policy field could have seemed natural, the Council's choice as to the Regulation legal basis was not that misplaced. Article 122, indeed, is encompassed in Part II, Title VIII of the TFEU, which is dedicated to the Economic and Monetary Union (EMU); more specifically, Art. 122 is part of the Chapter constituting the Economic "leg" of the EMU, aimed at coordinating Member States' economic policies.[31] This, strictly speaking, is the task the EU Economic Policy is limited to. In this view, it is striking to note the breadth of the powers Art. 122(1) endows the Council with. Not that salient, by contrast, is the specification made by Art. 122(1) referring to the «area of energy»[32], too. After all, it has been already noted that energy (and its price) is a key factor for an economy,[33] one

[28] Court of Justice, 11 June 1991, Case C-300/89, *Titanium dioxide*, cit., para. 10.

[29] See *supra* note 2.

[30] While the harmonizing effect of the Regulation is indisputable (G. ERDŐS, G. CZOBOLY, *New Legislative Tool for Introducing EU-Wide Windfall Taxes*, cit., section 2.2, underline it), the content of the act and its Preamble clearly frame the objective of preventing the fragmentation of the Internal Market as ancillary. The Regulation Preamble, in particular, deals extensively with the purpose of the introduced measures, see Rs. 5-9 on Reg. 2022/1854 overall goal, but also R. 15 on the macroeconomic significance shared by the three measures laid out in the Regulation. With specific regard to each measure, see R. 22 (concerning the EDR Section); Rs. 11-12, 25, 27 (for the MRC); Rs. 13-14, 51, 56-57, 58-59 (for the TSC). Notwithstanding the interplay between macroeconomic considerations and Internal Market ones, particularly in the field of energy, the analysis of the foregoing Recitals suggests that, when it comes to this piece of legislation, the economic policy concerns have weighted more than the harmonization ones in the balance struck by the EU legislature. This conclusion is supported also by the fact that the Regulation takes great care in regulating the allocation of the funds raised by the MRC and the TSC (see Rs.56, 58-59 and Arts. 10 and 17 of the Regulation). Indeed, there was no need for disciplining the allocation of the two measures' revenues, were the protection of the Internal Market cohesion the main preoccupation moving the Council.

It is to be highlighted that one thing is to underline the little weight of Internal Market concerns to the purpose of the Regulation legal basis, another is to say that these concerns are (and were) not of great practical relevance. Since the latter is not what the reasoning above contends, there is no contradiction on this point between this study and P. DE' CAPITANI DI VIMERCATE, *The 2022 and 2023 Italian Windfall Profit (?) Tax(es) On the Energy Sector: Lessons to Be Learned*, in *Dir. prat. trib. int.*, 2023, p. 367 ff., 379.

[31] See Arts. 2(3) and 5(1) TFEU.

On Art. 122 TFEU collocation in the economic pillar of the EMU architecture, see F. FABBRINI, *op. cit.*; S. BARONCELLI, *Differentiated Governance in European Economic and Monetary Union*, cit.; L. FLYNN, *Article 122 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit.*, p. 1282 ff. As for seminal case-law concerning the EMU and, among the other aspects, Art. 122, see Court of Justice, 27 November 2012, Case C-370/12, *Pringle*, cit. and Court of Justice, 12 September 2017, Case C-589/15 P, *Anagnostakis*, cit. On the consequences of Art. 122(1) collocation related to the array of measures available to the Council, see A. DE GREGORIO MERINO, *supra* note 19.

The imbalance between the Economic and the Monetary "legs" of the EMU is renowned, and a lot has been written on the matter. For some recent contributions, see P. TUCKER, *Does the ECB Care about Inflation?*, in R. WEBER (ed.), *op. cit.*, p. 19 ff.; C. NEUMEIER, *Inventing the Asymmetrical Monetary Union*, in R. WEBER (ed.), *op. cit.*, p. 37 ff.

[32] Art. 122(1) TFEU.

[33] As acknowledged by the Regulation Preamble, see *supra* note 30.

every national economic policy has to take into account. This is indeed what EU national governments have been doing for the last two years, enacting measures to address the energy crisis.[34] Reg. 2022/1854, then, is the result of a coordinated approach to that crisis, developed within the Council, in line with the role the Treaties appoints this Institution to. Moreover, the Regulation has been drafted to fit the description that emerges from Art. 122(1) wording, although it is noteworthy the broad interpretation the Council (and the Commission before) has made of the difficulty-of-supply requirement, adopting a legal instrument whose purpose is energy *affordability*, rather than securing energy *supply*.[35] Behind the straightforward purpose of energy affordability, thus, the Regulation ultimate objective pertains to Member States' economic policy coordination and the economic cohesion of the Union.

Even though Reg. 2022/1854 can be coherently included as a part of the EU Economic Policy, the strong link with the EU Energy Law dominion remains apparent. The relevant provision in the field is Article 194 TFEU.[36] The norm, enumerating in its first paragraph the EU Energy Policy primary targets, adopts an objective-driven approach to define which measures are to be included in the basket. In this view, the Regulation could have been framed as a set of energy policy measures, too. Indeed, in the light of how the Council has read the reference to energy supply in Art. 122(1), the Regulation could be seen as furthering the objective pointed at by Art. 194(1)(b) TFEU.[37] Besides, it could be argued that it aims at «ensuring the functioning of the energy market»[38]. Following this line of reasoning, the Council initiative would have been the fixer for a market which is failing to keep energy prices under control, *i.e.* to guarantee energy affordability, and it is not, thereby, serving consumers.[39] The only intricacy left, from this perspective, would be related to the legislative procedure to follow, whether the ordinary one, according to Art. 194(2), or the consultation procedure, according to

[34] G. SGARAVATTI *et al*., *National fiscal policy responses to the energy crisis*, in *Bruegel Datasets*, 26 June 2023.

[35] It is not something unheard before in the context of EU Energy Law. In this respect, see the reference made *infra*, at note 37.

[36] A. JOHNSTON, E. VAN DER MAREL, *Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU*, in *European Energy and Environmental Law Review*, 2013, pp. 181 ff., 184-185; K. HUHTA, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, in *International & Comparative Law Quarterly*, 2021, p. 991 ff., 992; K. TALUS, *Introduction to EU Energy Law*, Oxford, 2016, p. 7 ff., 12; S. GARBEN, *Article 194 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit*., p. 1547 ff., para. 7. See also F. MARTUCCI, *op. cit.*, p. 156, precising that the EU competence in the field is a shared one.

[37] On art. 194(1)(b) see M. MARLETTA, *Titolo XXI – Energia*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, Milano, 2014, pp. 1650 ff., 1656-1657, recalling that it was to reach this objective that the EU Energy Policy was born, and for a long time this has been the main, if not the only, goal of that Policy.

[38] Art. 194(1)(a) TFEU.

[39] Nor the recourse to Art. 194 TFEU would have been prevented by the second subparagraph of Art. 194(2), enshrining the so-called Member States' energy rights. The CJEU interprets the latter restrictively, being therefore safe to deem the provision inapplicable to the case at hand.

To appreciate how the doctrine has evolved on this point, compare A. JOHNSTON, E. VAN DER MAREL, *Ad Lucem?*, cit., with K. HUHTA, *The Scope of State Sovereignty under Article 194(2) TFEU*, cit. See also K. TALUS, *op. cit*., p. 13. Yet, Poland has brought the issue to the attention of the Court of Justice once again, see Action brought on 2 November 2022, Case C-675/22, *Republic of Poland v Council of the European Union*, in which the Court has been asked to precise yet another time the scope of the norm.

the subsequent paragraph 3.[40] It all depends, as the next pages illustrate, on whether the Regulation can be framed as «primarily of a fiscal nature»[41] or not.

Both Arts. 122(1) and 194 – be it paragraph 2 or 3 – seem, thus, viable legal bases for the Regulation, at least in principle. They all fall short in some respect, however. Whereas applying Art. 122(1) to fiscal provisions has proven contentious, other than resulting in sidelining the EP, nowhere in Art. 194 TFEU it is possible to find a legal basis providing for a decision-making procedure fast enough to match the urgency of the issues tackled by the Regulation. Regrettably, there do not seem to be better options available. Hypothetically, the EU legislator had only two further alternatives. The first was enhanced cooperation,[42] the second was to conclude an international agreement outside the EU legal framework.[43] As for the enhanced cooperation, the Treaties frame it as an instrument of «last resort».[44] This path thereby lacked the rapidity needed to react to the energy crisis. Preferring an international agreement to the Regulation, on the other hand, would have not avoided Art. 194(3) downsides, given that international agreements are the quintessence of the intergovernmental method. Besides, assuming that the ultimate objective of the Regulation was coordinating Member States' economic policy response to the energy crisis and supporting the EU economy's cohesion in the face of the latter,[45] none of the two options above would have been consistent with such goals, both leading, on the contrary, to an increase in fragmentation.

The *aut aut* between Arts. 122(1) and 194 TFEU cannot be circumvented, then. There are more than a few instances in which an EU act has to be adopted under multiple provisions, and even more are the situations in which this only *seems* to be the case.[46] According to the CJEU case-law, there are three routes to escape this kind of impasses. First, it is possible that, in fact, only one provision is the correct legal basis, because it derogates the other(s). In similar cases, the different options are not actually all equally viable, being legally sounder to root the concerned EU act in the (only) applicable *lex specialis*.[47] Secondly, and this is the most well-

[40] *E.g.*, A. WILSON, *Emergency intervention to address high energy prices in the EU,* cit., p. 10 indicates Art. 194(3) as a possible alternative to Art. 122(1) TFEU.

On the other hand, given that, by any chance, the TFEU does include provisions apt to the purpose, the recourse to Art. 352 TFEU, evoked by F. MARTUCCI, *op. cit.*, p. 160, does not seem in order.

[41] Art. 194(3) TFEU.

[42] See R. SZUDOCZKY, D. WEBER, *op. cit.*, p. 21, for enhanced cooperation past practice in the field of direct taxation.

[43] This has happened before, particularly in the context of the EMU. The reference is to the Treaty on Stability, Coordination and Governance, 2 March 2012 [1 January 2013], also known as TSCG or *Fiscal Compact*, but also to the ESM Treaty (Treaty Establishing the European Stability Mechanism, 2 February 2012 [27 September 2012]).

[44] Art. 20 TEU. The implications of the "last resort" requirement have been explored by the Grand Chamber in Court of Justice, 16 April 2013, Joined Cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v Council of the European Union*, ECLI:EU:C:2013:240, para. 50 (upholding the Opinion of Advocate General Bot).

[45] As argued *supra* in this section.

[46] A. ENGEL, *op. cit*., p. 142.

[47] Court of Justice, 6 November 2008, Case C-155/07, *European Parliament v Council of the European Union,* ECLI:EU:C:2008:605, paras. 34, 39-48; Court of Justice, 6 September 2012, Case C-490/10, *European Parliament v Council of the European Union*, ECLI:EU:C:2012:525, para. 44; K. HUHTA, *The Scope of State Sovereignty under Article 194(2) TFEU,* cit., p. 999.

According to the *lex specialis* maxim, among two norms the most specific shall apply. The essence of the relationship between the *lex specialis* and the *lex generalis* can be pictured as follows: the former features all the elements of the latter, while the opposite is not true; if the *lex generalis* is composed of three elements (A, B and

known approach, all the multiple options could actually be applicable, yet the act aim and content allow us to ascertain whether the instrument "centre of gravity" is closer to a Treaty provision or another.[48] When this is not possible, finally and exceptionally, the EU act is to be based on all the different provisions it is engaged with,[49] on the condition that the decision-making procedures provided for by the different Treaty norms are compatible among themselves.[50] When this is not the case, in the end, the act could not be adopted as it is.

From the reading above it is easy to grasp why the following pages adopt the *lex specialis* approach to find an answer to the Regulation legal basis quest. As a matter of logic, indeed, it seems most correct to always pursue the *lex specialis* avenue first and, only after, the "centre

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C), the *lex specialis* is made out of A, B, C, *and* D, at least (see A. ROSS, *On Law and Justice*, Oxford, 2019 (orig. 1953), pp. 149-150).

On the conceptualization of the *lex specialis derogat legi generali* dynamics see also A. LINDROOS, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, in *Nordic Journal of International Law*, 2005, pp. 27 ff., 46-47. Lindroos' work is relevant to this research even though she investigates the *lex specialis* maxim in the different context of International Law. The EU legal order, indeed, being a system based on the principle of conferral, is still closer to International Law than to Constitutional Law. Although from her International Law perspective, *id.*, pp. 35-39 introduces the *lex specialis* maxim in general terms. At p. 41, furthermore, she acknowledges that the *lex specialis* maxim is a successful criterion for solving conflicts between norms in the context of any sufficiently coherent international legal system. In her view, however, that kind of coherence is scarce in the International law panorama, following that the maxim is often an inadequate tool before complex conflicts between International norms, see *infra* note 71. In any event, there is no doubt about the fact that EU law is at least as coherent as the most coherent *corpus* of international law.

[48] A. ENGEL, *op. cit*., pp. 13-16, 140.

In legal bases litigation cases, it is more frequent that the Court justifies its decisions on this second approach, rather than on the *lex specialis* one (see A. ENGEL, *op. cit*., pp. 140-141 in this respect. Yet, see K. HUHTA, *The Scope of State Sovereignty under Article 194(2) TFEU*, cit., *supra* note 47). As a matter of logic, though, the latter comes first, which is why it has been anticipated in the main text, too.

[49] Court of Justice, 6 December 2001, Opinion of the Court pursuant to article 300 EC, Opinion 2/00 (*Cartagena Protocol* Opinion), para. 23 was the first time the Court acknowledged this possibility. On the point see A. ENGEL, *op. cit*., pp. 83-87; G. STROZZI, R. MASTROIANNI, *Diritto dell'Unione Europea. Parte istituzionale*, Torino, 2016, VII ed., p. 286. For an example of more recent case-law, see the Grand Chamber in Court of Justice, 11 June 2014, Case C-377/12, *European Commission v Council of the European Union*, ECLI:EU:C:2014:1903, para. 34.

[50] *Cf.* Court of Justice, 11 June 1991, Case C-300/89, *Titanium Dioxide*, cit., paras. 17-21. The concept has been later expressed in clearer words by the Court, see *e.g.*, Court of Justice, 11 June 2014, Case C-377/12, *European Commission v Council of the European Union*, cit. *Cf.* also A. ENGEL, *op. cit*., pp. 86-87.

So far, the CJEU has not provided a general definition of what compatibility between different decision-making procedures actually entails. The only guidance comes from CJEU precedents, from which one can try to infer some rules or trends. However, the only cases such precedents offer a clear solution to are the ones involving the same decision-making procedures. See, in this respect, Court of Justice, 11 June 1991, Case C-300/89, *Titanium dioxide*, cit., paras. 17-21; Court of Justice, 10 January 2006, Case C-94/03, *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2006:2, paras. 52-54; Court of Justice, 6 November 2008, Case C-155/07, *European Parliament v Council of the European Union*, cit., paras. 73-84; Court of Justice, 12 July 2012, Case C-130/10, *European Parliament v Council of the European Union*, ECLI:EU:C:2012:472, paras. 45-48.

A consistent trend in the CJEU case-law on the matter, assuming the possibility of detecting any, is the one highlighted by A. ENGEL, *op. cit*., p. 141 (but also p. 79), who notes that the decisive factor accounted for by CJEU decisions on compatibility among legal bases is whether a decision-making procedure provides for QMV or unanimity at the Council. By contrast, the Court usually overlooks the role of the EP, on which see *id*., pp. 87-90. This notwithstanding some isolated CJEU rulings leading to different conclusions, see Court of Justice, 10 January 2006, Case C-94/03, *Commission of the European Communities v Council of the European Union*, cit., paras. 52-54; Court of Justice, 10 January 2006, Case C-178/03, *Commission of the European Communities v European Parliament and Council of the European Union*, ECLI:EU:C:2006:4, para. 57; Court of Justice, 6 November 2008, Case C-155/07, *European Parliament v Council of the European Union*, cit., paras. 78-82. Indeed, see Court of Justice, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, para. 235.

of gravity" one. This study, besides, argues that the former leads to conclusions that are satisfactory enough.[51]

The next subsections explore the relationship between Art. 122(1) and, respectively, Art. 194(3) and Art. 194(2) TFEU from a *lex specialis* perspective. As already pointed out, the meaning of the «primarily of a fiscal nature» formula enshrined in Art. 194(3) TFEU is crucial to identify which is the paragraph of Art. 194 on which the Regulation could have been adopted, were it not approved through the procedure provided for by Art. 122(1) TFEU. Having already been highlighted that the final answer to this research is for the CJEU to give, the results of the analysis below are tested against the interpretation criteria adopted by the Court.

2.1. Article 122(1) TFEU vs Article 194(3) TFEU: The Traditional Reading of the «primarily of a fiscal nature» Formula

The «primarily of a fiscal nature» formula appears just twice in the Treaties. Other than in Art. 194(3), it recurs in Art. 192(2)(a) TFEU, the cornerstone of the EU Environmental Policy. A precise and explicit explanation of what this formula means does not exist,[52] yet it is clear that EU Treaties' drafters have employed this formulation to guide the legislature when EU environmental (or energy) policy measures encroach on fiscal matters. Whereas it is known that the latter is governed by the consultation procedure,[53] the ordinary legislative procedure applies to the former.[54] Measures «primarily of a fiscal nature» are thus the ones which, although included in the EU Environmental (or Energy) Policy, are to be approved through the consultation procedure.

As to the meaning of the formula, its consolidated reading takes as a reference the Treaty drafters' historical reluctance to share sovereignty in a policy field as sensitive as the fiscal one. Thereby, the formula is usually interpreted as requiring every EU intervention in the energy or

[51] Yet the reference to the "centre of gravity" approach emerges once again *infra* section II.2, even though from a different perspective.

As to the "multiple legal bases" avenue, it seems hard to imagine how it could be relevant to this research (in this respect, *cf. supra* note 50). Indeed, a CJEU ruling on the compatibility of Art. 122(1) decision-making procedure with either of the two provided for by Art. 194 has never been delivered to date. Nevertheless, there does not seem to be compatibility between the latter two norms and the Council QMV procedure under Art. 122(1), having regard to the EP's position, the procedure length, and the different voting requirements within the Council. In this sense, *cf.* also Court of Justice, 12 July 2012, Case C-130/10, *European Parliament v Council of the European Union*, cit., paras. 45-49.

[52] E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., p. 277.

[53] See, first of all, Arts. 113 and 115 TFEU, the two main Treaty legal bases of EU Tax Law (M. KELLERBAUER, *Article 113 TFEU, op. cit.*), but also Art. 311 TFEU, on EU Own Resources (see, generally, see B. KILLMANN, *Article 311 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *op. cit.*, p. 1977 ff.).

Analyzing the two taxes introduced by the Regulation is instructive of what new Own Resources could look like, even though the redistribution effect produced by the two takes place predominantly within every Member State borders and not beyond them. In fact, Arts. 11 and 17(1)(e) of the Regulation carve out some space for sharing among Member States the MRC and the TSC proceeds, respectively. How much the Member States will opt in is to be seen, yet it is not reasonable to expect any remarkable impact from these two norms.

[54] See Arts. 192(1) and 194(2) TFEU.

environmental field including fiscal provisions[55] – the Regulation undoubtedly to be considered as such[56] – to be adopted through the consultation procedure.[57]

According to the traditional interpretation of the «primarily of a fiscal nature» formula, thereby, Art. 194(2) TFEU could not possibly be considered as an alternative to Art. 122(1) in the quest for the Regulation correct legal basis. Only Art. 194(3) could.[58] Regrettably, this study has not found a single decision of the Court of Justice, at least among the ones published so far, in which the judges reflect on the relationship between Arts. 122(1) and 194(3) TFEU.[59] Every conclusion on the issue is thus doomed to remain speculative.

The closest reference made by the CJEU case-law to the issue at hand can be read in a 2012 judgment, *European Parliament v Council*, which briefly focuses on the relationship between Art. 122(1) and Art. 194(2) TFEU. According to the Court, the latter is the pillar on which the EU Energy Policy is built and, as such, it is the *lex generalis* to be derogated by more specific provisions, Art. 122(1) included.[60] The Court did not spend many words on the point, but, given that it did not refer to any other aspect,[61] it seemed to rely on a merely formalistic argument: both provisions refer – partially, at least – to the Energy Law and Policy dominion, yet the reference, in Art. 122(1), to the difficulty of supply of energy products, is much more specific than the broad and general formulation of Art. 194(2). The *lex specialis* shall be identified, thus, in Art. 122(1), on the ground of its *littera legis*.

Such a conclusion raises two questions. Given that the Court, in that 2012 judgment, was pretty laconic, taking a strictly logical and formalistic stance seems the most effective way to answer such questions while remaining as faithful as possible to the judgment.

To our purposes, first of all, Art. 122(1) is made of three parts, each one more specific than the previous: *1)* the reference to the «economic situation», *2)* the link to the difficulty of supply of «certain products» and, *3)* the one to the energy sector.[62] Considering the first and the second

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[55] There is no difference between EU acts containing only fiscal provisions and others, including non-fiscal provisions too, as the Regulation itself does. This is due to the very same *lex specialis* maxim. Arts. 192(2)(a) and 194(3), indeed, cover energy/environmental policy measures which are *also* fiscal in nature, while Arts. 192(1) and 194(2) do not. Thus, the former two apply. *Cf. supra* note 54 (and accompanying text), other than note 47 (in particular as far as the conceptualisation of the *lex specialis* maxim is concerned).

[56] *Cf.* E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., pp. 277-278.

[57] E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., pp. 275-278. *Cf.* also L. HANCHER, F. M. SALERNO, *Energy Policy after Lisbon*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds.), *EU Law after Lisbon*, Oxford, 2012, pp. 367 ff., 372, 374. *Cf.* also M. MARLETTA, *op. cit.*, p. 1658.

[58] This would seem to be Dr. Wilson's opinion, too, given that he indicates only Art. 194(3) as a possible alternative to Art. 122(1) TFEU (see *supra* note 40).

[59] The EUR-LEX database was interrogated by running an advanced search by text, entering the following input: "122(1) TFEU" AND "194(3) TFEU", expanding the research both to the title and the text of the CJEU case-law (this was the resulting URL: https://eur-lex.europa.eu/search.html?SUBDOM_INIT=EU_CASE_LAW&DTS_SUBDOM=EU_CASE_LAW&textScope0=ti-te&textScope1=ti-te&DTS_DOM=EU_LAW&CASE_LAW_SUMMARY=false&lang=en&type=advanced&qid=1699461604774&andText1=%22194%283%29+TFEU%22&andText0=%22122%281%29+TFEU%22).

[60] Court of Justice, 6 September 2012, Case C-490/10, *European Parliament v Council of the European Union*, cit., para. 67. On the point, see S. GARBEN, *op. cit*., para. 8. According to M. MARLETTA, *op. cit.*, p. 1654, this was the first judgment ever dealing with Art. 194 TFEU as a legal basis.

[61] *Cf.*, by contrast, *infra* in this subsection, the Court in the *Balkan-Import* case.

[62] As noted by M. CHAMON, *The use of Article 122 TFEU*, cit., p. 19, as well as A. DE GREGORIO MERINO, *op. cit.*, p. 122, the weight of the "in particular" clause of Art. 122(1) should not be overstressed, to the point that the «economic situation» reference becomes subject to an *interpretatio abrogans*. As a matter of interpretation, indeed, such an approach would be in breach of the primacy of the *littera legis*, on which see K. LENAERTS, J.

references, one would rightly conclude that Art. 122(1) is broader in scope than Art. 194(2), being the latter – contrary to the former – limited to the energy sector. However, the relevance of each part of Art. 122(1) depends on the context, which includes the other Treaty provisions concerned. In the case dealt with by the CJEU in 2012, what mattered was the energy sector, thereby the last part of Art. 122(1) was relevant while the previous ones were not, and the last part was indeed more specific than Art. 194(2).

A second question relates to the relevance of the reservation clause opening Art. 122(1) TFEU.[63] Reservation clauses indicate subsidiarity, so how could a subsidiary provision be *lex specialis*? It would be logical to answer by noting that Art. 194(2) opens with a reservation clause too, the two clauses being therefore irrelevant in identifying the *lex specialis*. Reservation clauses operate only *vis à vis* provisions which do not feature them, in the sense that, through these formulas, the subsidiary provision reroutes the interpret towards the more specific provisions applicable. When two subsidiary provisions are compared, by contrast, the subsidiarity character does not help to seek the one derogating the other.[64]

In 2012, however, the Court did not mention Art. 194(3) at all and, what is more, the provision is quite explicit and precise in derogating Art. 194(2), too.[65] The Court, though, could have motivated its decision differently, backing on the *Balkan-Import* precedent.[66] *Balkan-Import*, indeed, is commonly understood as framing Art. 103(2) TEEC – now Art. 122(1) TFEU[67] – as an emergency provision.[68] Consequently, as every such provision, it derogates norms made for ordinary times, such as Art. 194(2), regardless of any formalistic argument.

A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Paper, AEL 2013/9, 2013, p. 7: «Stated simply, the ECJ will never ignore the clear and precise wording of an EU law provision» (ambiguously, though, *id*., p. 13 makes clear that the Court is not prone to formalistic interpretations of the Treaties – as confirmed by A. SENNEKAMP, I. VAN DAMME, *A Practical Perspective on Treaty Interpretation: The Court of Justice of the European Union and the WTO Dispute Settlement System*, in *Cambridge Journal of International and Comparative Law*, 2014, p. 489 ff., 490 – which could mean something different from the obvious observation that the judge has to go beyond literal interpretation when the latter is not sufficient).

[63] From a constitutional viewpoint, Art. 122(1) reservation clause is extremely important, because it traces the scope of this extremely powerful provision which, otherwise, thanks to the general reference to the «economic situation», would grant the Council an immense power to determine EU economic policy, putting in a corner the EP completely, no matter the importance of the topic.

[64] On reservation clauses and subsidiarity see M. CHAMON, *The use of Article 122 TFEU*, cit., pp. 21-22.

[65] Art. 194(3) TFEU opening reads: «By way of derogation from paragraph 2 […]».

[66] Court of Justice, 24 October 1973, Case 5/73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof* [hereafter *Balkan-Import*], ECLI:EU:C:1973:109.

[67] To the purpose of this research there is no real difference between the two.

[68] *Cf.* in particular Court of Justice, 24 October 1973, Case 5/73, *Balkan-Import*, cit., para. 15 (leaving aside the terminological finesse that would distinguish between "emergency" and the term "urgency", employed by the Court).

The emergency nature of Art. 122(1) – also mirrored by the straightforward decision-making procedure it provides for – is a well-established concept in the literature by now, see, *e.g.*, B. DE WITTE, *The European Union's COVID-19 recovery plan*, cit., pp. 653, 668, and P. DERMINE, *Article 122 TFEU*, cit., highlighting the emergency nature of Art. 122, including par. 1 thereof. See also A. DE GREGORIO MERINO, *op. cit.*, p. 122-123, highlighting that *emergency* measures are, by definition, *temporary*, as the emergency they react to, otherwise it would be the normality and not, indeed, an emergency. On this exact point, J. LAMMERS, B. KUŹNIACKI, *The EU Solidarity Contribution and a More Proportional Alternative*, cit., p. 455 challenge the very characterization of the energy crisis as an emergency.

Contra see M. CHAMON, *The use of Article 122 TFEU*, cit., who maintains that Art. 122(1) is, indeed, an exceptional provision (p. 21), but it shall not be applied only in emergencies (pp. 22-23). In fact, the author contends that the perimeter of such an exceptional instrument should be identified by referring to the context (*ibid.*). It seems, however, that qualifying such a contextual element as an emergency element is the best way to

Is this a stance compatible with the 2012 judgment? Whereas it is true that the latter did not mention *Balkan-Import*, the two are not incompatible. It is possible to coordinate the two positions by holding that the more recent does not deny the other one, and in the 2012 case the Court simply did not deem to frame the situation as an emergency, adjudicating that there were all the same further (formal) reasons for making Art. 122(1) prevail on Art. 194(2).

The Council Legal Service, although in the different context of NGEU and its legal feasibility under the Treaties, has advanced an interpretation that, while duly considering the *littera legis* of Art. 122(1), preserves the *Balkan-Import* landing. In a nutshell, it has read the reservation clause of Art. 122(1) as a reference to ordinary times, thereby grounding in the provision wording the emergency character of the norm.[69] In this light, the relationship between Arts. 122(1) TFEU and 194(2) – in fact, paragraph 3 thereof – could be framed as a dialogue between the respective reservation clauses: the one in Art. 122(1) would refer to ordinary times norms, while the one opening Art. 194(2) would (also) indicate the provision subsidiarity *vis à vis* extraordinary times legislative means, Art. 122(1) TFEU included.

An identical argument could be made for Art. 194(3).[70] The conclusion would be that Art. 122(1) derogates Art. 194(3) as well, since prevailing on standard procedures, regardless of any other consideration, is the essence of emergency procedures.[71]

Logical as it could seem, such a conclusion – also reflecting «the clear intent of the Treaty authors to create a flexible legal basis»[72] – could face resistance in so far as it leads to the adoption of EU taxes by QMV, bypassing the consultation procedure. The EU fiscal stance, after all, is deeply rooted in an intergovernmental understanding of the integration process. This could be rendered in more legal terms by noting that, even though both Arts. 194(3) and 122(1) are *leges speciales* to more general rules, thereby to be interpreted restrictively,[73] such an imperative is undoubtedly more stringent for Art. 122(1), since the other provision is in fact a

guarantee exceptionality in the norm application and, at the same time, a degree of legal certainty to the provision scope, remaining loyal to the emergency logic reflected by Art. 122(1) wording, which also Prof. Chamon seems to acknowledge, at least to some extent.

[69] Council Legal Service, Opinion 9062/20, 24 June 2020, para. 121.

[70] Being par. 3 of Art. 194 a mere variation on the theme *vis à vis* Art. 194(2) (*cf.* in this respect *supra* note 65), it is to be read as an integration of the previous paragraph. In other words, it shall be interpreted as if it reads: «Without prejudice to the application of other provisions of the Treaties, [and by way of derogation from par. 2,] the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature».

[71] Borrowing again from the International Law discourse, Art. 122(1) resembles what the laws of war are for International Law: in times of war (in times of emergency) normal rules – as Art. 194(3) in the case at hand – are superseded by war (emergency) rules like Art. 122(1). See A. LINDROOS, *Addressing Norm Conflicts in a Fragmented Legal System*, cit., pp. 42-43. Yet, the author *ibid.* exemplifies how, in International Law, it is not always clear which norm is derogating and which one is being derogated. The same could be held before the conflict at hand, opposing a *lex specialis* on the ground of emergency to a *lex specialis* on the ground of the (fiscal) matter concerned. In this respect, see *infra* in this subsection.

[72] M. CHAMON, *The use of Article 122 TFEU*, cit., p. 20.

[73] K. LENAERTS, J. A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is*, cit., p. 26 (citing CJEU case-law). See also A. SOLOMOU, *Exceptions to a Rule Must Be Narrowly Constructed*, in J. KLINGLER, Y. PARKHOMENKO, C. SALONIDIS (eds.), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law*, Alphen aan den Rijn, 2019, p. 359 ff. (addressing the issue from the perspective of International Law; in particular on the EU, see pp. 376-377).

specific declination of the rule – ubiquitous in the Treaties – according to which the EU co-legislator have to go through a consultation procedure to act in the fiscal policy area.[74]

As to the possible interpretative approaches the CJEU could abide by,[75] it is clear that a merely literal interpretation would be of no use. A purely systematic interpretation, on the other hand, should make the "ordinary times procedures *vs* emergency times procedures" duality prevail over the aforementioned rule requiring strict interpretation of the exceptions. Nonetheless, the historical perspective plays a crucial role in the Court's systematic interpretation.[76] It follows that Member States' sovereignty would, in all likelihood, be the most relevant consideration in this context.

The Court could opt for a teleological approach as well. This, however, would not have only one possible outcome, as there are different kinds of teleological interpretation[77] and, besides, the same declination of the teleological criterion could lead to different results. On the one hand, indeed, a consequentialist interpretation would easily prioritise Art. 122(1) over Art. 194(3) TFEU. On the other, though, were the Court to frame the issue in *stricto sensu* teleological terms, the same conclusion would not be a given. It should be, at least at first sight, but the Court uses to back on its systematic reading of the Treaties to define the *telos* of a norm.[78] Were it the case, and in light of the above, the primacy of the intergovernmental approach to fiscal matters would prevail again.[79]

However, it has to be underlined that the most distinctive trait of the CJEU's interpretation of the EU law is its meta-teleological interpretation, *i.e.* the Court's capacity to read the law keeping the overarching objective of fostering integration in the 27 Countries' block always in mind.[80] Relying on this approach, the Court has always played a major role in the EU integration process.[81] Were this the ultimate approach followed by the Court in solving the Regulation legal

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[74] F. SCIAUDONE, *Art. 122*, in A. TIZZANO (ed.), *op. cit.*, p. 1310 ff., 1312 highlights how this principle should decisively impact the scope of Art. 122(1).

From this perspective, one could argue that, notwithstanding the wide margin of discretion awarded by the provision to the Council as for which measures it deems «appropriate» (see *id.*, pp. 1312-1313, referring to the CJEU case-law related to the original Art. 103 TEEC, from which Art. 122(1) derives; A. MIGLIO, *The Regulation on the Provision of Emergency Support within the Union*, cit., *supra* note 19; L. HANCHER, *A sound legal basis for emergency action in the EU's energy markets,* cit.; A. DE GREGORIO MERINO, *op. cit.*, p. 122, but also *id.*, *supra* note 19), fiscal measures should be among the options out of the table due to the strict interpretation requirement (*contra* J. LAMMERS, B. KUŹNIACKI, *The EU Solidarity Contribution and a More Proportional Alternative*, cit., p. 456, but see *id.*, *supra*, note 66).

[75] An interesting source for a more extensive reflection on the topic, which is beyond the scope of this research, is G. BECK, *The Legal Reasoning of the Court of Justice of the EU,* Oxford-Portland, 2012.

[76] K. LENAERTS, J. A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is,* cit., p. 13.

[77] *id*., p. 25 distinguish the *stricto sensu* teleological interpretation from other two *species* of teleological interpretation: functional interpretation (aimed at securing the *effet utile* of EU law), and consequentialist interpretation (which «focuses on the consequences that flow from an interpretative choice»).

[78] *Ibid.*

[79] Teleological interpretation, indeed, does not always expand the reach of a norm, as there can be instances of "teleological reduction", see *id.*, p. 28.

[80] *id*., p. 26; but also CONWAY G., *op. cit.*, pp. 358, 372-373.

[81] See K. ALTER, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe,* Oxford, 2003, pp. 1-32. See as well A. SENNEKAMP, I. VAN DAMME, *A Practical Perspective on Treaty Interpretation*, cit., p. 499; R. D. KELEMEN, S. K. SCHMIDT, *Introduction – the European Court of Justice and legal integration: perpetual momentum*, in *Journal of European Public Policy*, 2012, pp. 1 ff., 1-2; A. BOIN, S. K. SCHMIDT, *The European Court of Justice: Guardian of European Integration*, in A. BOIN, L. A. FAHY, P. HART (eds.), *Guardians of Public Value. How Public Organisations Become and Remain Institutions*, Cham, 2021, p. 135 ff.

basis conundrum, the act validity should not be at risk, and the Court would confirm to be one of the main actors of the EU project.

In addition, it is to be considered that an alternative path to uphold Art. 122(1) appropriateness to be Reg. 2022/1854 legal basis does exist. This paper contends that it is even sounder, in strictly legal terms. The whole line of reasoning abode by above, indeed, could be challenged by pointing at the little legal accuracy of the premise according to which the only possible alternative to Art. 122(1) is Art. 194(3), and not Art. 194(2). Being acritically stuck by such a premise, this subsection had to face complications all the same, towards the end of the reasoning, when testing its outcome against the CJEU interpretation criteria. The next subsection, on the other hand, relies on a more carefully crafted legal premise, yet it will have to face (political) hurdles from the beginning.

2.2. Article 122(1) TFEU vs Article 194(2) TFEU: A (Convincing) Minority Perspective on the «primarily of a fiscal nature» Formula

The traditional interpretation of Art. 194(3) is not the only one. In fact, an alternative – and more faithful to the Treaty text – reasoning has been advanced with respect to the «primarily of a fiscal nature» clause.[82]

Despite the relevance of the abovementioned formula with respect to the applicable decision-making procedure between the one provided for by Art. 194(2) and the one established by Art. 194(3), the CJEU has never dedicated much attention to it.[83] To date, the most authoritative consideration ever come from Luxembourg is still the one made by Advocate General Léger, in 2000, when he upheld what, even today, remains the consolidated understanding of this clause, according to which the latter is a manifestation of the Treaties drafters' political will to restate Member States' sovereignty with respect to fiscal matters, regardless of any consideration for possible interplays between fiscal policy and other policy fields.[84]

Dissenting from the foregoing, a more accurate reasoning should start by comparing the «primarily of a fiscal nature» formula with the reference to fiscal measures contained in Art. 114(2) TFEU: the Treaty text clearly traces a wider scope for the latter (referring to fiscal measures *tout court*) than for the former (reading «primarily of a fiscal nature»). There is indeed no other explanation for the insertion of the adverb «primarily».[85]

It follows that not *all* the fiscal measures provided for by environmental or energy policies have to be adopted through the consultation procedures, but only the ones *primarily of a fiscal nature, i.e.* the ones in which the fiscal nature prevails on the environmental or energy one. What is argued, then, is that the «primarily of a fiscal nature» formula implies a comparison between the two "souls" of the concerned measures, a test analogous to the "centre of gravity" one.[86]

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[82] E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit.

[83] M. CHAMON, *The use of Article 122 TFEU*, cit., p. 31.

[84] *Cf.* E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., pp. 276-277.

[85] M. CHAMON, *The use of Article 122 TFEU*, cit., p. 31. E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., p. 278: «Since the legislator added the term "primarily"…».

[86] See *supra* note 51. In this sense, E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., p. 280, envisages an «inherent "centre of gravity" test».

On what is *fiscal* in nature there is no need to speculate further, as taxes are without a doubt fiscal in nature, and this study ultimately relates to two taxes. What is to be seen is whether these taxes have a *primarily* fiscal nature or not. Whereas the nature of an EU act is to be inferred from its content and purpose,[87] no comparison would be possible considering only the content, because it is not the content of a measure that makes it pertaining to the EU Energy – or Environmental – Policy area. The scope of the two is indeed objective-driven.[88] The comparison has therefore to be carried out with respect to the goals of the two taxes.

The objectives of the EU Energy Policy are listed in Art. 194(1). There is nothing similar with regard to the definition of "fiscal *purpose*" which is usually linked to the concepts of public spending and public revenues. One could point out that EU Fiscal Policy also – or, rather, mainly – targets coordination among Member States' fiscal policies, with an eye to ultimately increase the level of economic cohesion[89] in the block. Indeed, in the EU context the traditional understanding of fiscal policies has gained momentum only in recent times.

In this specific instance, one could reasonably exclude that the taxes introduced by the Regulation have the purpose of generically raising public revenues. On the contrary, the Council has chosen these measures to face the energy crisis and fix a market which was no longer able to keep prices under control.[90] The Commission could have proposed other instruments to achieve the same result, so the Council could have adopted different measures envisaging the same outcome.[91] It does not seem unreasonable, thus, to conclude that the two

[87] *Ibid.* In the CJEU case-law, going beyond the discussion around the judgment and its implications for the EMU (in this respect, see *e.g.*, A. HINAREJOS, Gauweiler *and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, in *European Constitutional Law Review*, 2015, p. 563 ff.; P. CRAIG, M. MARKAKIS, *Gauweiler and the Legality of Outright Monetary Transactions*, in *European Law Review*, 2016, p. 4 ff.; H. SCHEPEL, *The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone*, in *Journal of Law and Society*, 2017, p. 79 ff.; T. TRIDIMAS, N. XANTHOULIS, *A Legal Analysis of the* Gauweiler *Case*: *Between Monetary Policy and Constitutional Conflict*, in *Maastricht Journal of European and Comparative Law*, 2016, p.17 ff.), *cf.* also the Grand Chamber's preliminary ruling in Court of Justice, 16 June 2015, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400, para. 46 (*cf.* in this sense A. HINAREJOS, Gauweiler *and the Outright Monetary Transactions Programme*, cit., p. 568), from which it could be inferred a general rule in the sense maintained in the text above.

[88] See in this respect Arts. 191 and 194(1) TFEU.

[89] The economic cohesion is arguably one of the goals hidden between the lines of Art. 194(1) TFEU, yet this should not blur the distinction between energy and fiscal purposes. Whereas different objectives in the Treaties can ultimately underline a shared (and deeper) rationale – such as, in this case, furthering economic progress and cohesion in the Union – this cannot lead to disregarding the architecture of the Treaties, according to which, in the case at hand, Fiscal Policy and Energy Policy are two different domains, each one with its own objectives and rules.

[90] The same conclusion is upheld by M. CHAMON, *The use of Article 122 TFEU*, cit., p. 31. Besides, the fact that Arts. 10 and 17 of the Regulation earmark the proceeds of the two taxes to support energy consumers is particularly illustrative in this sense.

This is not contradicted by A. DE GREGORIO MERINO, *op. cit.*, *supra* note 19. From note 89 *supra*, indeed, it is clear that – provided that Art. 122(1) allows the Council to adopt *economic* measures – such measures shall consequently have an *economic nature*, emerging from their content and purpose. However, the reasoning *supra* shows how a measure content and purpose can be appraised within a big picture or from a closer perspective. As to the former, in the case at hand, the two taxes have indeed an *economic* objective and content. As to the latter, though, they share a fiscal content and an energy policy objective. Fiscal and energy content/objectives, then, are *species vis à vis* the *genus* of economic objectives and content. As noted *supra* note 89, what matters here is the closer perspective.

[91] *Cf.* the reasons for considering the MRC a tax, F. BERTOCCO, *EU Taxes in The Aftermath of The Energy Crisis*, cit., section 2.

concerned taxes have not a *primarily* fiscal nature, rather serving first and foremost an energy policy objective.

Taking stock of the consequences of this minority opinion would require identifying Art. 194(2) TFEU, and not the following paragraph 3, as the eligible alternative to the legal basis chosen for the Regulation.[92] This, in turn, would result in upholding the choice made by the Council, given that the Court of Justice has ruled for the prevalence of Art. 122(1) on Art. 194(2) in the 2012 judgment analysed above.

The question, then, is whether it is possible to identify interpretative paths for the Court to uphold such a conclusion. Again, the literal interpretation would need the support of a systematic approach, which would confirm the theory advanced in these pages, were it based on the pure logic linking one Treaty provision to the other, rather than predominantly on historical considerations. Being true the opposite, though, both the systematic and the *stricto sensu* teleological interpretation the Court makes of the Treaties would confirm the reading of the formula which is – indeed – the consolidated one.

Ça va sans dire, the Court would endorse this minority doctrine were it to abide by a consequentialist interpretation. The thesis argued in this subsection would also be in line with a meta-teleological interpretation, valuing the Treaty words meaning as well. After all, the *littera legis* is the only real lead of the Treaty drafters' will. It is therefore ironic that, in rejecting an interpretation which is the most faithful to the Treaty text, so much weight is put on the will behind that text.

3. Pondering Shortcomings, Looking for Ways Out

Were the judges in Luxembourg to uphold the Council's choice, the need for Treaty reform voiced by many would be a little less urgent, since the TFEU would have been proved emergency-proof, showing, in addition, that there is still space for further integration, even without entering the reform process. After all, the first EU taxes ever to be approved by QMV would have not required a Treaty reform.

However, such a step forward in integration is coupled, regrettably, with a step back, *i.e.* the democratic deficit paid by the Regulation, which is inherent in Art. 122(1) decision-making procedure.[93] The EP had indeed no role in the negotiation and adoption of Reg. 2022/1854.[94] Granting autonomous powers to the executive branch is not something uncommon for Member

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[92] This would also strengthen the democratic legitimacy of fiscal measures adopted for an energy or environmental objective, see E. SCUDERI, *"Provisions Primarily of a Fiscal Nature"*, cit., pp. 282-284.

[93] On the "democratic deficit" phrase, see *e.g.*, W. WALLACE, J. SMITH, *Democracy or Technocracy? European Integration and the Problem of Popular Consent*, in J. HAYWARD (ed.), *The Crisis of Representation in Europe*, London, 1995, p. 137 ff.; J. BOWMAN, *The European Union Democratic Deficit: Federalists, Skeptics, and Revisionists*, in *European Journal of Political Theory*, 2006, p. 191 ff.; D. SEBASTIÃO, *Covid-19: A Different Economic Crisis but the Same Paradigm of Democratic Deficit in the EU*, in *Politics and Governance*, 2021, p. 252 ff.

[94] See P. DERMINE, *Article 122 TFEU*, cit., on the reference to the "European 49.3" made on *Le Monde*. The fact that the EP was among the forces that have pushed for the approval of the Regulation (see European Parliament resolution of 19 May 2022 on the social and economic consequences for the EU of the Russian war in Ukraine – reinforcing the EU's capacity to act (2022/2653(RSP), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0219&qid=1684620952287, is of little comfort.

States' constitutions, yet their parliamentary assemblies always have the final say on the exercise of such powers.[95] This is not the case for Art. 122(1) TFEU. Besides, tax law has been rooted in the "no taxation without representation" principle for centuries, and the only representation EU citizens were given, when it came to the Regulation, lies under the fact that all Member States' governments sitting around the Council table enjoyed, at least on paper, a democratic legitimation.

Undoubtedly, a reformed and updated TFEU should not put EU Institutions before an *aut aut* between a lengthy and ineffective crisis response, on the one hand, and a weak democratic legitimation together with a non-neglectable risk of litigation, on the other.

The picture above begs us to ask ourselves: *a)* whether the only way to avert that *aut aut* is to reform the Treaties, and *b)* if this is the case,[96] what would these new EU primary rules look like.

Keeping the Treaties as they are, several options are available. First of all, the three main players involved in the drafting process of the EU legislation, namely the European Commission, the European Parliament and the Council, could formally agree on the meaning of Art. 122(1). This would grant the Parliament engagement in the definition of the autonomous powers the Council is entrusted with under such provision. Alternatively, or cumulatively, the Commission could voluntarily enter negotiations with the Parliament every time it chooses to present a proposal to the Council under Art. 122(1), so that the final proposal were the result of a shared understanding between the Parliament and the Commission. Finally, the EC and the co-legislators could sign an Inter-Institutional Agreement (IIA) according to which when the Commission proposes measures under Art. 122(1), the European Parliament shall be included in the decision-making process. To make this IIA compatible with Art. 122(1) TFEU, the former should not mirror the ordinary legislative procedure and, obviously, it could not be deemed binding for the Council. In other words, the Agreement would be the institutionalisation of a practice, yet the Council would always be free not to consult the EP, nor the EP opinion could legally bind the Council in any way.[97]

Whereas all the former proposals could somehow help narrowing the democratic gap, they would transform the fast procedure established by Art. 122(1) into a lengthier one. The same objection could be raised against the Treaty reform proposals that have been put forward with regard to this norm, since they usually opt for replacing the current procedure with the ordinary legislative one.[98]

Truth be told, bypassing the *aut aut* above is not possible without amending the Treaties, nor extending to Art. 122(1) an already-seen solution as the ordinary legislative procedure could be enough. The only answer would be to learn from the constitutional design of EU Member States, rewriting Art. 122(1) so that the autonomous powers established therein would be

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[95] E. PALICI DI SUNI, *Le fonti del diritto*, in ID (ed.), *Diritto costituzionale dei Paesi dell'Unione Europea*, Milano, 2015, III ed., pp. 109 ff., 138 ff. See also A. DE GREGORIO MERINO, *op. cit.*, p. 121; P. DERMINE, *Article 122 TFEU*, cit.

[96] See M. CHAMON, *The use of Article 122 TFEU*, cit., p. 40 on the technical aspects that would be involved by a reform of Art. 122(1) TFEU. Art. 48(6) TEU would apply.

M. DAWSON, *The National Case for Reforming the EU Treaties*, in *Verfassungsblog*, 16 May 2023 proposes possible strategies to make Member States endorse the Treaties reform process.

[97] On these proposals, see M. CHAMON, *The use of Article 122 TFEU*, cit., pp. 34-39, dealing, in particular, with the compatibility of the IIA with EU primary law.

[98] See P. DERMINE, *Article 122 TFEU*, cit.; M. CHAMON, *The use of Article 122 TFEU*, cit., p. 40.

entitled to the Commission, which shall adopt temporary measures to face emergencies, while the co-legislators would exert an *ex post* control, confirming, rejecting or amending the provisional measures adopted by the EC.[99] Such an arrangement would combine Art. 122(1) emergency preparedness with a higher rate of democratic legitimacy.[100]

4. Conclusion

Reg. 2022/1854 has been a real breakthrough for EU (Tax) Law, representing a step forward in the quest towards the dismissal of the consultation procedure in fiscal matters. The interrogative at the core of this article is whether such a step is legally tenable.[101] Notwithstanding that, in the light of the legal challenges moved against the Regulation, it will be for the CJEU to have the final say on the point, the research identifies arguments which could back the choice made by the Commission and the Council as to Reg. 2022/1854 legal basis.

Two are the alternative paths suggested. If one accepts the traditional reading of the «primarily of a fiscal nature» formula enshrined in Art. 194(3) TFEU, the latter would be the only eligible alternative to Art. 122(1), which – all the same – should be deemed the *lex specialis* between the two, given its emergency nature, acknowledged not only by the Council, but also by the scholars' majority and the CJEU in the *Balkan-Import* case.

However, section II.2 maintains that a more accurate interpretation of Art. 194(3) would result in framing the Regulation as a *primarily* energy policy instrument, hence the applicability of Art. 194(2) TFEU instead of the subsequent paragraph 3. This, nonetheless, would lead to the prevalence of Art. 122(1), because the Court of Justice established, in 2012, that Art. 122(1) derogates Art. 194(2). Abiding by this second approach would not lead to different conclusions, then. Nonetheless, section II.2 gives an example of how impactful the minority reading of the «primarily of a fiscal nature» clause could be, also suggesting possible ways out from the unanimity trap blocking EU action in the energy (as well as in the environmental) policy field.

Assessing the two options exposed in section II in the light of CJEU interpretation criteria makes apparent that, first, there are indeed *legally* tenable approaches which could back the conclusions of this study and, second, that, as far as interpretation is concerned, both the

[99] *Ibid*. Compared to what proposed in the European Parliament Committee on Constitutional Affairs' Draft Report on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)), https://www.europarl.europa.eu/doceo/document/AFCO-PR-746741_EN.pdf *i.e.* to replace Art. 122 with a new procedure, formulated in a reformulated Article 222(1) TFEU, where the co-legislator exerts an *ex ante* control, rather than an *ex post* one, the option above would fasten the procedure. The latter proposal would also be in line with the Report of the Franco-German Working Group on EU Institutional Reform, *Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century*, 18 September 2023, p. 28 («In case the treaty is opened, Article 122 TFEU should be amended to include the EP in the decision-making on measures to address emergencies or crises.»).

[100] Interestingly, P. DERMINE, *Article 122 TFEU*, cit., reflects on the possible role of the European Council in the context of a reformed Article 122(1) TFEU.

[101] It is to be underlined that while this article argues that Art. 122(1) TFEU is indeed the most appropriate legal basis for the Regulation and, subsequently, that this Treaty norm has a big potential in terms of further integration among EU Member States when it comes to the fiscal policy area, these pages are not to be read as maintaining that there is no reason for the Regulation annulment, not at least in strictly legal terms. Indeed, the violation of Art. 296(2) TFEU, establishing the duty to state reasons, remains (see *supra* note 25). The speculative character of this study is proof of that.

proposed solutions involve *political* choices. As far as section II.1 is concerned, the tension between the emergency rationale behind Art. 122(1) and the unanimity tenet in fiscal matters would put the Court before a choice which is particularly sensible from a political point of view. In section II.2, on the other hand, politics weights in the premise in itself, as going beyond the *status quo* to uphold (far more logical and literal) legal arguments does require some political courage. Were the Court to adjudicate on the Regulation legal basis, if ever, it would be faced with these political choices.[102]

It is renown that the European integration has been made in times of crisis, most of all. If this is true, ours seems the perfect time[103] for further developments, particularly in the fiscal policy area.[104] Were the Court to follow its meta-teleological approach, it could gift[105] EU tax law with a Hamiltonian moment,[106] encompassing taxes among the measures the Council is allowed to adopt under Art. 122(1) TFEU, and opening a breach in the intergovernmental wall that tends to keep some deeply needed developments in fiscal matters out of the EU Institutions reach.

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[102] This is what often happens when dealing with hard cases. On the concept of "hard cases" in the debate among some classics of Legal Philosophy, see H. HART, *The Concept of Law*, Oxford, 1994, II ed., pp. 272-276.

Whereas, usually, the formalistic interpretation of a norm is more in line with the *status quo*, when it comes to interpreting the «primarily of a fiscal nature» clause the opposite seems to be true.

[103] A. TOOZE, *Welcome to the world of the polycrisis*, in *Financial Times*, 28 October 2022. On the concept of polycrisis, M. LAWRENCE, S. JANZWOOD, T. HOMER-DIXON, *What Is a Global Polycrisis? And how is it different from a systemic risk?*, Cascade Institute Discussion Paper 2022-4, September 2022. See also J. ZEITLIN, F. NICOLI (eds.), *The European Union Beyond the Polycrisis? Integration and politicization in an age of shifting cleavages*, London, 2020.

Note that taxes as the ones introduced by the Regulation, particularly the TSC, which targets the fossil sector, address not only the energy crisis but also the climate emergency. *Cf.* in this respect the UN Secretary-General's words reported on by Reuters, https://www.reuters.com/business/energy/un-chief-urges-tax-grotesque-greed-oil-gas-companies-2022-08-03/ (on the TSC as an example of windfall taxation, see F. BERTOCCO, *EU Taxes in The Aftermath of The Energy Crisis,* cit., sections 1-2, and the cited literature).

[104] As P. LEINO-SANDBERG, *op. cit.*, p. 162 points out, this is a field in which the response to the pandemic-related crisis has been built «on solutions that would have been *considered* illegal just a while ago» [emphasis in the original]. Indeed, granting financial support for free, as well as issuing common debt, have been taboos for a long time before NGEU. Likewise, the case of Reg. 2022/1854 could be for EU tax law what NGEU has been for the EMU as a whole.

After all, whereas, in 2012, L. HANCHER – SALERNO F. M., *supra* note 57, investigating on which was the *lex specialis* between Arts. 194(3) and 122(1) TFEU, contended that the former derogated the latter, L. HANCHER, *A sound legal basis for emergency action in the EU's energy markets*, cit., herself, today, envisages the possibility for the Regulation legal basis to be upheld by the CJEU.

[105] It is for the Court, indeed, to ultimately decide what is consistent with EU law and what, instead, violates it, as P. LEINO-SANDBERG, *op. cit.*, p. 162 acknowledges. *Id.*, pp. 180-181 predicts that the CJEU will not oppose the choice made by the Council (see *supra* note 25).

[106] Paraphrasing Otmar Issing, as quoted by F. MARTUCCI, *op. cit.*, p. 153. Given the circumstances, it would be more appropriate to talk about a *van Gend & Loos* moment (the judgment had just turned sixty).