

ARTICLE

Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy

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Abstract

Recent geopolitical and environmental events have created a new urgency for a just energy transition and a socially inclusive modernization of the energy sector. This article critically evaluates the extent to which Article 194(1) of the Treaty on the Functioning of the European Union (TFEU), as the competence provision of EU energy law, is congruent with the energy justice framework emerging from social sciences. It establishes the substantive scope and justiciability of Article 194(1) TFEU, including the legal principles and so-called ‘guiding principles’ of the provision relating to the internal market, environmental protection, and energy solidarity. The article analyzes the potential and shortcomings of Article 194(1) TFEU in contributing to more equitable decision-making processes in EU energy law. It concludes by evaluating the provision as a regulatory instrument that facilitates the (re)balancing of competing interests of the energy sector. This research further concludes that social considerations of energy justice cannot be sufficiently addressed through Article 194(1) TFEU.

Keywords: EU energy law, Energy justice, Energy transition, Internal energy market, Principle of environmental integration, Principle of solidarity

1. INTRODUCTION

Recent geopolitical and environmental events have created a new urgency for the energy transition in the European Union (EU). The European Commission’s effort to ensure the integration of renewable energy sources and security of energy supply, while safeguarding a ‘gradual’,¹ ‘just’,²

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¹ European Commission, ‘Clean Energy for All Europeans’, 30 Nov. 2016, COM(2016) 860 final, Annex 1, p. 1.

² European Commission, ‘The European Green Deal’, 11 Dec. 2019, COM(2019) 640 final, p. 2.

‘inclusive’,³ and ‘socially fair’⁴ energy transition, constitutes the main emphasis of current EU energy policy. While the Commission falls short of comprehensively defining how a just energy transition could be legally accelerated and safeguarded, its effort is a testament to the development that justice aspects of energy policy have come to the fore.⁵

As the term ‘energy transition’ implies, the EU energy sector is currently subject to large-scale disruptive changes with far-reaching societal implications. Owing to increasing environmental awareness, technological advancements and gradually more liberalized markets, this transition is more than simply of a technological nature. It is a socio-cultural change with significant effects on incumbent institutions transitioning towards a more sustainable, more distributed and overall smarter energy system, with an increased focus on demand-side actors.⁶ The simultaneous decarbonization, decentralization, and digitalization of the energy sector prompts new market demands and a significant societal shift towards increasing democratization.⁷

Aiming to guide the energy transition in its effort to modernize the energy sector, the concept of energy justice is currently gaining importance in legal scholarship, where it has been described as the ‘primary driver’,⁸ ‘overall *raison d’être*’,⁹ and ‘main trigger of energy law in the 21st century’.¹⁰ Energy justice aims critically to evaluate energy policy by reflecting on the societal implications of energy regulation, otherwise often dominated by technological considerations.¹¹ It promotes cross-sectoral governance beyond the implications of particular energy technologies, networks or infrastructures by identifying an overarching framework of values and objectives to align energy policy with public interests. Moreover, it aims to guide energy decision making by offering a framework to (re)balance the competing interests governing the energy sector.

Article 194(1) of the Treaty on the Functioning of the EU (TFEU)¹² enshrines the overarching legal principle of solidarity and so-called ‘guiding principles’ relating to the internal market and environmental protection that serve as binding standards of interpretation. As such, Article 194(1) governs EU energy policy and the EU energy

³ Ibid.

⁴ European Commission, ‘Fit for 55: Delivering the EU’s 2030 Climate Target on the Way to Climate Neutrality’, 14 July 2021, COM(2021) 550 final, p. 4.

⁵ R.J. Heffron, ‘Applying Energy Justice into the Energy Transition’ (2022) 156 *Renewable and Sustainable Energy Reviews*, article 111936, p. 1.

⁶ D. Loorbach, N. Frantzeskaki & F. Avelino, ‘Sustainability Transitions Research: Transforming Science and Practice for Societal Change’ (2017) 42 *Annual Review of Environment and Resources*, pp. 599–626, at 601; M. Edens, ‘Public Value Tensions for Dutch DSOs in Times of Energy Transition: A Legal Approach’ (2017) 18(1–2) *Competition and Regulation in Network Industries*, pp. 132–49, at 134; S. Lavrijssen, ‘The Right to Participation for Consumers in the Energy Transition’ (2016) 25(5) *European Energy and Environmental Law Review*, pp. 152–71, at 153.

⁷ Edens, n. 6 above, p. 134.

⁸ J. Heffron & K. Talus, ‘The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers’ (2016) 19 *Energy Research & Social Science*, pp. 1–10, at 9.

⁹ Heffron, n. 5 above, pp. 1–2.

¹⁰ I. Maher & O. Stefan ‘Delegation of Powers and the Rule of Law: Energy Justice in EU Energy Regulation’ (2019) 128 *Energy Policy*, pp. 84–93, at 84.

¹¹ Heffron & Talus, n. 8 above, p. 5.

¹² Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2012] OJ C 326/47.

objectives that are explicitly enumerated under Article 194(1)(a)–(d) TFEU. As the first paragraph of the competence clause on energy in EU primary law,¹³ it guides secondary legislation¹⁴ and outlines the substantive scope of EU competences. Notably, energy is otherwise a sector of shared competences.¹⁵ The provision therefore defines the context and outer boundaries of the EU energy objectives.

This article seeks to analyze the potential of Article 194(1) TFEU as a legal instrument to promote energy justice in EU energy regulation. It firstly aims to clarify the legal character of Article 194(1) and its systematic understanding, before evaluating the extent to which the provision's scope and interpretation is congruent with the elements of energy justice emerging from social sciences. In this regard, the intrinsic potential of Article 194(1) TFEU to balance competing interests in the energy sector is analyzed.

This article proceeds as follows. Section 2 presents the main conceptualization approaches of energy justice, which have been discussed in social science literature for more than a decade,¹⁶ and explores their relevance for EU energy regulation. Section 3 then offers an evaluation of the extent to which the elements of energy justice are congruent with the substantive legal scope and justiciability of Article 194(1) TFEU. Section 4 presents conclusions. A doctrinal analysis outlines the systematic understanding of Article 194(1) in the light of recent case law and scholarly contributions before evaluating the potential of the provision to promote energy justice through the (re)balancing of competing interests of the energy sector. The article ultimately aims to bridge the gap between energy justice as a universal concept of social sciences and the legal implications of energy justice in the context of Article 194(1) TFEU.

2. CONCEPTUALIZATION OF ENERGY JUSTICE

Originating from grassroots environmental and climate justice movements with an increasing focus on energy,¹⁷ the concept of energy justice has been used by scholars to describe various developments, including responses to energy poverty.¹⁸ As later understood in social and legal scholarship, energy justice aims critically to evaluate energy policy by identifying and tackling ongoing injustices in the energy

¹³ Primary law refers to the EU treaties that lay down the legal framework of the EU.

¹⁴ Secondary legislation in EU law constitutes the body of law (such as Regulations and Directives) that is derived from the principles and objectives set out in the EU treaties.

¹⁵ Shared competences mean that the EU has primary competence to legislate, and Member States may exercise their competence only to the extent that the EU has not done so. The derogation of Art. 194(2) TFEU reserves the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply.

¹⁶ See A. Goldthau & B.K. Sovacool, 'The Uniqueness of the Energy Security, Justice, and Governance Problem' (2012) 41 *Energy Policy*, pp. 232–40; R.J. Heffron, D. McCauley & B.K. Sovacool, 'Resolving Society's Energy Trilemma through the Energy Justice Metric' (2015) 87 *Energy Policy*, pp. 168–76.

¹⁷ K. Jenkins, 'Setting Energy Justice Apart from the Crowd: Lessons from Environmental and Climate Justice' (2018) 39 *Energy Research & Social Science*, pp. 117–21, at 119.

¹⁸ R.J. Heffron & D. McCauley, 'The Concept of Energy Justice across the Disciplines' (2017) 105 *Energy Policy*, pp. 658–67, at 659.

sector.¹⁹ The concept has been described, inter alia, as an evaluative and normative contribution,²⁰ as well as an analytical and conceptual tool.²¹ In the context of energy regulation, however, its role as a decision-making instrument can particularly support legislative, judicial and executive decision-making processes in delivering more just and equitable ways of managing competing interests of energy policy.²² It is considered to guide energy regulation towards a more holistic view by moving away from regulating individual or technology-specific aspects of the energy sector.²³ As a balancing mechanism, it serves to achieve more effective energy regulation, which does not merely address individual aspects of security of supply, economic or environmental considerations, but aims to manage energy resources in line with societal needs.²⁴

While EU law has not adopted an explicit definition of ‘energy justice’, the EU is clearly pursuing the objective of establishing a more equitable, just, and sustainable energy sector.²⁵ The Clean Energy for All Europeans package (2019)²⁶ – the fourth revision of the EU energy law framework – and the European Green Deal (2019)²⁷ – the EU policy framework for a transition towards climate neutrality – both implicitly refer to energy justice issues.²⁸ This includes placing the EU energy consumer at the heart of energy policy and seeking to ensure that future regulation is developed close to EU citizens through the promotion of active public participation and democratization of the energy sector.²⁹ The Commission particularly highlights certain energy justice concerns, such as ‘access to energy for all, tackling energy poverty at its roots and protecting vulnerable consumers’.³⁰ The Fit for 55 package (2021)³¹ – the Commission’s proposal on reducing greenhouse gas emissions by at least 55% by 2030 compared with 1990 – recently confirmed that the path towards climate neutrality can be a unique opportunity to tackle inequality and energy poverty.³²

¹⁹ See K.E.H. Jenkins et al., ‘Towards Impactful Energy Justice Research: Transforming the Power of Academic Engagement’ (2020) 67 *Energy Research & Social Science*, article 101510, p. 2; B. Vitéz & S. Lavrijssen, ‘The Energy Transition: Democracy, Justice and Good Regulation in the Heat Market’ (2020) 13(5) *Energies*, pp. 1–24, at 4.

²⁰ K. Jenkins et al., ‘Energy Justice: A Conceptual Review’ (2016) 11 *Energy Research & Social Science*, pp. 174–82, at 174.

²¹ B.K. Sovacool & M.H. Dworkin, ‘Energy Justice: Conceptual Insights and Practical Applications’ (2015) 142 *Applied Energy*, pp. 435–44, at 435.

²² Heffron & Talus, n. 8 above, pp. 8–9; Heffron & McCauley, n. 18 above, p. 665.

²³ Heffron & Talus, n. 8 above, p. 5; A. McHarg, ‘Energy Justice: Understanding the “Ethical Turn” in Energy Law and Policy’, in I. del Guayo et al. (eds), *Energy Justice and Energy Law* (Oxford University Press, 2020), pp. 15–30, at 29.

²⁴ Heffron & Talus, n. 8 above, p. 5.

²⁵ See European Commission, Directorate-General for Energy, *Clean Energy for All Europeans* (European Union, 2019), pp. 1–14, at 12, available at: <https://data.europa.eu/doi/10.2833/9937>; European Commission, n. 2 above; European Commission, n. 4 above.

²⁶ European Commission, n. 25 above.

²⁷ European Commission, n. 2 above.

²⁸ *Ibid.*, p. 2; European Commission, n. 25 above.

²⁹ *Ibid.*

³⁰ European Commission, n. 25 above, p. 12.

³¹ European Commission, n. 4 above.

³² *Ibid.*, p. 1.

Moreover, the Electricity Directive, which establishes the common rules for the internal market in electricity, acknowledges that ‘(e)nergy services are fundamental to safeguarding the well-being of the Union citizens’, with an increased focus on vulnerable consumers and energy poverty.³³ Hence, it becomes evident that EU secondary legislation on energy is increasingly introducing social considerations.

Yet, in the absence of a more explicit legal analysis of energy justice in EU law, the objective of an equitable, just, and sustainable energy sector lacks a framework against which existing and future energy legislation can be evaluated. The conceptualization of energy justice aims to address this gap by offering justice principles and values according to which tensions in energy regulation can be identified and settled.

Sovacool and co-authors describe energy justice as ‘a global energy system that fairly distributes both the benefits and burdens of energy services, and one that contributes to more representative and inclusive energy decision-making’.³⁴ However, as an emerging notion, energy justice lacks a uniformly accepted definition. Several approaches serve as points of departure to conceptualize the notion of energy justice, three of which have emerged as dominant: (i) framing energy justice as a collection of different justice tenets,³⁵ (ii) rooting the concept in ten ‘energy justice principles’,³⁶ or (iii) abandoning the pursuit of a homogeneous definition altogether.³⁷

None of these proposed universal conceptualizations of energy justice exist without criticism.³⁸ However, taken individually and as outlined below, each approach presents a unique decision-making instrument through which different aspects of energy justice in energy policy can be highlighted. Combined and interpreted in a complementary way, they offer a comprehensive lens through which the potential and shortcomings of Article 194(1) TFEU in addressing energy justice issues can be identified.

2.1. Justice Tenets

By connecting energy policy to justice tenets, energy justice ties energy regulation to the fundamental notions of justice.³⁹ While there is an ongoing debate as to how many tenets are inherent in energy justice,⁴⁰ its classification according to justice tenets allows energy policy to be analyzed through the lens of a more nuanced understanding

³³ Directive (EU) 2019/944 on Common Rules for the Internal Market for Electricity and Amending Directive 2012/27/EU [2019] OJ L 158/125 (Electricity Directive), Recital 59, Arts 28–29.

³⁴ B.K. Sovacool et al., ‘New Frontiers and Conceptual Frameworks for Energy Justice’ (2017) 105 *Energy Policy*, pp. 677–91, at 677.

³⁵ See Jenkins et al., n. 20 above, p. 174.

³⁶ See Sovacool et al., n. 34 above, p. 677.

³⁷ See Jenkins et al., n. 19 above; M.C. LaBelle, ‘In Pursuit of Energy Justice’ (2017) 107 *Energy Policy*, pp. 615–20, at 615.

³⁸ R. Mauger, ‘Making Sense of Changing Concepts for the Energy Transition: An Energy Transition Concepts Nexus for Policy and Law’, in R. Fleming, K. Huhta & L. Reins (eds), *Sustainable Energy Democracy and the Law* (Brill, 2021), pp. 28–53, at 35.

³⁹ Jenkins et al., n. 20 above, p. 175.

⁴⁰ Some scholars further refer to additional tenets such as cosmopolitan and restorative justice; most recently Heffron, n. 5 above, p. 2.

of social justice, offering a framework to identify ongoing injustices in the energy sector.⁴¹

The tenets predominantly agreed upon are distributive justice,⁴² recognition justice, and procedural justice.⁴³ *Distributive justice* considers a fair allocation of burdens and benefits throughout the energy system ('who receives what'), such as a just distribution of energy revenues.⁴⁴ *Recognition justice* is concerned with a fair representation of those affected ('who is misrepresented'), which includes recognition of those consumers who are particularly vulnerable to higher energy prices and energy poverty.⁴⁵ *Procedural justice* addresses equal access to governing decision-making processes and is often associated with public participation ('who decides'), which includes information disclosure such as the transparency of energy bills.⁴⁶ Some scholars argue that the latter two justice tenets are relatively similar in nature.⁴⁷ However, other voices are emerging which connect recognition justice to the principle of equality with an increased focus on human dignity and autonomy, explicitly delimitating it from procedural justice.⁴⁸ Nevertheless, while the three tenets of energy justice can highlight different injustice aspects within a given scenario, they are also inherently interlinked in practice.

2.2. 'Principles of Energy Justice'

Another conceptualization approach defines energy justice according to so-called 'principles of energy justice', which are built upon social justice theories and aim to promote energy justice as a decision-making tool.⁴⁹ These 'energy justice principles' are not legal norms, but identify the underlying values and elements of a just and socially acceptable energy sector that energy decision-making must seek to balance and strive towards. They do not just offer guidance to regulators, administrative bodies, and the judiciary, but also to consumers and industrial actors.

Initially, eight 'energy justice principles' were introduced, which were later extended to ten.⁵⁰ These are defined as detailed in [Table 1](#):⁵¹

⁴¹ D.A. McCauley et al., 'Advancing Energy Justice: The Triumvirate of Tenets' (2013) 32(3) *International Energy Law Review*, pp. 107–10, at 107.

⁴² Often also referred to as 'distributional justice', despite a lack of clear differentiation between the two concepts.

⁴³ See Heffron, McCauley & Sovacool, n. 16 above, p. 168; Jenkins et al., n. 20 above, pp. 176–7.

⁴⁴ Jenkins et al., n. 20 above, pp. 176–7; Vitéz & Lavrijssen, n. 19 above, p. 4.

⁴⁵ *Ibid.*

⁴⁶ Jenkins et al., n. 20 above, p. 178; R. Fleming, K. Huhta & L. Reins, 'What Is Sustainable Energy Democracy in Law?', in Fleming, Huhta & Reins, n. 38 above, pp. 3–27, at 13.

⁴⁷ R. Salter, C.G. Gonzalez & E.A. Kronk Warner, 'Energy Justice: Frameworks for Energy Law and Policy', in R. Salter, C.G. Gonzalez & E.A. Kronk Warner (eds), *Energy Justice: US and International Perspectives* (Edward Elgar, 2018), pp. 1–11, at 3.

⁴⁸ N. van Uffelen, 'Revisiting Recognition in Energy Justice' (2022) 92 *Energy Research & Social Science*, article 102764, pp. 2–4.

⁴⁹ Sovacool et al., n. 34 above, p. 688; Sovacool & Dworkin, n. 21 above, p. 439.

⁵⁰ The initial 8 'energy justice principles' introduced by Sovacool & Dworkin (n. 21 above) were later extended to 10 in Sovacool et al. (n. 34 above).

⁵¹ Sovacool & Dworkin, n. 21 above, p. 435; Sovacool et al., n. 34 above.

Table 1 Overview and Definition of Principles of Energy Justice

Availability	Sufficient energy resources of high quality (e.g., security of energy supply)
Affordability	Not more than 10% of a person's income should be paid for energy services (e.g., affordability of energy prices)
Due process	The respect for due process and human rights in the production and use of energy (e.g., participation in energy policy making)
Good governance*	Access to high-quality information on energy and the environment, and fair, transparent, accountable forms of energy decision making (e.g., transparency of energy bills)
Sustainability	Energy resources should be depleted with consideration for savings, community development, and precaution (e.g., energy efficiency)
Intragenerational equity	All people have a right to access energy services fairly (e.g., protection of vulnerable consumers)
Intergenerational equity	Future generations have a right to enjoy a good life undisturbed by the damage our energy systems inflict on the world today (e.g., resilience of energy communities)
Responsibility	Responsibility to protect the natural environment and minimize energy-related environmental threats (e.g., the polluter pays)
Resistance	Energy injustices must be actively and deliberately opposed (e.g., public education)
Intersectionality	Expanding the idea of recognitional justice to other forms of justice including socio-economic, political, and environmental (e.g., addressing the gender data gap)

Note

* Later also referred to as transparency and accountability.

2.3. *Beyond a Homogeneous Definition*

While the previously outlined conceptual frameworks play an important role in identifying justice concerns and guiding energy decision making at the universal level, some scholars consider the picture to be more complex and refrain from pursuing a single homogeneous definition altogether.⁵² The underlying rationale of this understanding is that energy justice, as a workable notion, must be capable of responding to local particularities and differences.⁵³ It requires a nuanced interpretation tailored particularly to a given contemporary societal environment and its political-economic landscape.⁵⁴ The totality of factors such as fossil fuel dependencies, given infrastructures, and the current energy mix, as well as socio-economic circumstances, demand a particular policy response.⁵⁵

Communal and regional levels of decision making demonstrate a greater ability to identify and meaningfully address local realities.⁵⁶ Communal factors such as social

⁵² See Jenkins et al., n. 19 above; LaBelle, n. 37 above, p. 615.

⁵³ A. Pinker, *Just Transition: A Comparative Approach: A Report Prepared for the Just Transition Commission* (The James Hutton Institute & SEFARI Gateway, 2020), p. 4.

⁵⁴ LaBelle, n. 37 above, p. 616.

⁵⁵ Pinker, n. 53 above, p. 64.

⁵⁶ *Ibid.*, p. 65; see also S. Bouzarovski & N. Simcock, 'Spatializing Energy Justice' (2017) 107 *Energy Policy*, pp. 640–8, at 645.

vulnerabilities and differences in race, gender and wealth can be more efficiently recognised by local approaches rather than undifferentiated top-down regulation.⁵⁷

It is evident that the national governments of Member States can contribute positively in this respect. This is particularly significant given that important aspects of energy policy remain national competences.⁵⁸ Nevertheless, it is also necessary to recognize the political-economic ties of national energy sectors and potential protectionist behaviour over national industries and employment, which carry far-reaching effects on other Member States. This highlights the importance of additional supranational leadership that ensures a clear sense of direction and guidance, offering cooperation, coordination, monitoring, integration, and objective setting.⁵⁹

As a result, similar to a plurality of just transitions currently taking place in parallel,⁶⁰ energy justice must be reflected throughout all regulatory levels. Only a nuanced interpretation of energy justice on different legal scales can address the multifaceted character of energy regulation and its societal consequences. Consequently, in addition to justice tenets that allow for greater visibility of injustices in the energy sector, and ‘energy justice principles’ that identify the values towards which energy decision making should strive, energy justice must be defined according to the particularities that a given regulatory level aims to address. In the context of the EU, this means that energy justice must provide a clear sense of direction and guidance while leaving sufficient flexibility for local and national particularities. Consequently, energy justice must always be understood as an interplay of the individual energy justice approaches on the communal, regional, national, and EU levels.

3. ARTICLE 194(1) TFEU THROUGH THE LENS OF ENERGY JUSTICE

This section applies the previously outlined energy justice frameworks to Article 194(1) TFEU:

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
 - (a) ensure the functioning of the energy market;
 - (b) ensure security of energy supply in the Union;

⁵⁷ Jenkins et al., n. 19 above, p. 3.

⁵⁸ See, e.g., the choice between different energy sources according to Art. 194(2) TFEU: K. Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector’ (2021) 70(4) *International & Comparative Law Quarterly*, pp. 991–1010, at 991.

⁵⁹ J. Gupta & L. Ringius, ‘The EU’s Climate Leadership: Reconciling Ambition and Reality’ (2001) 1(2) *International Environmental Agreements: Politics, Law and Economics*, pp. 281–99, at 282–94.

⁶⁰ See J. Abraham, ‘Just Transitions in a Dual Labor Market: Right Wing Populism and Austerity in the German Energiewende’ (2019) 22(3) *Journal of Labor and Society*, pp. 679–93; Pinker, n. 54 above.

- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.⁶¹

As the first paragraph of the competence clause of energy in EU primary law, Article 194(1) TFEU enshrines the principle of solidarity and ‘guiding principles’ which govern and frame the EU energy objectives of Article 194(1)(a)–(d) TFEU. The following section analyzes the extent to which the elements of energy justice are congruent with Article 194(1) TFEU and the provision’s potential in mitigating between competing interests within the energy sector. This research first outlines the systematic understanding of Article 194(1), considering its scope and justiciability. Subsequently, the substantive interpretation of ‘in the context of the establishment and functioning of the internal market’, ‘with regard for the need to preserve and improve the environment’, and ‘in a spirit of solidarity between Member States’ is analyzed. In cases where explicit reference is made to particular elements of energy justice, these aspects are cited in quotation marks (for instance, ‘distributive justice’).

3.1. The Legal Principle of Solidarity and the ‘Guiding Principles’ of Article 194(1) TFEU

The following section analyzes the substantive scope and justiciability of Article 194(1) TFEU and its implications for energy justice. It classifies the individual aspects of Article 194(1) as a legal principle, or so-called ‘guiding principles’, through a systematic interpretation of the provision and recent case law. Furthermore, it evaluates the potential of Article 194(1) to strike a balance between competing interests within the energy sector.

Substantive scope

The introductory sentence of Article 194(1) TFEU incorporates the enlisted energy objectives of Article 194(1)(a)–(d) into the contextual embedding of (i) ‘the establishment and functioning of the internal market’, (ii) ‘the need to preserve and improve the environment’, and (iii) ‘a spirit of solidarity between Member States’. While the energy objectives of Article 194(1)(a)–(d) TFEU are clearly defined as indicated by the wording of the provision (‘Union policy on energy shall aim ... to’), the scope of the introductory sentence of Article 194(1) is not apparent from the phrasing of the norm or from legal scholarship. In fact, the broad conceptual openness of the provision created by the wording ‘in the context of’, ‘with regard for’, and ‘in the spirit of’ further blurs the scope of Article 194(1) TFEU.

This bears close resemblance to the phrasing of Article 3(3) of the Treaty on European Union (TEU).⁶² This provision enshrines the overarching EU objectives

⁶¹ For completeness, Art. 194(1) TFEU is cited here including the objectives of its subclauses (a)–(d). In the context of this research, Art. 194(1) refers only to the stated paragraph before the enlisted energy objectives (a)–(d).

⁶² Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009 [2008] OJ C 115/13, Art. 3(3) (‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced

and refers to, inter alia, the establishment of ‘an internal market’, ‘a high level of protection and improvement of the quality of the environment’, and ‘solidarity among Member States’. The similarity in the wording of Article 194(1) TFEU and Article 3(3) TEU aims to underpin EU competence on energy regulation by subjecting the objectives of Article 194(1)(a)–(d) TFEU to the substantive scope of the fundamental EU objectives enshrined in Article 3(3) TEU. Tying energy regulation in such a way to the central competences of the EU not only promotes overall EU law coherence but also reinforces EU jurisdiction in a policy area historically concerned with hesitant market integration.⁶³ By relying on the internal market, environmental protection and solidarity between Member States, the legislator refers to those objectives of Article 3(3) TEU, which is deemed essential for governing the energy sector.

In its function of establishing coherence within EU law, Article 194(1) TFEU also plays an important role in balancing the different interests within the EU energy sector. This responsibility becomes particularly important in cases where these conflicting interests are governed by norms of equal legal status. Because of the lack of hierarchy, these regulatory tensions must then be reconciled through legislative and judiciary decision making. As established by case law and based on the general principles of EU law, this discretion, however, is limited by the principle of proportionality.⁶⁴ The Court of Justice of the EU (CJEU) has applied such proportionality assessment to balance conflicting private and/or public interests in the field of energy law in several cases, despite often only implicitly referring to Article 194(1) TFEU.⁶⁵ In the recent case of *Commission v. Germany*,⁶⁶ further discussed below, the Court held that a measure that restricts the fundamental freedoms of the internal energy market ‘cannot be accepted unless it pursues one of the legitimate aims listed in the TFEU or is justified by overriding reasons in the public interests’.⁶⁷ Such restriction must, nevertheless, be ‘capable of ensuring the achievement of the objective in question’ and ‘not go beyond what is necessary to attain that objective’.⁶⁸

Such a proportionality assessment requires a weighing of legitimate interests – particularly in instances where pursuing an EU energy objective of Article 194(1)(a)–(d) TFEU carries restrictive implications for the aspects protected under Article 194(1). Hence, the provision serves as a regulatory instrument, which promotes the reconciliation of opposing interests of energy law and the facilitation of a regulatory

economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. ... It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States’).

⁶³ C. Calliess, ‘AEUV Art. 194’, in C. Calliess & M. Ruffert (eds), *EUV/AEUV* (C.H. Beck, 2022), paras 1–17, at para. 4

⁶⁴ See Case T-141/00, *Trenker v. Commission*, ECLI:EU:T:2002:283, para. 186.

⁶⁵ See, e.g., Case C-573/12, *Ålands Vindkraft AB v. Energimyndigheten*, ECLI:EU:C:2014:2037 (*Vindkraft*); Case C-718/18, *Commission v. Germany*, ECLI:EU:C:2021:662.

⁶⁶ Case C-718/18, *Commission v. Germany*, ECLI:EU:C:2021:662.

⁶⁷ Case C-848/19 P, *Germany v. Poland*, ECLI:EU:C:2021:598, para. 62.

⁶⁸ *Ibid.*

dialogue. If applied, the proportionality principle can serve regulatory and judicial decision-making processes as a framework to address conflicts of interest and to guide the energy sector towards a fairer allocation of burdens and benefits ('distributive justice'). The principle of proportionality can ensure that the freedoms of the internal market, the integrity of the environment, and the interests of individual Member States are not restricted beyond what is necessary to pursue a regulatory objective, leading to a more integrated and transparent approach to decision making ('good governance').

However, the lack of social inclusiveness as a legal interest within Article 194(1) TFEU prevents social aspects from being explicitly balanced against other interests governing the energy sector. The lack of reference to the social aspects of Article 3(3) TEU, including combating 'social exclusion', promoting 'social justice' and 'solidarity between generations', proves to be a missed opportunity to emphasize the social consequences of energy regulation. This holds true not only in the light of the ongoing energy transition and energy as a critical infrastructure but also for energy justice. It particularly renders its social aspects such as 'affordability', 'due process', 'intra- and intergenerational equity', and 'intersectionality' more difficult to be addressed through Article 194(1) TFEU. Consequently, it also constitutes a significant shortcoming of 'recognition justice' as it does not guarantee the identification of those who are unrepresented by EU energy regulation.

The current narrative of the European Commission aims to bridge this gap by applying an increased social focus through secondary legislation, ranging from emphasizing the need to address energy poverty⁶⁹ and promoting consumer empowerment⁷⁰ to ensuring a fair coal phase-out facing the threat of displaced fossil fuel workers.⁷¹ However, a direct reliance on Article 194(1) TFEU to promote social considerations and to balance social inclusiveness on an equal footing with, *inter alia*, the interests of the internal market proves difficult.

Justiciability

As previously established, Article 194(1) TFEU serves as a transposition and further concretization of the general objectives established in Article 3(3) TEU into EU energy regulation. Given that the objectives of Article 3(3) TEU are essentially comparable with objectives of national constitutions,⁷² the generality and broad margin of discretion of the objectives of Article 3(3) require them to be concretized by more

⁶⁹ See Commission Recommendation (EU) 2020/1563 on Energy Poverty [2020] OJ L 357/35; European Commission, n. 25 above, p. 7.

⁷⁰ See European Commission, 'Powering a Climate-Neutral Economy: An EU Strategy for Energy System Integration', 8 July 2020, COM(2020) 299 final, p. 4; European Commission, n. 25 above, pp. 12–3.

⁷¹ See European Commission, 'An EU-Wide Assessment of National Energy and Climate Plans: Driving Forward the Green Transition and Promoting Economic Recovery through Integrated Energy and Climate Planning', 17 Sept. 2020, COM(2020) 564 final, pp. 14–5; European Commission, n. 4 above, p. 4.

⁷² The primary difference is the lack of state quality of the EU and instead the added purpose of guiding the integration process between the Member States.

specific norms in order to gain justiciability.⁷³ It is, however, questionable whether the concretization in Article 194(1) TFEU suffices to give rise to reviewable legal obligations. Legal scholars have answered this in the affirmative, arguing that both the contextual embedding and the positioning in the energy competence provision provide for sufficient concretization to convey legal rights.⁷⁴ However, it is particularly the legally undefined embedding of Article 194(1) TFEU into the scope of ‘in the context of’, ‘with regard for’, and ‘in a spirit of’ which raises doubts whether the conceptual openness of the provision allows for a higher degree of justiciability compared with Article 3(3) TEU.

The CJEU has offered partial clarification in its recent *OPAL* judgment.⁷⁵ The Court held that the ‘spirit of solidarity’ constitutes an energy-specific expression of the principle of solidarity entailing ‘rights and obligations both for the European Union and for the Member States’.⁷⁶ As stated in the opinion of Advocate General (AG) Campos Sánchez-Bordona, the principle of solidarity constitutes a legal principle of EU law, which is ‘justiciable’ and ‘capable of legal application’.⁷⁷ The CJEU, however, derives the resulting judicial reviewability and legal obligations not only from Article 3(3) TEU but also from the principle of sincere cooperation enshrined in Article 4(3) TEU, pursuant to which solidarity between Member States, as well as between Member States and EU institutions, can be directly derived.⁷⁸ The Court confirms that the principle of solidarity requires consideration of interests that are liable to be affected of the EU institutions and Member States alike.⁷⁹ Despite not giving rise to absolute rights and carrying only moderate consequences in the event of non-compliance, as a legal principle it nevertheless imposes a general obligation to balance affected interests, whenever conflict arises.⁸⁰ The principle therefore aims to provide general orientation, direction and structure for legislative, executive, and judicial decision making (‘good governance’ and ‘guidance on EU level’).⁸¹ Unlike rules, the principle of solidarity ‘may produce effects ... not only where it has been enshrined in a provision of secondary law but also ... in the absence of such a provision, and, of course, in the judicial review of decisions adopted in the subject area for which it was established’.⁸²

⁷³ K.P. Sommermann, ‘Article 3 [The Objectives of the European Union] (ex-Article 2 TEU)’, in H.-J. Blanke & S. Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer, 2013), pp. 157–84, paras 6–8.

⁷⁴ See D. Hackländer, *Die allgemeine Energiekompetenz im Primärrecht der Europäischen Union* (Peter Lang Frankfurt, 2010), pp. 118–20.

⁷⁵ Case C-848/19 P, *Germany v. Poland*, n. 67 above.

⁷⁶ *Ibid.*, para. 49.

⁷⁷ Case C-848/19 P, *Germany v. Poland*, Opinion of AG Campos Sánchez-Bordona, ECLI:EU:C:2021:218, para. 99.

⁷⁸ Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 41.

⁷⁹ *Ibid.*, para. 73.

⁸⁰ *Ibid.*

⁸¹ R. Fleming, ‘The “Trias”: A New Methodology for Energy Law’ (2019) 28(5) *European Energy and Environmental Law Review*, pp. 164–75, at 169; Í. del Guayo Castiella, ‘Concepto, Contenidos y Principios del Derecho de la Energía’ (2020) 212 *Revista de Administración Pública*, pp. 309–46, at 321–4.

⁸² Case C-848/19 P, *Germany v. Poland*, AG Opinion, n. 77 above, para. 99.

Some scholars previously concluded that the individual aspects of Article 194(1) TFEU – namely ‘the establishment and functioning of the internal market’, ‘the need to preserve and improve the environment’, and ‘the spirit of solidarity’ – must be considered of equal hierarchy.⁸³ According to this interpretation, the recent findings of the CJEU in its *OPAL* judgment would consequently raise ‘the establishment and functioning of the internal market’ and ‘the need to preserve and improve the environment’ to the status of a legal principle with a similar legal character as the principle of solidarity. Such understanding, however, is not reflected in the systematic understanding of EU primary law. Beyond the merely objective-setting scope of Article 3(3) TEU, the treaty does not raise the internal market or environmental considerations to the level of general principles of EU law that are comparable with the solidarity principle. The distinctive positioning of the principle of solidarity as a direct derivation of the principle of sincere cooperation enshrined in Article 4(3) TEU, therefore, legally differentiates it from ‘the establishment and functioning of the internal market’ and ‘the need to preserve and improve the environment’. Consequently, interpreting the internal market and environmental aspects of Article 194(1) TFEU as legal principles, with the same legal character as the principle of solidarity, is incoherent with EU law. The findings of the *OPAL* judgment in fact refute the assumption of an equal hierarchy of the individual aspects of Article 194(1).

The question therefore arises how the legal character of the internal market and environmental integrity of Article 194(1) TFEU can be defined. The wording of ‘[i]n the context of the establishment and functioning of the internal market’ and ‘with regard for the need to preserve and improve the environment’ continue to convey a vague and broad conceptual openness, which does not establish subjective legal rights, even though it concretizes the objectives of Article 3(3) TEU to a certain degree. Instead, drawing on constitutional doctrines, some legal scholars describe these aspects of Article 194(1) TFEU as ‘guiding principles’.⁸⁴ These ‘guiding principles’ reflect the wide discretion granted to the legislator in realizing and, by all possible means, optimizing its mandate to pursue the EU objectives of Article 3(3) TEU in an energy-specific context.⁸⁵ Despite not conveying enforceable legal rights, ‘guiding principles’ cannot be reduced to a mere political statement.⁸⁶ They constitute legally binding norms, which develop their effect as a binding standard of interpretation.⁸⁷ Thus, the ‘guiding principles’ constitute an interpretative lens for EU energy law, which,

⁸³ See Calliess, n. 63 above, para. 4; M. Nettesheim, ‘AEUV Art. 194 Europäische Energiepolitik; Ziele und Maßnahmen’, in E. Grabitz, M. Hilf & M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (C.H. Beck, 2021), paras 1–44, at paras 25–6.

⁸⁴ See Calliess, n. 63 above, para. 4; Hackländer, n. 74 above, pp. 112–20; J. Gundel, ‘M. Energierecht’, in M.A. Dausen & M. Ludwigs (eds), *Handbuch des EU-Wirtschaftsrechts* (C.H. Beck, 2021), paras 1–306, at para. 26. These scholars refer to the ‘guiding principles’ as its German translation ‘*Leitprinzipien*’.

⁸⁵ See Sommermann, n. 73 above, paras 6–8.

⁸⁶ Hackländer, n. 74 above, p. 120.

⁸⁷ See Sommermann, n. 73 above, paras 6–8.

while the legislator remains the main addressee, further encompass measures by the executive and the judiciary.

Hence, the legal principle of solidarity imposes a general obligation to balance affected interests in an institutional setting, while the ‘guiding principles’ manifest their applicability through an interpretative lens. In the absence of enforceable legal rights, however, the justiciability of Article 194(1) TFEU is limited (also restricting ‘procedural justice’). Nevertheless, this underpins the provision’s character of not promoting a single absolute objective. Instead, it aims to serve as a balancing mechanism built into the constitutional set-up of EU energy regulation. Because of its inherent purpose of mediating between interests in the energy sector, Article 194(1) is an important regulatory instrument, which can promote the overarching objective of energy justice: to create a more integrated and holistic approach to energy decision-making processes. Yet, to fully outline the potential of Article 194(1) as a balancing tool, the substantive scope of the legal principle of solidarity and the ‘guiding principles’ of the provision must be defined. Further, the role of the proportionality assessment, which was previously established as inherent in Article 194(1), must be evaluated in its ability to balance interests in the energy sector. These aspects are addressed in the following section.

3.2. Energy Justice and the Principles and ‘Guiding Principles’ of Article 194(1) TFEU

The subsequent analysis turns to the ‘guiding principles’ of Article 194(1) TFEU: namely, ‘the establishment and functioning of the internal market’, ‘the need to preserve and improve the environment’, and the principle of solidarity, which the provision refers to as ‘spirit of solidarity between Member States’. It aims to outline the scope and definition of these individual aspects of Article 194(1) TFEU and the implications that lack of clarity may carry for energy justice. The following analysis also points to aspects that can safeguard and promote a more equitable and just energy sector in the EU.

‘In the context of the establishment and functioning of the internal market’

Article 194(1) TFEU requires the EU energy objectives of its subclauses (a) to (d) to be considered ‘in the context of the establishment and functioning of the internal market’, which, according to Article 26(2) TFEU, is defined as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’. Hence, the internal market brings into the realm of energy policy not only the fundamental EU freedoms of goods, persons, services, and capital (Articles 28–37 TFEU and Articles 45–66 TFEU) but also inherently connected provisions such as those governing competition and state aid (Articles 101–109 TFEU), tax (Articles 110–113 TFEU), and the approximation of laws (Articles 114–118 TFEU).

In its function as a ‘guiding principle’, it requires the legitimate interests of the internal market and market participants to be considered and, in the event of conflict, to be weighed within the context of a proportionality assessment. As previously

established, this aims to ensure that rights derived from the regulatory framework of the internal market are not restricted beyond what is necessary. In this role the ‘guiding principle’ of the internal market offers a two-fold function: on the one hand, it protects market participants by safeguarding their rights granted by the internal market; on the other hand, it disciplines those market participants who go beyond the discretion conferred by these rights. Consequently, this ‘guiding principle’ serves as a legal instrument and regulatory infrastructure of checks and balances. By facilitating and safeguarding a free market structure, it can contribute positively to the ‘availability’ and ‘sustainability’ of energy services as well as effective competition to benefit consumers.⁸⁸

Historically, the liberalization process of the energy market targeted the extension of the internal market to the energy sector.⁸⁹ While a monopolistic structure for network operators was maintained, the opening of the generation market for competition aimed to create a level playing field for new generation capacities (‘availability’) and new entrants to challenge the dominant position of incumbents (‘sustainability’ through the entry of renewable energy generation).⁹⁰ Today, this ‘guiding principle’ gains particular importance considering the shifting responsibilities of market participants as a direct consequence of the energy transition and the associated decentralization. An increasingly distributed energy generation challenges the traditional energy infrastructure, historically dominated by high-level concentration and vertical integration of energy suppliers. With the emergence of prosumers – namely, active customers engaged in both consumption and self-generation of electricity⁹¹ – and new entrants to the market through renewable energy producers, a failure to deliver the decentralization of the energy transition threatens the integration of renewable energy sources (‘sustainability’).

In this respect the Clean Energy for All Europeans package attributes an essential role to distribution system operators (DSOs). While their traditional task included ensuring a reliable and efficient energy supply,⁹² DSOs are now assigned with the role of being neutral market facilitators concerned with maintaining a balanced distribution grid.⁹³ This task requires the real-time grid balancing of electricity consumption with electricity production to ensure security of supply (‘availability’), while integrating renewable energy sources (‘sustainability’) and facilitating prosumer activities.⁹⁴ To do so, DSOs require substantial access to essential consumer data,

⁸⁸ M.M. Roggenkamp et al., ‘Introduction’, in M.M. Roggenkamp et al. (eds), *Energy Law in Europe: National, EU and International Regulation* (Oxford University Press, 2016), pp. 3–13, paras 16, 28–9. K. Talus, *Introduction to EU Energy Law* (Oxford University Press, 2016), p. 58.

⁸⁹ C. Jones & R. Vermeeren, ‘Creating Competition on the Generation Market’, in C. Jones & W.J. Kettlewell (eds), *EU Energy Law, Vol. 1: The Internal Energy Market*, 5th edn (Edward Elgar, 2020), pp. 7–14, at 7, para. 2.2.

⁹⁰ *Ibid.*

⁹¹ Legally defined by the Electricity Directive, Art. 2(8).

⁹² S. Lavrijssen & A. Carrillo Parra, ‘Radical Prosumer Innovations in the Electricity Sector and the Impact on Prosumer Regulation’ (2017) 9(7) *Sustainability*, article 1207, p. 6.

⁹³ Electricity Directive, Art. 31(5).

⁹⁴ *Ibid.*

including demand patterns and consumption behaviour. DSOs in the EU, however, are natural monopolies and, in some Member States, remain part of vertically integrated undertakings that are active in both the generation and supply markets.⁹⁵ Traditionally, extensive unbundling and independence requirements were applied to the distribution function of DSOs in the form of organization, decision making, and legal structure. With the new role of DSOs as neutral market facilitators, these independence requirements were further extended to ‘other activities not relating to distribution’, particularly concerning data management.⁹⁶ The Electricity Directive, inspired by competition law, targets these data management operators, similar to ‘data monopolists’, with specific *ex ante* regulatory intervention to prevent competition harm.⁹⁷

Hence, by exposing EU energy regulation to the checks and balances of competition law, Article 194(1) TFEU facilitates and safeguards an equal playing field of market participants and a free market structure. This may be through regulatory interventions, including the requirements of DSOs to act as neutral market facilitators in a transparent, non-discriminatory, and market-based manner,⁹⁸ while imposing further independence requirements and confidentiality obligations when obtaining commercially sensitive information in the course of their activity.⁹⁹ However, Article 194(1) also subjects the energy sector to the disciplining instruments of competition law (Articles 101–106 TFEU). This opens the door to infringement procedures in cases where market participants overstep the discretion granted by regulation.¹⁰⁰ It also highlights the importance of the internal market ‘guiding principle’ with regard to the clarification of responsibilities and reconciliation of transitional tensions, which are a result of incumbent institutions transitioning towards a more sustainable, decentralized, and digitalized energy sector. The role of the proportionality assessment in the context of the internal market is further discussed in the following section.

‘With regard for the need to preserve and improve the environment’

Comparable with the previous ‘guiding principle’, which discussed the extension of internal market policy to the energy sector, the ‘need to preserve and improve the environment’ subjects EU energy policy to the environmental provisions of EU primary law. In the absence of a legal definition, the wording of Article 194(1) TFEU establishes an explicit bridge between energy regulation and the environmental provisions of Articles 191–193 TFEU and Article 11 TFEU. Substantively, the ‘guiding principle’ has a broader scope than the energy objective of Article 194(1)(c) TFEU, the latter

⁹⁵ Lavrijssen, n. 6 above, p. 156.

⁹⁶ Electricity Directive, Art. 35.

⁹⁷ C. Ducuing, ‘Data as Infrastructure? A Study of Data Sharing Legal Regimes’ (2020) 21(2) *Competition and Regulation in Network Industries*, pp. 124–42, at 134.

⁹⁸ Electricity Directive, Art. 31(5).

⁹⁹ *Ibid.*, Art. 37.

¹⁰⁰ European Parliament, ‘Competition Policy and an Internal Energy Market’, July 2017, p. 81, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/607327/IPOL_STU\(2017\)607327_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/607327/IPOL_STU(2017)607327_EN.pdf).

being limited to promoting energy efficiency and renewable forms of energy. Article 11 TFEU further enforces the obligation to integrate environmental protection requirements into the definition and implementation of EU policies and activities through the principle of environmental integration, which arguably raises environmental protection to one of the founding values of the EU.¹⁰¹ The explicit repetition and reinforced positioning of environmental concerns in the energy competence provision demonstrates the strengthened application of the relevant environmental provisions in the context of energy regulation.¹⁰² This close linkage and integration of environmental and energy regulation is further illustrated by the cross-reference of Article 192(2)(c) TFEU, an environmental provision, and Article 194(2) TFEU, establishing energy competences. Consequently, Article 194(1) TFEU brings the environmental objectives and principles of Articles 191–193 TFEU and Article 11 TFEU into the realm of energy regulation, including the principles of precaution, prevention, and rectifying pollution at the source, the polluter pays principle and the principle of sustainability.¹⁰³ This applicability was also confirmed in *Austria v. Commission (Hinkley Point)*, in which the CJEU held that the Euratom Treaty does not preclude the application of the environmental principles enshrined in Articles 191(2) and 11 TFEU.¹⁰⁴ The Court based its reasoning on Article 194(1) TFEU in conjunction with Article 11 TFEU and Article 37 of the EU Charter of Fundamental Rights.¹⁰⁵

However, despite the strong dogmatic linkage of Article 194(1) TFEU to the environmental provisions of EU primary law, its practical implementation falls short of attesting to such solid integration. This becomes particularly evident in cases where environmental interests must be weighed against other public interests that govern the energy sector. In the context of energy justice and the overall understanding of Article 194(1) TFEU as a ‘guiding principle’, this often requires environmental interests (‘sustainability’ and also ‘responsibility’) to be considered on an equal footing with the economic considerations of the internal market or security of supply (‘availability’).

In this regard, the substantive scope of ‘the need to preserve and improve the environment’ of Article 194(1) TFEU in the context of the limitations imposed by Articles 192(2)(c) and 194(2) TFEU must be addressed. The environmental provision of Article 192(2)(c) TFEU triggers a special legislative procedure in cases in which EU measures significantly affect a Member State’s choice between different energy sources and the general structure of its energy supply. Article 194(2) TFEU, as part of the energy competence provision, limits EU measures in situations where a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources, and the general structure of its energy supply is affected. This

¹⁰¹ S. Kingston, V. Heyvaert & A. Čavoški, *European Environmental Law* (Cambridge University Press, 2017), p. 103.

¹⁰² S. Bings, ‘AEUV Art. 194’, in R. Streinz (ed.), *EUV/AEUV* (C.H. Beck, 2018), paras 1–42, at para. 35.

¹⁰³ Art. 191(2) TFEU and Art. 11 TFEU.

¹⁰⁴ Case C-594/18 P, *Austria v. Commission (Hinkley Point)* ECLI:EU:C:2020:742, paras 40–1.

¹⁰⁵ *Ibid.*, para. 42. Charter of Fundamental Rights of the European Union, 26 Oct. 2012, [2012] OJ C 326/391, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

particularly raises questions regarding the limits to EU measures that aim to promote the decarbonization of the energy transition and the development of renewable energy sources.

The CJEU was confronted with this exact question in *Poland v. Parliament and Council*.¹⁰⁶ Poland relied upon Article 192(2)(c) TFEU in its request to annul a decision establishing a market stability reserve for the EU greenhouse gas emissions trading scheme.¹⁰⁷ Poland substantiated its claim through its particular dependence on fossil fuels, and argued that the establishment of a market stability reserve would unavoidably alter the structure of the national electricity supply as well as reduce the competitiveness of the Polish energy sector and industry.¹⁰⁸ Consequently, Poland claimed that the measure in question was wrongly adopted on the basis of an ordinary legislative procedure as opposed to the special legislative procedure under Article 192(2)(c) TFEU. However, the Court held that environmental policy objectives inherently affect Member States' energy sectors and that recourse to the special legislative procedure may be relied upon only in cases where the 'primary outcome sought by that measure' is to significantly affect a Member State's choice of energy source and its general structure of energy supply.¹⁰⁹ Moreover, as a derogation and competence limitation, Article 192(2)(c) is to be interpreted narrowly, especially as questions of environmental policy cannot ignore energy concerns.¹¹⁰ A broader interpretation of Article 192(2)(c) and Article 194(2) TFEU by analogy would render EU energy policy measures extremely limited and reduce the ability to address the promotion of renewable energy sources.¹¹¹

Another issue becomes evident in the context of the CJEU judgment in *UNESA*.¹¹² In this case the Court rejected the direct reliance on the polluter pays principle to challenge a national measure transposing the EU Electricity Directive,¹¹³ as Article 191(2) TFEU is directed at action at the EU level and the Electricity Directive is not based on the environmental legal basis of Article 192 TFEU.¹¹⁴ The case law therefore suggests that while the environmental principles in theory are applicable to energy policy at the EU level and also extend to the nuclear sector, Article 191(2) TFEU cannot be relied upon when questioning the compatibility of a national measure with an energy

¹⁰⁶ Case C-5/16, *Poland v. Parliament and Council*, ECLI:EU:C:2018:483.

¹⁰⁷ *Ibid.*, para. 1.

¹⁰⁸ *Ibid.*, para. 29.

¹⁰⁹ *Ibid.*, para. 46.

¹¹⁰ *Ibid.*, para. 44. Case C-5/16, *Poland v. Parliament and Council*, Opinion of AG Mengozzi, ECLI:EU:C:2017:925, para. 25.

¹¹¹ Huhta, n. 58 above, p. 1008; M. Fehling, 'Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement' (2021) 10(2) *Transnational Environmental Law*, pp. 339–63, at 344–5.

¹¹² Case C-80/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v. Administración General del Estado and Others*, ECLI:EU:C:2019:934 (*UNESA*).

¹¹³ Then Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC [2009] OJ L 211/87.

¹¹⁴ *UNESA*, n. 112 above, para. 28.

(namely, non-environmental) directive.¹¹⁵ However, Article 194 TFEU is *lex specialis* for energy matters in comparison with the general environmental scope of Article 192 TFEU.¹¹⁶ It was also relied upon exclusively in the Clean Energy for All Europeans package and therefore constitutes the legal basis for extensive energy regulation.¹¹⁷ This raises the question of whether procedural limitations hinder the possibility of challenging energy measures on the basis of a wide variety of legal instruments offered by the environmental principles of Article 191(2) TFEU.

The Court is not new in having to balance environmental aspects of energy regulation against other interests in the energy sector. In *Vindkraft*,¹¹⁸ the CJEU was faced with weighing the EU freedom of free movement of goods against the Swedish transposition of the Renewable Energy Directive,¹¹⁹ aiming to promote the national use of renewable energy sources through green electricity certificates reserved for national installations located in Sweden.¹²⁰ It held that, in accordance with Article 36 TFEU, a measure having equivalent effect to a quantitative restriction may be justified on grounds of public interest, including the promotion of the use of renewable energy sources as these aim to protect ‘health and life of humans, animals or plants’.¹²¹ However, such measures must comply with the principle of proportionality, which the Court answered affirmatively for both the territorial restrictions and the use of green certificates as such.¹²² While these measures must be no more restrictive than necessary to achieve those objectives, *Vindkraft*¹²³ demonstrates the CJEU’s willingness to support the efforts of Member States in using a market-based approach to promote environmental objectives in energy policy.¹²⁴

The case law demonstrates that while Article 194(1) TFEU is rarely explicitly considered, and often the procedural lens of internal market law is applied through which a proportionality assessment is triggered, environmental concerns of energy policy are becoming increasingly important. The intensification of efforts to protect the climate and promote the energy transition frequently encounters the interdependence of the currently distinct areas of EU energy and environmental law. Energy justice particularly highlights this interdependence by extending ‘sustainability’ aspects and questions of ‘responsibility’ to protect the environment to the energy sector.

¹¹⁵ S. Kingston, ‘The Polluter Pays Principle in EU Climate Law: An Effective Tool before the Courts?’ (2020) 10(1) *Climate Law*, pp. 1–27, at 19.

¹¹⁶ Huhta, n. 58 above, pp. 999–1000.

¹¹⁷ *Ibid.*

¹¹⁸ N. 65 above.

¹¹⁹ This case relied upon the now amended Renewable Energy Directive: Directive 2009/28/EC on the Promotion of the Energy from Renewable Sources [2009] OJ L 140/16.

¹²⁰ *Vindkraft*, n. 65 above, para. 24.

¹²¹ *Ibid.*, paras 76–80.

¹²² *Ibid.*, paras 76, 104–19.

¹²³ Also confirmed in Joined Cases C-204/12 and C-208/12, *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, ECLI:EU:C:2014:2192.

¹²⁴ Kingston, Heyvaert & Čavoški, n. 101 above, pp. 115–9; see also F. Mormann, ‘Of Markets and Subsidies: Counter-intuitive Trends for Clean Energy Policy in the European Union and the United States’ (2021) 10(2) *Transnational Environmental Law*, pp. 321–37, at 335–7.

Both aspects are central to EU environmental law as the principle of sustainable development and the polluter pays principle are enshrined in Articles 11 and 191(2) TFEU, respectively. The lack of a more explicit emphasis on the role of Article 194(1) TFEU as an integrating factor, therefore, results in a disconnect between environmental and energy law, which withholds the otherwise considerable variety of legal instruments and principles capable of addressing environmental concerns in energy policy. These shortcomings of integration deprive Article 194(1) of its potential to serve as a potent tool to mediate between environmental and energy regulation. Nevertheless, the rapidly developing case law and climate *acquis* constitute an interesting opportunity for the judiciary and legislators to recognize the unfulfilled potential of Article 194(1) TFEU as a primary instrument to bridge and align the interests of the energy sector with environmental law.

'In a spirit of solidarity'

In addition to the outlined clarification of the principle of solidarity constituting a ground for judicial review, the CJEU, in its *OPAL* judgment, offers further insights into the substantive scope of 'a spirit of solidarity'. Following the previous conclusions, the principle of solidarity, enshrined in Article 194(1) TFEU, must be factored in with regard to the entirety of Article 194 TFEU. In fact, the Court held that solidarity must 'inform any action relating to EU [energy] policy' beyond the initial assumption of limiting the scope of solidarity to situations outlined in Article 222 TFEU (namely, in cases of natural or man-made disasters) or Article 122(1) TFEU (namely, considering difficulties arising in the supply of energy).¹²⁵ The latter has proven to be an important legal basis to address temporary solidarity requirements as part of emergency measures during times of crisis.¹²⁶ In the context of Article 194(1) TFEU, the Court defines the principle of solidarity as a 'general obligation', which is both vertically applicable between EU institutions and Member States as well as horizontally between individual Member States, and which requires the aforementioned to 'take into account the interests of all stakeholders liable to be affected'.¹²⁷ The objective of such an account must be the avoidance of measures that 'might affect' the interests of the stakeholders involved,¹²⁸ indicating the prevention of actual and potential adverse impacts. The CJEU further reminds EU institutions and Member States of their 'interdependence' and 'de facto solidarity', borrowing from the wording of the Schuman Declaration.¹²⁹ Therefore, the chosen phrasing of the Court ties the 'spirit of solidarity'

¹²⁵ Case C-848/19 P, *Germany v. Poland*, n. 67 above, paras 62, 67.

¹²⁶ See Regulation (EU) 2022/1369 on Coordinated Demand-Reduction Measures for Gas [2022] OJ L 206/1.

¹²⁷ Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 71.

¹²⁸ *Ibid.*

¹²⁹ Schuman Declaration, 9 May 1950 ('Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity'), available at: <https://www.consilium.europa.eu/en/70-schuman-declaration>; L. Reins, 'Vergeet de Effectbeoordeling Niet: Het Beginsel van Energiesolidariteit en Leveringszekerheid' (2019) 7–8 *Nederlands Tijdschrift voor Europees Recht*, pp. 193–9, at 195.

to the building blocks of the EU, similar to AG Sharpston previously describing ‘solidarity’ as ‘the lifeblood of the European project’ with the requirement ‘to shoulder collective responsibilities’ and ‘burdens to further the common good’.¹³⁰ Consequently, the role of the principle of solidarity is to balance the burdens and benefits among Member States; it therefore constitutes a legal instrument of ‘distributive justice’ at the institutional level. Having to account for the interests of other Member States in the context of solidarity creates an institutional dialogue which can restore a sense of equity and accountability that creates a fairer, more accepted, and robust institutional framework (‘good governance’), according to which tensions and injustices arising from the energy transition can be addressed.

Nevertheless, solidarity in general, and more specifically energy solidarity, remain legally undefined,¹³¹ exacerbating the fact that the EU institutions and individual Member States may connect different obligations, or a lack thereof, to the concept of solidarity. AG Campos Sánchez-Bordona clarifies in the *OPAL* opinion that ‘as has been the case with other principles of EU law’, ‘energy solidarity will necessarily be defined over time, inasmuch as it is subject to the scrutiny of the Court of Justice’.¹³² As a starting point, the Court exemplifies in its respective judgment that relevant interests to be taken into consideration include security of supply, economic and political viability, and the diversification of sources of supply.¹³³ The latter is particularly interesting: it not only applies to EU competences regarding the cross-border implications of the integration of renewable energy sources and the imbalances this may cause for neighbouring electricity grids,¹³⁴ but also to the choice between different energy sources, which, according to Article 194(2) TFEU, falls within Member State competence. While the *OPAL* judgment clarifies that the obligations arising from the principle of solidarity must be considered within the exercise of the respective competences,¹³⁵ it seems, at the very minimum, to suggest that the principle of solidarity constitutes a counterweight to national sovereignty.¹³⁶ Blurring the lines drawn by the respective competences, the principle of solidarity undisputedly constrains the regulatory power of both the Member States and the EU institutions by imposing an obligation to take the interests of each other into account.¹³⁷

The threats to gas supply in the context of the ongoing energy crisis have also demonstrated that the principle of solidarity is constrained by technical limitations. Only directly connected Member States can provide gas in a show of solidarity and

¹³⁰ Case C-715/17, *Commission v. Poland*, Opinion of AG Sharpston, ECLI:EU:C:2019:917, para. 253.

¹³¹ Regulation (EU) 2017/1938 concerning Measures to Safeguard the Security of Gas Supply and Repealing Regulation (EU) No. 994/2010 [2017] OJ L 280/1 (Art. 13 defines solidarity in the context of gas supply and solidarity protected customers, and triggers a three-stage escalation system in case of crisis).

¹³² Case C-848/19 P, *Germany v. Poland*, AG Opinion, n. 77 above, para. 117.

¹³³ Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 71.

¹³⁴ A. Boute, ‘The Principle of Solidarity and the Geopolitics of Energy: Poland v Commission (OPAL Pipeline)’ (2020) 57(3) *Common Market Law Review*, pp. 889–913, at 912.

¹³⁵ Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 71.

¹³⁶ See Reins, n. 129 above, p. 197.

¹³⁷ Boute, n. 134 above, p. 899.

to the extent of the maximum available export capacities of the interconnectors.¹³⁸ The infrastructure, therefore, enables or prevents solidarity compensation for gas supply shortages. As a result, to prevent future supply crises, targeted expansion of the cross-border infrastructure is essential.¹³⁹ The importance of cross-border connections is gaining increasing attention by Member States in the context of the gas supply crisis and limits to energy solidarity. Irrespective of crisis management, the Electricity Directive aims for a minimum integration target of 15% of electricity interconnections between Member States by 2030.¹⁴⁰ Yet, the Court establishes that the principle of solidarity does not convey absolute rights,¹⁴¹ which means that the energy solidarity principle cannot be relied upon to demand positive action to actively promote interconnectivity between Member States.¹⁴²

Rather, the principle requires EU institutions and Member States to consider the interests of stakeholders liable to be affected and balance these in the event of conflict.¹⁴³ Yet, the Court leaves unanswered how this balancing act is to be conducted in practice. AG Campos Sánchez-Bordona proposes a procedural approach by obligating the Commission to carry out an analysis of ‘all the consequences’, economic and technical, inherent in a particular case.¹⁴⁴ While, within this assessment, the balancing of interests itself does not seem to be subject to judicial review, ‘overlooking one or more Member States’ constitutes a failure to fulfil the requirements of the principles of solidarity.¹⁴⁵ In contrast, the *OPAL* judgment does not adopt this approach and leaves open the issues of the degree to which the assessment of the Commission is subject to judicial review and the procedure according to which the balancing exercise must be conducted.

Considering the positioning of the spirit of solidarity in Article 194(1) TFEU and the previously outlined systematic interpretation of this provision, it constitutes a legal shortcoming not to embed the act of balancing interests into the procedural setting of a proportionality assessment. A proportionality analysis, as an established principle of EU law, constitutes a developed and comprehensive legal instrument to reconcile conflicting interests.¹⁴⁶ In particular, it provides a legal framework to determine the extent to which rights may be restricted, considering conflicting public interests.¹⁴⁷

¹³⁸ C. Kreuter-Kirchhof, ‘Europäische Energiesolidarität: Wege zur Vorbeugung und Bewältigung schwerer Energieversorgungskrisen in der EU’ (2020) *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, pp. 993–9, at 999.

¹³⁹ *Ibid.*

¹⁴⁰ Electricity Directive, Recital 16.

¹⁴¹ Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 73.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, para. 71.

¹⁴⁴ Case C-848/19 P, *Germany v. Poland*, AG Opinion, n. 77 above, para. 115.

¹⁴⁵ *Ibid.*, para. 116.

¹⁴⁶ See Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; Case C-120/78, *Reve v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (*Cassis de Dijon*).

¹⁴⁷ W. Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) 15 *Cambridge Yearbook of European Legal Studies*, pp. 439–66, at 440.

Solidarity, by design, aims to moderate the interaction between the EU institutions and the Member States as well as between the individual Member States by ‘filling any gaps identified in [the] provisions’ adopted ‘in implementation of the European Union’s powers in energy matters’.¹⁴⁸ Hence, the principle of solidarity aims to mediate between conflicting interests of the different regulatory levels (‘nuanced interpretation of energy justice frameworks’) and between the individual objectives of Article 194(1)(a)–(d) TFEU.¹⁴⁹ It must, therefore, be considered a regulatory instrument aimed at ensuring a more integrated approach to decision making in the EU energy sector (‘distributive justice’ and ‘good governance’).¹⁵⁰ In this role it has the potential overall to promote energy justice and accelerate the pace of the energy transition by clarifying conflicts arising between different institutional interests and tensions resulting from the simultaneous pursuit of opposing energy objectives.

However, in the absence of a more explicit proportionality analysis, the potential of the solidarity principle to mitigate interests in the energy sector is significantly diminished. This reduces the potential of the legal principle not only to promote ‘responsibility’ through increased accountability but also ‘resistance’ through the possibility of actively opposing energy injustices. The lack of more developed balancing criteria obscures the obligations arising from the principle of solidarity. The Court not only leaves undefined the degree to which interests must be taken into account; it also blurs the lines of competences enshrined in Article 194(2) TFEU. AG Campos Sánchez-Bordona describes the principle of solidarity as ‘dynamic in character’ and further influenced ‘by the future development of the European Union’s energy policy’.¹⁵¹ This seems to suggest that the principle of solidarity could be considered a potent tool in the new urgency for EU energy independence and the acceleration of the energy transition. However, the lack of an explicit reference to a proportionality assessment deprives EU energy regulation of the opportunity to become more integrated by providing guidance on how to balance competing interests in a more equitable manner (‘guidance on EU level’).

4. CONCLUSION

This article has analyzed the potential role of Article 194(1) TFEU in promoting energy justice in EU energy law. By reflecting on the emerging conceptualizations of energy justice in social sciences, this research has demonstrated that energy justice aims to guide legislative, judicial, and executive decision making in the energy sector towards more equitable and inclusive energy regulation. Its classification according to justice tenets allows energy policy to be analyzed through the lens of a more nuanced understanding of social justice, particularly by offering a framework to identify potential and actual injustices. The ten ‘energy justice

¹⁴⁸ Case C-848/19 P, *Germany v. Poland*, AG Opinion, n. 77 above, para. 96.

¹⁴⁹ See Case C-848/19 P, *Germany v. Poland*, n. 67 above, para. 43.

¹⁵⁰ Boute, n. 134 above, p. 912.

¹⁵¹ Case C-848/19 P, *Germany v. Poland*, AG Opinion, n. 77 above, para. 117.

principles' aim to describe and define the underlying values of a just and equitable energy sector, which is the direction towards which energy regulation should gravitate. While different regulatory levels must approach just and equitable decision making through the particularities of the energy sector that they govern, EU energy law must offer a clear sense of direction in the form of objective setting, coordination, and guidance.

In this context, Article 194(1) TFEU becomes particularly relevant as it enshrines the 'guiding principles' and principle of solidarity according to which EU energy objectives must be governed. By mirroring many important EU objectives of Article 3(3) TEU, Article 194(1) TFEU brings the interests of the internal market, environmental integrity, and increased solidarity between Member States into the realm of energy regulation and EU competence. The substantive scope and justiciability of Article 194(1) TFEU, however, remain largely legally undefined. The CJEU case law has recently confirmed that the spirit of solidarity enshrined in Article 194(1) must be understood as a legal principle based on sincere cooperation, which imposes consideration of affected interests of EU institutions and other Member States alike. It therefore constitutes a legal instrument of 'distributive justice' at the institutional level.

The elements of Article 194(1) TFEU – '(i)n the context of the establishment and functioning of the internal market' and 'with regard for the need to preserve and improve the environment' – can be defined as 'guiding principles', which develop their effect as a binding standard of interpretation. By forming part of the checks and balances of energy regulation through reliance on the disciplinary legal instruments of the internal market and competition law, the 'guiding principle' of the internal market can safeguard the rights of market participants and discipline those who go beyond the discretion conferred by these rights. In the context of energy justice, this function manifests in its ability to clarify responsibilities and transitional tensions, which arise from the changing roles of market players in the energy transition. The wording of the 'guiding principle' of environmental integrity suggests a strong linkage to the environmental provisions of EU primary law. Case law has confirmed that, in principle, the diverse instruments of EU environmental law also extend to Article 194(1) TFEU. This aims to promote 'sustainability' through the principle of environmental integration of Article 11 TFEU, and theoretically allows recourse to the environmental principles of Article 191(2) TFEU – which includes addressing justice questions of 'responsibility'. However, despite a strong dogmatic linkage of Article 194(1) TFEU to the environmental provisions of EU primary law, an analysis of case law has shown that a substantial and procedural disconnect remains in the practical application of the environmental provisions of EU primary law to Article 194(1).

Given the legal character of the principle of solidarity and the 'guiding principles', this research has further demonstrated that the justiciability of Article 194(1) TFEU is limited. In its quasi-constitutional function, the provision underpins its inherent responsibility to serve as a balancing mechanism for the competing interests governing the EU energy sector. Therefore, it can serve as a regulatory infrastructure to address and reconcile inequalities.

Particularly important in this respect is the proportionality assessment, which this research has described as inherent in Article 194(1) TFEU, and which the CJEU applies regularly in the context of balancing conflicting private and public interests in the field of energy. Nevertheless, case law often refers to Article 194(1) TFEU only implicitly. In the context of energy justice, this article has demonstrated that reliance on the principle of proportionality should be further developed and should be applied more explicitly. This holds true particularly in the context of the evolving solidarity principle, which imposes a balancing of institutional interests but does not offer any regulatory discourse on how to conduct such a reconciliation of tensions. The principle of proportionality can also serve as a legal instrument to facilitate the regulatory dialogue between environmental and energy law, which can maintain that the environmental principles are better integrated into energy regulation.

Ultimately, this research found that the elements of energy justice relating to the social aspects of energy regulation are under-represented. ‘Affordability’, ‘intra- and intergenerational equity’, and ‘intersectionality’ currently cannot be addressed through Article 194(1) TFEU, which also constitutes a shortcoming in ‘distributive, procedural and recognition justice’. Consequently, social considerations of energy justice are also not balanced on an equal footing with the potentially competing interests of ‘sustainability’ and market considerations. Regulatory and judicial decision making, therefore, must be aware of such limitations and, if necessary, compensate for these shortcomings through secondary legislation.