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The weak action of the European Union to tackle the rise in prices in the energy sector

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The inflationary spiral in the energy sector was generated in 2021 at global level. Although it was presumed to some extent in the context of the post-pandemic economic recovery and the relaxation of travel restrictions, related prices have increased more than awaited.

While both the European Council and the Commission were working to contain the rise in prices at issue, in the EU it has been further aggravated in 2022 following the military aggression by Russia against Ukraine. In response to the sanctions imposed by the EU on Russia, the latter has unilaterally decided to stop gas supply to a number of Member States which has, on the one hand, increased uncertainty of supplies and, on the other hand, pushed up the price of gas to record levels. Skyrocketing gas prices have caused a steep increase in electricity prices, due to the current functioning of the EU energy market.

About a month after the beginning of the conflict and, therefore, the constant rising energy prices, the European Council in its conclusions of 24th and 25th March 2022, tasked both the Council and the Commission, «as a matter of urgency, to reach out to the energy stakeholders, and to discuss, if and how, the short-term options as presented by the Commission». These options consist in direct support to consumers through vouchers, tax rebates or through an 'aggregator model/single buyer', State aid, taxation, price caps as well as regulatory measures. They would contribute to reducing the gas price and addressing its contagion effect on electricity markets, taking into account national circumstances. Among these measures, the most important is the establishment of a price cap. It is the maximum amount that energy suppliers are allowed to charge per kWh of gas and electricity - unit rate - per year.

In its conclusions of 30th and 31st May 2022, the European Council reiterated its invitation to the «Commission to explore (…) ways to curb rising energy prices, including the feasibility of introducing temporary import price caps where appropriate». It also noted «the importance of indigenous energy sources for the security of supply» as well as the need of accelerating the deployment of renewables.

Successively, in its conclusions of 23rd and 24th June 2022, it renewed once again its invitation in the same terms. It also added that «in the face of the weaponisation of gas by Russia, the European Council invites the Commission to pursue its efforts as a matter of urgency with a view to securing energy supply at affordable prices. The European Council invites the Council, together with the Commission, to take any appropriate measures to ensure closer energy coordination between Member States».

Following these invitations - and within the ambit of a shared competence between the Union and the Member States - the Commission, on 18th October 2022 launched a Proposal for a Council regulation enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks. The legal basis for this instrument is Article 122, para. 1, TFEU which can only be applied for issues of severe difficulties – such as the current shortage of gas supplies from Russia – and has to be applied in the spirit of solidarity. It aims at mitigating the impact on the price for gas by addressing demand and supply, ensuring security of supply across the EU and enhancing solidarity.

On the one hand, it appears to be focused on the principle of solidarity both between the EU and Member States and among Member States, in any case expressed in its emergency form. Under the first profile, the aggregation of EU gas demand and joint purchase of gas would allow the EU to use its collective purchasing power to negotiate better prices as well as to reduce the risk of Member States outbidding each other on the already tight market.

This would help smaller Member States in their national energy policies since they are in a less favorable situation as buyers.

Having regard to the second profile, since a common approach to price limitation requires, necessarily, solidarity across the Union and not all Member States have mutual solidarity agreements in place, the proposal contains provisions directly applicable in the absence of such solidarity agreements.

On the other hand, the Proposal contains a set of elements working towards lowering prices and reinforcing security of supply. This is a whole package of measures on gas prices, to address excessive price levels and to ensure fair gas and electricity prices even in a crisis situation. Within this ambit, it provides certainty about the price to be used in a context of gas shortage, when an emergency situation is declared.

Finally, a further reduction in gas demand should be possible, while ensuring that consumers continue to be adequately protected against shortages.

The EU has already strengthened its tools for saving gas and electricity. However, full implementation of the agreed regulations is required to achieve the necessary demand reduction targets. This would help to resist further disruptions to gas supplies and to relieve pressure on the international gas markets and hence on prices.

The Proposal, however, does not take up the invitation of the European Council and, therefore, does not set a price cap for gas. This reflects the lack of agreement, within the Member States, on the fixing of the price cap due to a set of reserves, for several reasons, for some of them.

In other words, it seems that the need of establishing a price cap is considered, in theory, a priority for the EU in order to tackle the energy crisis. Nevertheless, in practical terms, Member States still do not agree on it.

Member States supporting it - such as Italy, France and Spain - consider the price cap a measure that will help them to mitigate the inflationary pressure, manage expectations and provide a framework in case of potential supply disruptions, and limit the extra profits in the sector.

Among Member States opposing it, Netherlands observes that it would be a step backwards from the liberalization of the energy market. Germany - EU's largest gas consumer - considers, in a softer line on this issue, that through a unilateral (EU) introduction of a price limit, not followed by other economic systems, the gas will go to other consumers and therefore there could be a shortage of gas supplies.

This contrast was not overcome in the European Council of 20th and 21st October 2022.

In its conclusions, on the one hand, it did not ascertain the failure to reach an agreement on the price cap. On the other hand, it insisted, once again, on the need of a temporary EU framework to cap the price of gas in electricity generation, including a cost and benefit analysis, without modifying the merit order, while preventing increasing gas consumption, addressing the financing and distributional impacts and its impact on flows beyond the EU's borders. Finally, it focuses on the necessity that efforts to reduce demand, to ensure security of supply, to avoid rationing, and to lower energy prices for households and businesses across the EU must be accelerated and intensified in order to preserve the integrity of the internal market.

Albeit with more modest ambitions, the Council – with a written procedure – agreed to cap the market revenues for electricity generators, including intermediaries, that use inframarginal technologies to produce electricity, such as renewables, nuclear and lignite. Indeed, these operators have made unexpectedly large financial gains over the year, without their operational costs increasing.

The Council also agreed on measures able to collect and redirect the surplus revenues towards supporting and protecting final electricity customers. This appears to be due to the will of the Member States to set certain prices but introducing some flexibilities to reflect their national circumstances and the measures in place at national level.

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