

Internal EU Energy Sovereignty

Dr. Patrick Abel, MJur (Oxon)

Max Weber Fellow, EUI (LAW)

Assistant Professor, University of
Passau, Germany



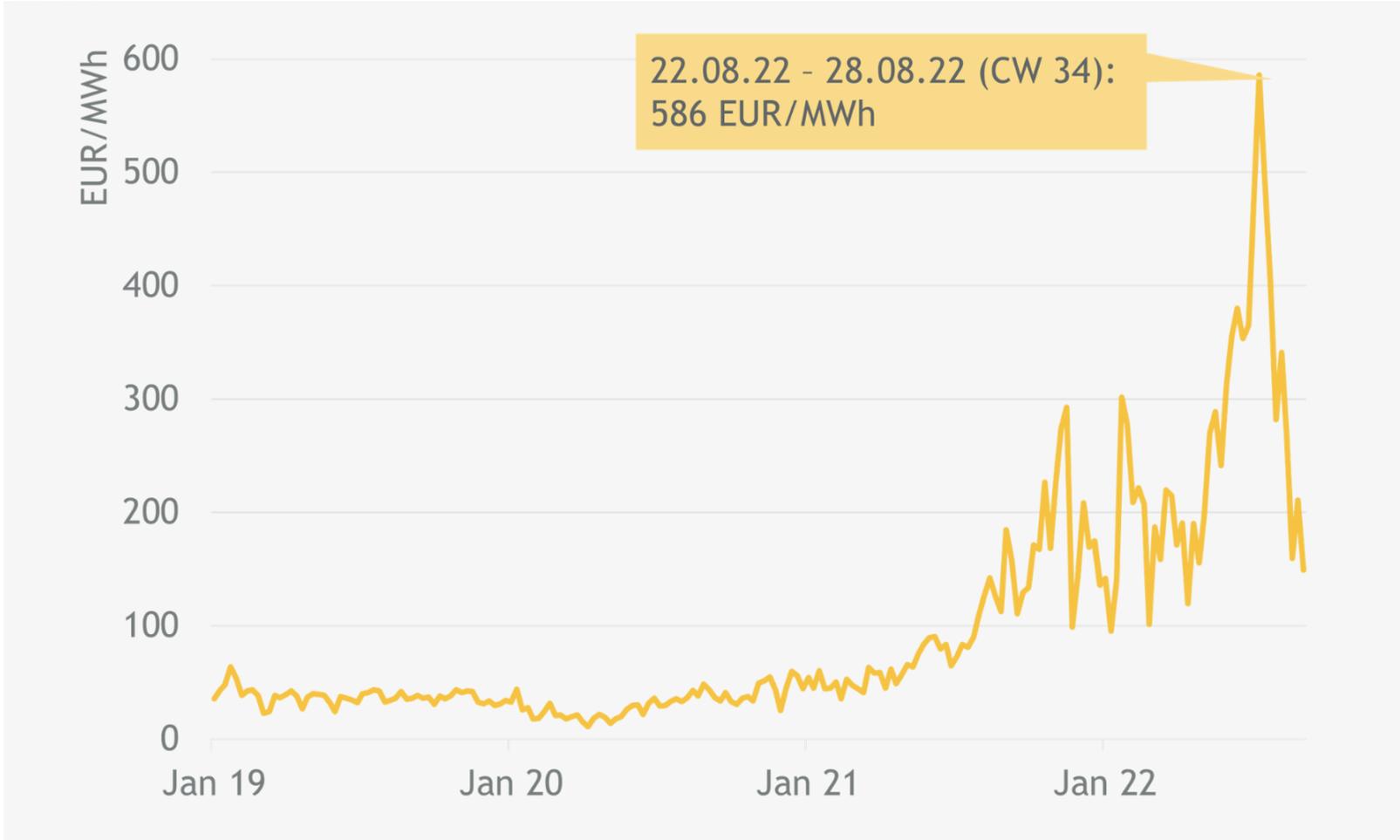
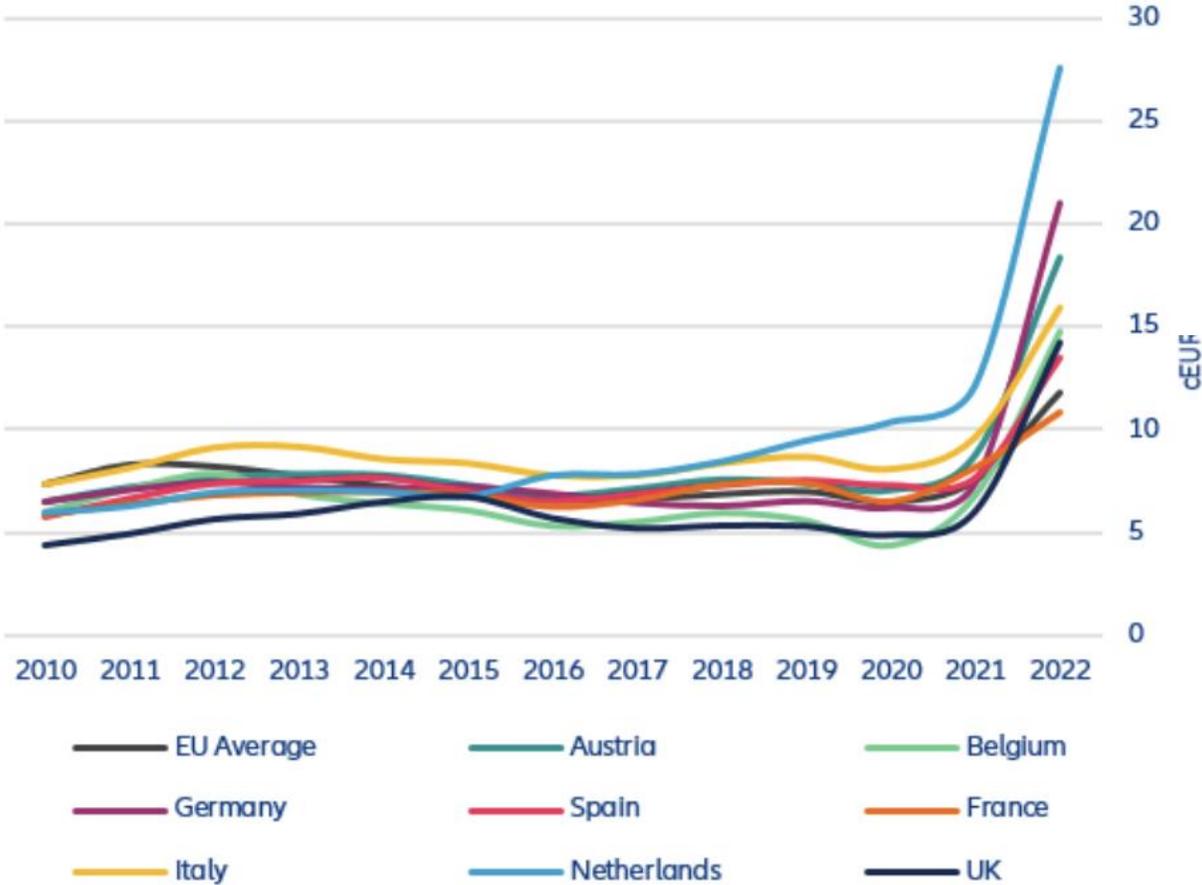


Figure 1: Weekly average of the German wholesale electricity price, 2019-2022. (Source: SMARD Strommarktdaten)



Averting Gasmageddon and securing a just transition

01 September 2022

Sources: Household Energy Price Index, Allianz Research.





Picture: CNN

„Only Europe can, in a word, guarantee genuine sovereignty or our ability to exist in today’s world to defend our values and interests. [...] The fourth key to our sovereignty is being able to address the first of the major global transformations, the ecological transition. This total transformation is revolutionizing the way we produce, redistribute and behave. This transition also means having a European energy market that really works [...]“

Sorbonne speech of President Macron, 2017

Structure of this seminar

- 1 Concept of Sovereignty
- 2 Sovereignty Potentials in Primary EU Law
- 3 Energy Law Developments in Secondary EU Law (Overview)
- 4 Case Study: Gas Emergency

1 The Concept of Energy Sovereignty

- Legal, political, rhetorical term?
- The instance that has the last say?
- A topic-specific concept?
- The capacity to self-assert oneself?
- A call for legal rules that allow to bring about special advantages of an integrated EU energy policy?

2 Potentials of Energy Sovereignty

Primary EU Law: Member State sovereignty reservation

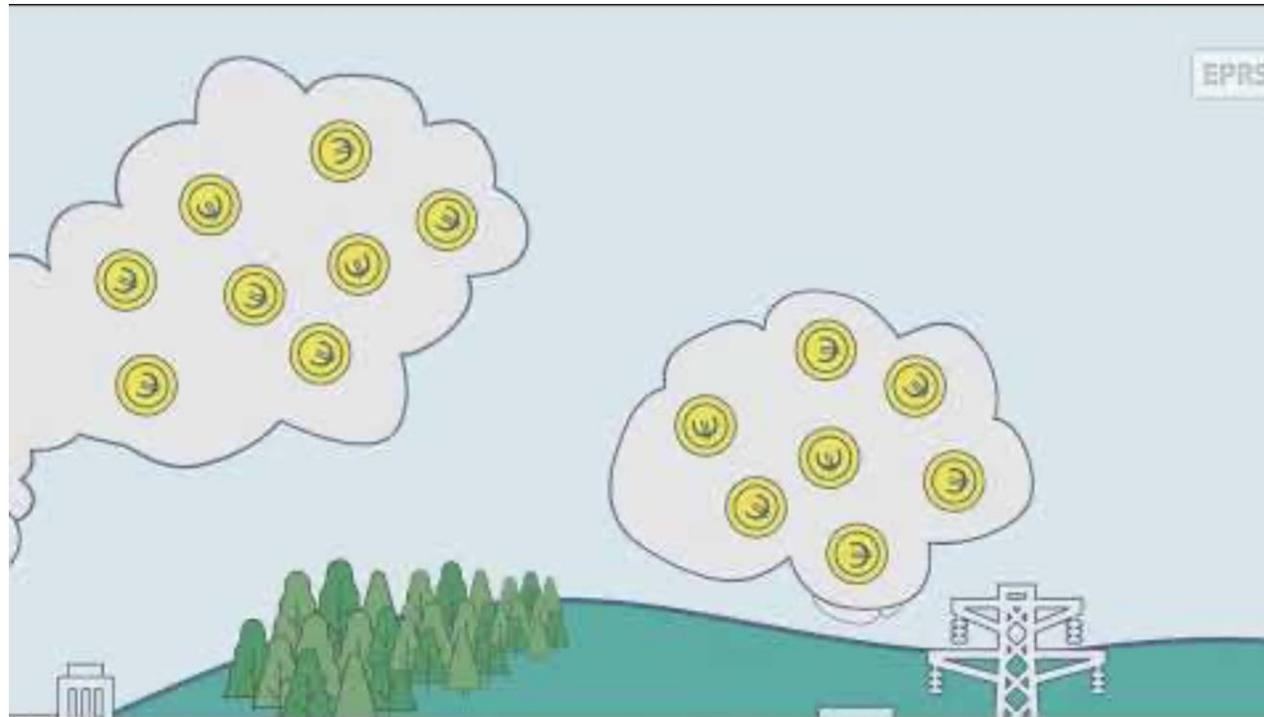
- Shared competence, Art. 4 para 2 i) and [194 para 2 subpara 1 TFEU](#)

2 Potentials of Energy Sovereignty

Primary EU Law: Member State sovereignty reservation

- Member State sovereignty reservation in Art. 194 para 2 subpara 2:
‘ Such measures shall not affect 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, without prejudice to Article 192(2)(c).’
 - CJEU, Judgment of 21 June 2018, C-5/16 (Poland/Parliament, Council) on the ETS market stability reserve mechanism and Article 192(2) TFEU.

2 Potentials of Energy Sovereignty Primary EU Law: Member State sovereignty reservation



Reducing the allowances (EUAs) surplus in the ETS as of 2019: How the Market Stability Reserve (MSR) and cancellation mechanism work.



<https://www.cleanenergywire.org>

2 Potentials of Energy Sovereignty

Primary EU Law: Member State sovereignty reservation

Does MSR "significantly affect" Poland's "choice between different energy sources and the general structure of the energy supply"?

CJEU:

“ [...] it follows from the aim and content of that measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State.” (para 46)



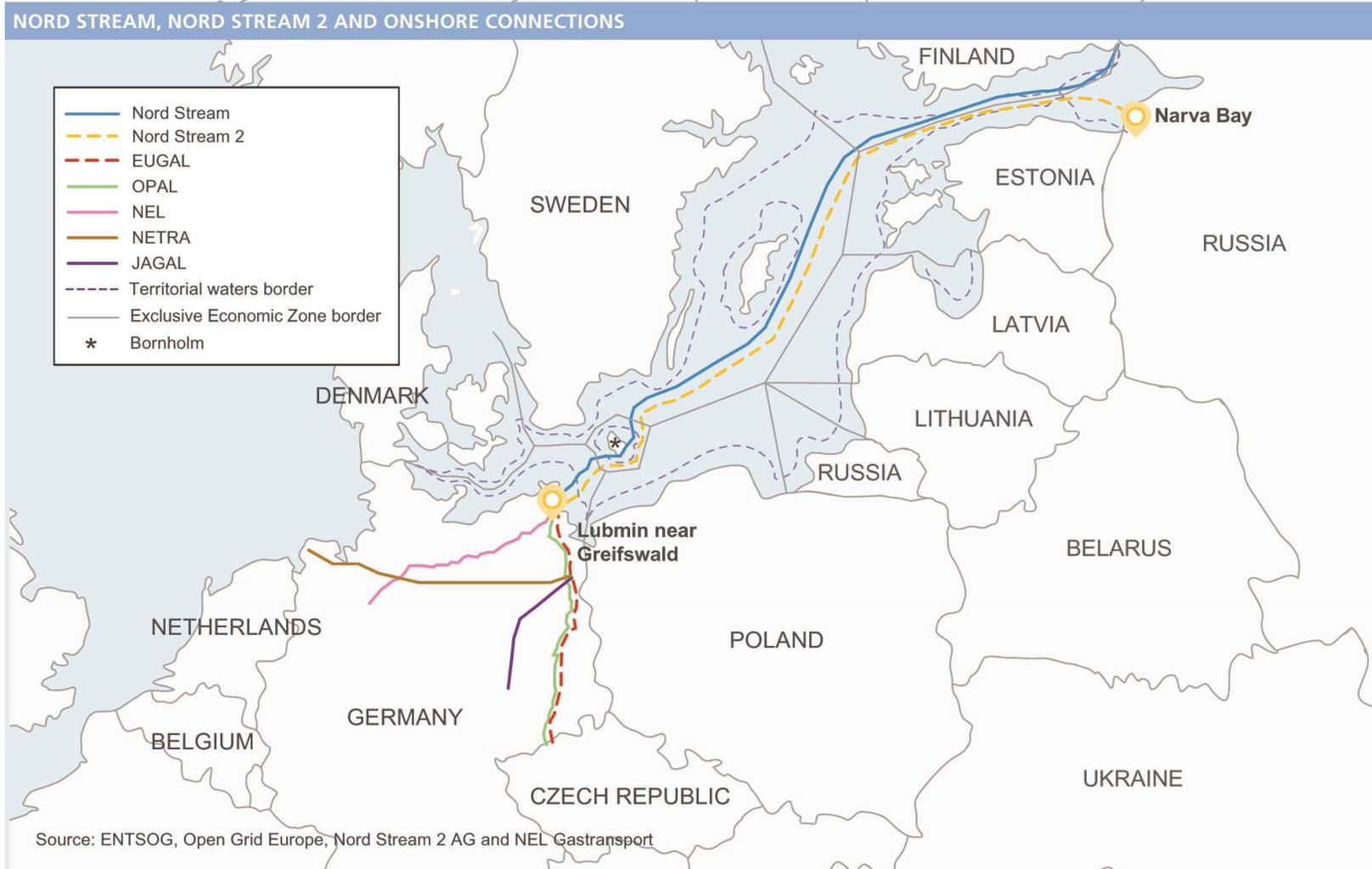
2 Potentials of Energy Sovereignty EU Primary Law: Solidarity

- Energy Solidarity between the EU and its Member States, Art. 191 para 1 TFEU
 - CJEU, Judgment of 15 July 2021, C-848/19 P (OPAL)



<https://www.reedsmith.com>





2 Potentials of Energy Sovereignty

EU Primary Law: Solidarity

- CJEU, Judgment of 15 July 2021, C-848/19 P (OPAL)
- Binding legal principle, justiciable
- Not only applicable to emergency situations
- Can cause measures to be unlawful and void
- Moderates conflicts between the EU and Member States and among the latter

3 Aspects of an EU Energy Sovereignty (Overview)



4 Deep dive: gas emergency

- [SoS Regulation \(EU\) 2017/1938](#)
- Early warning, alert and emergency levels, Art. 11(1)
- Decided and declared by the competent authority of the Member State, Art. 11(2)
- Declaration of emergency -> follow emergency plan, Art. 11(4)
- Commission must verify if there is an emergency, but comp authority retains final say, Art. 11(8)
- Declaration of emergency + indication cross-border action is required:
 - Increased gas supply standard or obligation of other member states (Art. 6(2)) reduced to level of Art. 6(1)
 - But: Either comp authority or Commission can conclude that emergency is not or no longer justified

4 Deep dive: gas emergency

- Declaration of emergency + indication cross-border action is required:
 - Increased gas supply standard or obligation of other member states (Art. 6(2)) reduced to level of Art. 6(1)
 - But: Either comp authority or Commission can conclude that emergency is not or no longer justified.
- Request solidarity measure from other Member States, Art. 13
 - Other Member State must reduce gas supply to customers other than solidarity protected customers
 - For as long as the gas supply to solidarity protected customers in the requesting Member State is not satisfied
 - Commission can conclude that emergency is not or no longer justified, Art. 13(15)
- Commission as the guardian of energy solidarity between member states

Conclusion

- Energy as a field in which Member State and EU competences are intertwined.
- Energy union is more than the sum of its parts = EU achieves sovereignty gains
- Solidarity as the modus operandi of a “pooled” EU energy sovereignty

Thank you for your attention!