Design and impact of
a harmonised policy for
renewable electricity in Europe

beyond 2020

D3.1 Report

Potential areas of conflict of a harmonised RES support scheme with European Union Law

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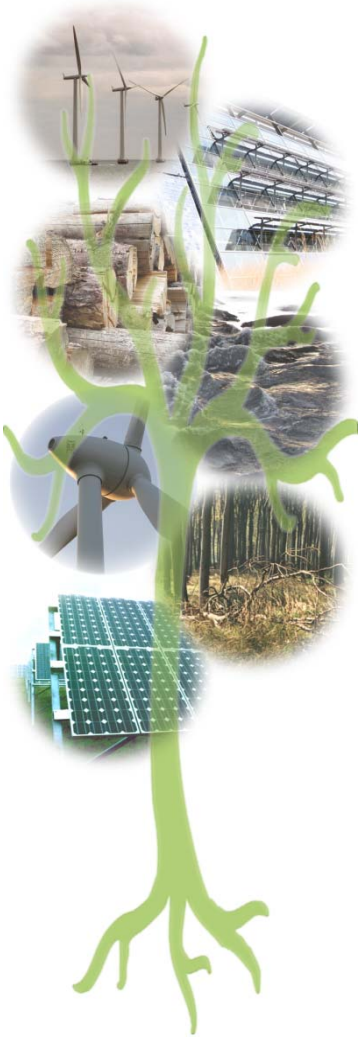
The beyond*2020* project *at a glance*



With Directive 2009/28/EC the European Parliament and Council have laid the grounds for the policy framework for renewable energies until 2020. **Aim of this project** is to **look more closely** *beyond 2020* by designing and evaluating feasible pathways of a harmonised European policy framework for supporting an enhanced exploitation of renewable electricity in particular, and RES in general. Strategic objectives are to contribute to the forming of a European vision of a joint future RES policy framework in the mid- to long-term and to provide guidance on improving policy design.

The work will comprise a detailed elaboration of feasible policy approaches for a harmonisation of RES support in Europe, involving five different policy paths - i.e. uniform quota, quota with technology banding, fixed feed-in tariff, feed-in premium, no further dedicated RES support besides the ETS. A thorough impact assessment will be undertaken to assess and contrast different instruments as well as corresponding design elements. This involves a quantitative model-based analysis of future RES deployment and corresponding cost and expenditures based on the Green-X model and a detailed qualitative analysis, focussing on strategic impacts as well as political practicability and guidelines for juridical implementation. Aspects of policy design will be assessed in a broader context by deriving prerequisites for and trade-offs with the future European electricity market. The overall assessment will focus on the period beyond 2020, however also a closer look on the transition phase before 2020 will be taken.

The final outcome will be a fine-tailored policy package, offering a concise representation of key outcomes, a detailed comparison of pros and cons of each policy pathway and roadmaps for practical implementation. The project will be embedded in an intense and interactive dissemination framework consisting of regional and topical workshops, stakeholder consultation and a final conference.

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This report serves as a general overview of all the Articles and provision in EU primary and secondary law which may have an impact the European Union's (EU) legislative competence in the field of renewable energy support. It does not yet assess them in detail nor set out which provisions would be relevant with respect to the different degrees of harmonization or under the different policy pathways identified in the course of the beyond*2020 project. Rather, it will present them and give a legal scholarly interpretation of the respective provisions with respect to legislation to support renewable energy.*

For a discussion on the applicability of EU law to the different degrees of harmonization and pathways, please refer to the later report.

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Content

1 Preliminary remarks

Within the course of this report and in order to explain the relevance of the respective provisions of primary and secondary EU law, the term 'any kind of measure' will be used to refer to any kind of future EU legislative measure in the field of renewable energy, thereby including all measures potentially taken in the course of the different degrees of harmonization and pathways identified in the Report D2.1 "Key Policy approaches for a harmonization of RES-E support in Europe – Main options and design elements". However, it will not apply to the approach of 'no further EU action'.

2 Potential legal bases of EU primary legislation for EU legislative action in the field of support for renewable energies

As established by Article 5(1) of the Treaty on European Union (hereafter, 'TEU') the limits of Union competences are governed by the principle of conferral. According to this principle, the EU has no inherent competence simply by virtue of its existence. Instead, the necessary competences are conferred upon the European Union by the Member States in the Treaties, to enable the Union to pursue its specific objectives.

In this regard, the Treaty on the Functioning of the European Union (hereafter, 'TFEU') provides a wide range of provisions conferring legislative competences to the EU in various policy fields, thereby establishing respective legal bases for EU legislative action. For every legislative action, it is thus important to choose the right legal basis.

According to the European Court of Justice (hereafter, 'ECJ'), the choice of the legal basis "must be based on objective factors which are amenable to judicial review"[1] and "those factors include in particular the aim and content of the measure."[2] The ECJ will review the choice of the legal basis if asked to do so in the course of an annulment action (Article 263 TFEU) or in case of a preliminary ruling (Article 267 TFEU). If a Member State brings an action for annulment based on the argument that the legal act was not adopted on the correct legal basis, the Court may, where the action proves successful, annul the legal act. The legal act will be void if found to have an incorrect legal basis where the choice of that legal basis does not constitute a mere formal defect, and that error in basis has led to different procedural consequences from those which would have applied under the correct legal basis.[3] However, the discretion left to the EU institutions is subject only to limited review by the Court in many cases.[4]

The provisions of the Treaty on the Functioning of the European Union which could provide a legal basis for any kind of legislative action in the field of support for renewables will be briefly presented in the following. As mentioned, they will not yet be discussed as to their respective applicability to any of the different degrees of harmonization or policy pathways, but the presentation will be neutral and interpret them in an abstract legal scholarly way. The relevant legal bases are presented in an ascending order as they appear in the TFEU.

2.1 Article 113 TFEU – Harmonization in the Area of Indirect Taxation

Article 113 TFEU provides:

"The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

[1] Case 45/86 *Commission v. Council* [1987] ECR 1439, para. 5.

[2] Case C-300/89 *Commission v. Council* [1991] ECR I-287, para. 10.

[3] Case 165/87 *Commission* v *Council* [1988] ECR 5545, para 19.

[4] Compare W Kahl, 'Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien', *NVwZ* 2009, 265, 268; Breier, in: Rengeling, Hans-Werner (ed.), *Handbuch zum europäischen und deutschen Umweltrecht*, Band I Allgemeines Umweltrecht, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 2. Auflage, 2003, § 13, para 28.

Article 113 TFEU empowers the EU to adopt measures on turnover taxes, excise duties and other forms of indirect taxation. Neither the Treaties nor the case law of the European Court provide a general definition of "taxes", "duties" and "indirect taxation". Differing views on the definition of taxes exist.[5] However, it has been established that neither fees[6] nor parafiscal charges[7] fall within the scope of "taxes". In contrast to fees and charges, taxes are characterised as payment obligations without a corresponding concrete performance in return.[8] For example, the establishment of a compensation scheme financed by a means of a levy under the common organization of the markets in the sugar sector has been based on Articles 42 and 43 of the Treaty establishing the European Economic Community (now Article 43 TFEU)[9] and not on a (additional) legal basis concerning taxes.

Regarding the definition of taxes, the European Court of Justice has stated that a tax intends to provide for the general expenses of public authorities and a contribution or a charge intends to finance a single financial scheme or to finance the costs in a particular sector only, even if such a contribution is levied in a manner resembling the levying of taxes.[10] Thus, it follows that duties and taxes to be adopted under Article 113 TFEU have to contribute to the coverage of public budgets.[11]

The effect and link between taxes and Member States' budgets as well as their financial sovereignty made it necessary that they should transfer some of this financial sovereignty to the EU; that sovereignty is, in turn, protected by the special procedure of decision-making by unanimity in the Council under this legal basis.

However, since the introduction of the specific energy competence in Article 194 TFEU, Article 113 TFEU should be considered exhausted, as Article 194(3) TFEU addresses such measures of a primarily fiscal nature, which would include taxation issues. However, under that provision a special legislative procedure, with unanimity in voting in Council, is also required.

The legal basis of Article 113 TFEU may become relevant, when a measure concerns payment obligations intending to provide means for the public budget without a right to specific performances in return. However, since the introduction of Article 194 TFEU it has become redundant for measures of a primarily fiscal nature relating to energy.

[5] Compare F Heselhaus, *Abgabenhoheit der EUropäischen Gemeinschaft in der Umweltpolitik, Eine Untersuchung unter besonderer Berücksichtigung der Möglichkeiten und Grenzen einer Ertragshoheit der Europäischen Gemeinschaft,* Duncker und Humblot, Berlin 2001, pp. 74ff., 275; Seiler in in: E. Grabitz/ M. Hilf/ M. Nettesheim, *Das Recht der Europäischen Union*, 45. Ergänzungslieferung, C.H. Beck 2011, Article 113, paras 18f.

[6] Compare (*inter alia*) the legal basis for the provision on fees in Article 11 of Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, OJ L 99, 11.4.1992, p. 1–7; see also Council Regulation (EEC) No 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme, OJ L 168, 10.7.1993, p. 1–18.

[7] Joined cases C-332, 333 and 335/92 *Eurico Italia Srl, Viazzo Srl and F & P SpA* v *Ente Nazionale Risi* [1994] ECR I-711, para 34.

[8] F Heselhaus, *Abgabenhoheit der EUropäischen Gemeinschaft in der Umweltpolitik, Eine Untersuchung unter besonderer Berücksichtigung der Möglichkeiten und Grenzen einer Ertragshoheit der Europäischen Gemeinschaft*, Duncker und Humblot, Berlin 2001, pp. 75, 276.

[9] Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector, OJ L 177, 1.7.1981, p. 4–31.

[10] Case C-191/94 *AGF Belgium SA v European Economic Community, Institut National d'Assurance Maladie-Invalidité (INAMI), Fonds National de Reclassement Social des Handicapés, Croix-Rouge de Belgique and Belgian State* [1996] ECR I-1859, para 12; Case 265/87 *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237, para 10.

[11] Compare Opinion of Advocate General Lenz, delivered on 8 November 1990, in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415, para 96 with reference to the provisions on the own resources system; S. Breier, in C O Lenz/ Borchardt K-D, *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5th edition, 2010, Köln, Art. 192, para 21.

2.2 Article 114 TFEU – Approximation of Laws

Article 114 TFEU provides:

"1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonization measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonization measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonization measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

   In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

   When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonization measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonization measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the Euro-

pean Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonization measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure."

Article 114 TFEU empowers the EU to adopt approximation measures with the purpose of establishing the internal market, with the internal market being a shared competence.[12] Such approximation can follow different approaches, ranging from full harmonization with national deviation completely excluded or only allowed within the limits of safeguard clauses, down to optional or minimum harmonization, which establish minimum standards but allow for more stringent national measures and differing rules applied only within the territory of the respective Member State (subject to such national measures respecting the provisions of the TFEU on free movement and competition: see chapter 5, below).[13] The EU is also empowered to pursue harmonization progressively.[14]

With regard to the method of approximation, the necessity of the measure and the choice of instrument, Article 114 TFEU confers broad discretion upon the EU institutions.[15] However, the European Commission's proposal for a measure under Article 114 TFEU has to respond to ensuring a high level of protection of health, safety, environment and consumers (Article 114(3) TFEU), which must also be pursued by the European Parliament and the European Council (see also Articles 7, 11 and 12 TFEU on the integration of such policies across the EU's policies and activities).[16]

Article 114(1) TFEU allows the EU to act by ordinary legislative procedure (including co-decision by the European Parliament and the Council, and qualified majority voting (hereafter, 'QMV') in Council). It enables the EU institutions to choose the appropriate instrument, including all of those mentioned in Article 288 TFEU (regulations, directives, decisions, recommendations and opinions) and other instruments.[17]

All provisions laid down by law, regulation or other action in the Member States are potentially subject to an approximation measure. However, the existence of differences between the relevant provisions of the Member States is not a mandatory precondition of reliance upon Article 114(1).[18]

Recourse to Article 114 TFEU is possible if the approximation measure is "intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or the freedom to provide services, or to the removal of distortions of competition".[19] The obstacles referred to must be likely to emerge, the distortion to competition appreciable and the approximation measure must to be designed to prevent the obstacles.[20] Where these conditions are fulfilled,

[12] See Article 4(2) lit. a TFEU.

[13] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition 2011, C.H. Beck, Article 114 TFEU, para 15; also: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Article 114 TFEU, par. 38f.

[14] Case C-193/94, *Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-00929, para 27.

[15] Case C-66/04 *United Kingdom v Parliament and Council* [2005] ECR I-10553, para 45; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* [2005] ECR I-6451, para 52.

[16] On which see chapter 5.3, 5.4 and 5.5 (respectively), below.

[17] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition 2011, C.H. Beck Article 114, para 28.

[18] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition 2011, C.H. Beck Article 114, para 18.

[19] Case C-491/01 *The Queen v Secretary of State for Health,* ex parte *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para 60.

[20] Case C-491/01 *The Queen v Secretary of State for Health,* ex parte *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para 61; Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, para 35; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 15.

the EU can adopt approximation measures which additionally contribute to other objectives, such as environmental protection.[21]

Thus, despite its broad wording, the legislative competence conferred upon the EU by Article 114 TFEU is certainly limited. For example, and in the light of the principle of limited competence and the intention of Article 114 TFEU to provide a competence only to cure diversity between national laws with the overall aim of the establishment and functioning of the internal market, the creation of new administrative institutions with operational functions goes beyond the given limits. According to the ECJ, on the basis of Article 114 TFEU 'the legislator may deem it necessary to provide for the establishment of a [Union] body responsible for contributing to the implementation of a process of harmonization in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'.[22] It must be stressed, however, that the ECJ emphasized that the establishment of a new body in order to support such implementation would be possible only by using non-binding measures, and only when the body had a merely complementary function.

Whereas comprehensive EU competences allow all-encompassing approaches (including the establishment of special funds and administrative framework conditions),[23] Article 114 TFEU is not considered sufficient as a legal basis in such cases.[24] This is further reflected by the procedural safeguards for the EU Member States, and notably the unanimity requirements in the context of EU measures with budget implications — for instance under Article 113 TFEU, Article 192(2)(a) TFEU and Article 194(3) TFEU — while Article 114 TFEU only requires the ordinary legislative procedure and thus gives less influence to the Council (the Member States). Those procedural safeguards cannot simply be circumvented by basing the measure on Article 114 TFEU.[25]

The limited interpretation of the scope of application is also confirmed by Article 114(2) TFEU. Pursuant to the latter, the competence of Article 114(1) TFEU cannot be used to adopt a harmonized measure on fiscal provisions. According to the case law, fiscal provisions cover all areas of taxation, not differentiating between the types of duties or taxes concerned, and all aspects of material or procedural nature.[26] Fiscal provisions have to be adopted based on Article 113 TFEU in case of indirect taxes, under Article 115 TFEU in case of direct taxes, under Article 192(2) TFEU in the field of environment and under Article 194(3) when it comes to taxes in the field of energy.[27]

According to Article 114(10) TFEU, the harmonization measure shall in appropriate cases include safeguard clauses. Under those safeguard clauses Member States shall be entitled provisionally to deviate from the harmonization measure for reasons referred to in Article 36 TFEU. Those include public morality, public policy, public security, but also the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial or commercial property. As a derogation, any such Member

[21] Compare Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para 62; H.-H. Herrnfeld, in: Schwarze, Jürgen (ed), U. Becker/ A. Hatje/ J. Schoo (Co-editors), *EU-Kommentar*, 2nd edition, Nomos, Baden-Baden 2009, Article 95, para 7.

[22] Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union,* 2006 ECR I-03771, para 44.

[23] Compare M Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften : rechtliche Gestaltungsmöglichkeiten und Grenzen*, Springer Verlag, Berlin 1982, p. 303

[24] Compare F Heselhaus, *Abgabenhoheit der Europäischen Gemeinschaft in der Umweltpolitik, Eine Untersuchung unter besonderer Berücksichtigung der Möglichkeiten und Grenzen einer Ertragshoheit der Europäischen Gemeinschaft,* Duncker und Humblot Berlin 2001, p. 334, 335.

[25] On the importance that the ECJ attaches to keeping procedural safeguards, see e.g. the cases on dual legal bases in which he ECJ protected the participation rights in the Parliament: Case C-300/89 *Commission v Council ('Titanium Dioxide')* [1991] ECR I-2867, para 19; Case C-491/01 *The Queen v Secretary of State for Health,* ex parte *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, para. 112.

[26] Case C-338/01, Commission v Council of the European Union, 2004 ECR I-04829, para 63; Case C-533/03, Commission v Council of the European Union, 2006 ECT I-01025, para 47.

[27] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition 2011, C.H. Beck Article 114, para 10..

State measure must be of a provisional nature and will be subject to an EU control procedure: such safeguard clauses do not allow for long-term modifications to any kind of EU measure. Further, Article 114(10) TFEU does not require safeguard clauses to be provided for environmental reasons,[28] as Article 36 TFEU does not explicitly include environmental reasons.

However, Articles 114(4) and (5) TFEU expressly allows for deviation based on environmental reasons: Member States can maintain or introduce even more stringent measures, provided that they notify the Commission and give reasons why they deem it necessary to maintain or introduce the relevant national rules. Those deviations need not necessarily be temporary and provisional.

Accordingly, the harmonization competence of the EU under Article 114 TFEU remains subject to some room for the Member States to retain or introduce differing national rules.

With regard to the relationship between Article 114 and other competences, neither Article 192 TFEU nor Article 194 TFEU expressly states a hierarchy of competences in relation to Article 114 TFEU. In relation to Article 192 (2) TFEU, Article 114 TFEU does not become subordinate due to the express wording "without prejudice to Article 114" in Article 192(2) TFEU.[29] The wording 'without prejudice to the application of other provisions of the Treaties' as given in Article 194(2)(1) TFEU does not imply a subordinate relationship to other competences either.[30]

In contrast, the wording of Article 114(1) TFEU — "[s]ave where otherwise provided in the Treaties" — clearly expresses the subsidiary nature of Article 114 TFEU with regard to any other *specific* provision.[31] This caveat, now, since the introduction of the energy chapter into the TFEU, applies to energy.[32] In the context of the functioning of the energy market under Article 194(1)(a) TFEU, this provision applies as a specific provision (*lex specialis*).[33] Article 114 TFEU is thus exhausted and can no longer be used as a legal basis for harmonization measures with a view to the functioning of the internal energy market.

[28] H.-H. Herrnfeld, in: Schwarze, Jürgen (ed), U. Becker/ A. Hatje/ J. Schoo (Co-editors), *EU-Kommentar*, 2nd edition, Nomos, Baden-Baden 2009, Article 95, para 44; however, the reasoning in Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099 might, on one reading, include elements of environmental protection within the notion of 'the protection of the health and life of human, animals and plants' under Article 36 TFEU. For discussion, see A Johnston *et al*, 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' [2008] EELRev 126, esp. 131ff.

[29] Compare also A Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts*, Nomos, Baden-Baden 2011, p. 121, with further references at page 13.

[30] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 1. Auflage 2009, Baden-Baden, p. 415; M. Nettesheim, in: E. Grabitz/ M. Hilf/ M. Nettesheim, *Das Recht der Europäischen Union*, 44. Ergänzungslieferung, C.H. Beck 2011, Article 194, para 35.

[31] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 1. Auflage 2009, Baden-Baden, p. 417; Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 590; for the contrary opinion, see F Sensfuß *et al*, *Fortentwicklung des Erneuerbaren Energien Gesetzes (EEG) zur Marktdurchdringung Erneuerbarer Energien im deutschen und europäischen Strommarkt* - Endbericht -, Karlsruhe September 2007, p. 66, retrieved 30 December 2011 from http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/endbericht_fortentwicklung_eeg.pdf.

[32] H Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy', *European Energy Journal*, Volume 1, Issue 1, October 2011, 33 (42). This has been given particular emphasis with regards to the objective of the internal energy market: compare Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 2011, Artikel 194, par. 15.

[33] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 1. Auflage 2009, Baden-Baden, p. 417; A Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts*, Nomos, Baden-Baden 2011, pp. 143, 146; W Kahl, 'Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien', NVwZ 2009, 265, 269; M Rodi, in C Vedder/ W Heintschel von Heinegg (eds), Europ. Verfassungsvertrag, Handkommentar, Nomos, Baden-Baden 2007, Art. III-256, Rn. 3; W Kahl, 'Die Kompetenzen der EU in der Energiepolitik nach Lissabon', EuR 2009, 601-621, 617; C Calliess, in: the same and Ruffert, EGV/EUV, 4. Auflage 2011, C. H. Beck, AEUV Art. 194 para 12; see also Communication from the Commission to the European Parliament and the Council - Addendum to COM(2009) 665 final - Communication from the Commission to the European Parliament and the Council - Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, COM/2010/0147 final, p. 3; Case C-271/94 *European Parliament* v Council [1996] ECR I-1689, para 33; H Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy', European Energy Journal, Volume 1, Issue 1, October 2011, 33 (42).

There has been quite some discussion of what happens when the legal basis of Article 194 (2) TFEU is blocked due to a measure having a significant effect upon a Member State's right to determine the conditions for exploiting its energy resources, the choice between different energy sources and the general structure of its energy supply (Article 194(2)(2)). Allowing a fallback option to the legal basis of Article 114 (1) TFEU - on the condition that the requirements for the general approximation competence are fulfilled - could provide leeway for circumvention of the stipulated national sovereignty on energy resources. The competence limit in Article 194(2)(2) TFEU had been inserted to clarify the continuing existence and limiting function of national sovereignty over energy resources.[34] Applying such a broad interpretation with an acceptance of a fallback option could undermine the specified competence in Article 194(2)(2) TFEU and jeopardise the intention of the Member States. In fact, it appears that the Member States, with the introduction of Article 194 TFEU wanted to codify existing competence as much as to set boundaries to a future (perceived and/or feared) competence creep and wide-ranging use of Article 114 TFEU by the European Commission.[35] This also becomes clear, for example, from their insistence on Protocol 35 to the Treaty of Lisbon, in which they reserved themselves the right to safeguard security of energy supply by national rather than EU measures.

Accordingly, Article 114 TFEU can no longer be used to approximate laws with a view to ensuring the functioning of the internal energy market. Rather, Article 194 TFEU now applies as *lex specialis* on this objective. In particular, Article 114 TFEU cannot be used to circumvent the caveat of Member States' sovereignty[36] due to Article 194(2) TFEU in order to adopt any kind of measure that interferes with the Member States' sovereignty over their energy mix and exploitation as well as their structure of energy supply, those being blocked under Article 194(2) TFEU.[37]

Article 114 TFEU provides a legal basis for any approximation measure which intends to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or the freedom to provide services, or to the removal of distortions of competition. However, as a result of the introduction Article 194 TFEU, with the specific objective of the functioning of the internal energy market, Article 114 TFEU can no longer serve as a legal basis for any kind of legislative measure with a view to ensure the functioning of the energy market.

[34] H Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy', European Energy Journal, Volume 1, Issue 1, October 2011, 33 (35).

[35] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 1. Auflage 2009, Baden-Baden, p. 417; A Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts*, Nomos, Baden-Baden 2011, pp. 143, 146; W Kahl, 'Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien', NVwZ 2009, 265, 269; M Rodi, in C Vedder/ W Heintschel von Heinegg (eds), *Europ. Verfassungsvertrag, Handkommentar*, Nomos, Baden-Baden 2007, Art. III-256, Rn. 3; W Kahl, 'Die Kompetenzen der EU in der Energiepolitik nach Lissabon', EuR 2009, 601-621, 617; C Calliess, in: the same and Ruffert, EGV/EUV, 4. Auflage 2011, C. H. Beck, AEUV Art. 194 para 12; see also Communication from the Commission to the European Parliament and the Council - Addendum to COM(2009) 665 final - Communication from the Commission to the European Parliament and the Council - Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, COM/2010/0147 final, p. 3; Case C-271/94 *European Parliament* v *Council of the European Union* [1996] ECR I-1689, para 33; H Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy', European Energy Journal, Volume 1, Issue 1, October 2011, 33 (42).

[36] As explained below, there is discussion whether Article 194(2) TFEU poses an absolute barrier to EU legislation and gives exclusive legislative competence to the Member States, or whether it means that the Member States retain an individual right to opt out of the national application of any EU legislation where their rights under that provision are affected.

[37] For more information on these provision see paragraphs 2.5.1.2 and 2.4.2.2 in this chapter.

2.3 Article 115 TFEU – Harmonization in the Field of Other Taxes

Article 115 TFEU provides:

"Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market."

As a legal basis, Article 115 TFEU is subsidiary in relation to Article 114 TFEU, thus only remaining relevant for the cases falling under Article 114(2) TFEU and being excluded from the scope of that provision.[38] However, in most of the areas excluded by Article 114 (2) TFEU the EU has specific competences, namely with regard to indirect fiscal taxes (Article 113 TFEU), to provisions relating to the free movement of persons (Articles 21(2), 45, 46, 50, 52, 53, 56, 59, 62 and 77 TFEU) and relating to the rights and interests of employed persons (Article 48, 153(2) and (3) TFEU).[39] Thus, the field of application of Article 115 TFEU is systematically restricted and what remains is only the area of direct taxes.[40] In this respect, taxes are characteristically defined as payment obligations without a corresponding concrete performance in return. Neither fees, nor parafiscal charges fall within the scope of direct taxes.

Measures under Article 115 TFEU have to be adopted by unanimous decision-making in the Council and in accordance with a special legislative procedure, and after consulting the European Parliament and the Economic and Social Committee.

However, after the introduction of Article 194(3) TFEU and the fiscal legislation competence in the area of energy, this provision seems exhausted as well. Undoubtedly, "fiscal" includes taxation issues, the term "fiscal" being generally used for government revenue and spending policies, and so again the new energy-related *lex specialis* exhausts the general harmonization competence.

Under the competence provision of Article 115 TFEU any measure intending to harmonise direct taxes might be adopted. However, for the field of energy, it appears that Article 194(3) should apply.

2.4 Article 192 TFEU – Environmental Protection

According to Article 191(1) TFEU the EU shall contribute to the preservation, protection and improvement of the quality of the environment, to the protection human health, to prudent and rational utilisation of natural resources and to the promotion of measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. In order to enable the EU to pursue these objectives, Article 192 (1) and (2) TFEU confer the necessary power upon the EU.

[38] W Kahl in: C Calliess and M Ruffert, *EGV/EUV*, 4. Auflage 2011, C. H. Beck, AEUV Art. 115 para 3, 11; H.G. Fischer, in: C-O Lenz/K-D Borchardt (eds), *EU-Verträge*, AEUV, Art. 115, para 3.

[39] W Kahl in: C Calliess and M Ruffert, *EGV/EUV*, 4. Auflage 2011, C. H. Beck, AEUV Art. 115 para 11.

[40] W Kahl in: C Calliess and M Ruffert, *EGV/EUV*, 4. Auflage 2011, C. H. Beck, AEUV Art. 115 para 11; H.G. Fischer, in: C-O Lenz/K-D Borchardt (eds), *EU-Verträge*, AEUV, Art. 115, para 3; S Leible, in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, C.H. Beck, München 2003, Artikel 95 EG, para 9.

2.4.1 Article 192(1) TFEU

Article 192(1) TFEU provides:

"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191."

Article 192 TFEU gives the European Union power to take the necessary actions to pursue the preservation, the protection and the improvement of the quality of the environment, the protection of human health, prudent and rational utilisation of natural resources and the promotion of measures at international level to deal with regional or worldwide environmental problems (Article 191(1) TFEU). Following Article 4(2)(e) TFEU, the EU has shared competence in the field of the environment, meaning that both the EU and the Member States may adopt legally binding acts in that area. However, the Member States are allowed to exercise their competence only to the extent that the Union has not exercised its competence (yet) (Article 2(2)(3) TFEU), and insofar as the Member States' rules are not incompatible with the TFEU's rules on free movement and competition (on which see chapter 5, below). Article 192(1) TFEU enables the EU institutions to choose the appropriate instrument, including all actions by ordinary legislative procedure as mentioned in Article 288 TFEU (regulations, directions, decisions, recommendations and opinions)[41] and other instruments.[42] The free choice of instrument is, however, limited by Article 5 TEU, which requires the EU to act in accordance with the principles of proportionality and subsidiarity.

The ordinary legislative procedure (as described in Article 294 TFEU) applies to measures under Article 192(1) TFEU

With regard to the question whether Article 192 TFEU would no longer be applicable to renewable energy legislation now that the specific competence in Article 194 TFEU has been created, specific attention must be paid to the wording of the two Articles: Article 194 TFEU mentions only the "development" of new and renewable forms of energy, which — in EU terms — normally refers to technological development, not to increased deployment. Rather, it would refer to issues such as: which technical standards need to be complied with to make a technology safe; or how a technology can be improved, made more efficient, and the like. It does not so clearly — and unlike the earlier reference, where it is explicitly said that the EU can legislate to "promote" energy efficiency and energy savings under Article 194 TFEU — address the question of support, in the sense of promotion.[43] Thus, it can be argued that, when it comes to measures aiming at the promotion of renewable energies, Article 194 TFEU is not exhaustive and there is still room for Article 192 TFEU to apply.

2.4.2 Article 192(2) TFEU

Article 192(2) TFEU provides:

"By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

[41] S. Breier, in C O Lenz/ Borchardt K-D, *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5th edition, 2010, Köln, Art. 192 TFEU, paras 1,2.

[42] M Nettesheim, 'Das Energiekapitel im Vertrag von Lissabon', *JZ* 1/2010, p. 19 (21).

[43] On that elaboration, see: W. Kahl, 'Die Kompetenzen der Energiepolitik nach Lissabon', EuR 2009, 601, p. 618.

- town and country planning,
- quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,
- land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

For all cases listed in (a) to (c), Article 192(2) TFEU requires a special legislative procedure to be followed with a unanimity requirement in the Council.

As an alternative to this special legislative procedure, Article 192(2)(2) TFEU allows the Council – after unanimous decision based on a proposal from the Commission and after consultation of the European Parliament, the Economic and Social Committee and the Committee of the Regions - to make the ordinary legislative procedure applicable in those cases. However, that means that Article 192(2) requires unanimity among the Member States in any case and the derogation procedure has not yet been applied in practice.[44] As the absence of any contradicting national interests on the sensitive topics mentioned in a) to c) and thus the probability of unanimity in the Council is very unlikely in those areas, the competence conferred by Article 192(2)(2) TFEU will probably not become too relevant in the future.[45]

2.4.2.1 Article 192(2)(a) TFEU

Article 192(2)(a) TFEU refers solely to 'taxes' in the narrow sense of the term; other fees, charges, contributions and the like fall within the scope of paragraph 1.[46] However, the linguistic differences[47] within the wording of Article 192(2)(a) TFEU in the versions in the different national languages of the Member States make it difficult to find the correct meaning.[48] The Treaty itself does not provide for a definition of the term 'tax'. As an exceptional provision it is therefore to be interpreted by close reference to the wording.[49] The German version and the comparison with Article 113 TFEU support the conclusion that only measures with an emphasis on tax provisions fall under Article 192(2) TFEU. This reasoning is based on the understanding that the taxation and budgetary policy of the Member States remains in their exclusive competence[50] and it complies with Article 311 TFEU, according to which any changes to the EU's own resources system are subject to special

[44] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article, 192, para 28.

[45] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article, 192, para 28.

[46] See S Breier, in: H-W Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht, Band I Allgemeines Umweltrecht*, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 2nd edition, 2003, § 13, para 22; *Epiney, Umweltrecht, para 57; Frenz, Europäisches Umweltrecht, para 85*; K Meßerschmidt, *Europäisches Umweltrecht*, C.H. Beck, 1. Auflage 2010, § 2 para 149; SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report, October 2011, p. 177, retrieved on 7.11.2011 from http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html.

[47] See in particular the French version: "des dispositions essentiellement de nature fiscale" and the German version: "Vorschriften überwiegend steuerlicher Art".

[48] S Breier, in: H-W Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht, Band I Allgemeines Umweltrecht*, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 2nd edition, 2003, § 13, para 22.

[49] *See ECJ, C-36/98, para 46 and 49, Calliess, ZUR Sonderheft 2003, 129ff, 130; S Breier,* in C O Lenz/ Borchardt K-D, *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5. Auflage 2010, Köln, Art. 192, para 7; *aA* Scherer/Heselhaus, in: M Dauses (ed), *Handbuch des EU-Wirtschaftsrechts, Band 2*, C.H. Beck, 27. EL, October 2010, O., para 86.

[50] Scherer/Heselhaus, in: M Dauses (ed), *Handbuch des EU-Wirtschaftsrechts, Band 2*, C.H. Beck, 27. EL, October 2010, O., para 89.

procedures and limitations, thereby depriving the EU of any competence to establish other revenues for the EU budget independently of the Member States.[51]

For the definition of what constitutes a tax and in the absence of an EU definition, one should again refer to the characteristics of taxes:[52] namely, the nature of payment obligations with the intention to provide means for the public budget without a right to specific performances in return.

2.4.2.2 Article 192(2)(c) TFEU

Where measures may have effects on a Member State's energy sources and energy supply, it is not completely clear when the special legislative procedure will apply. Various different views have been put forward concerning the scope of application of Article 192(2)(c) TFEU.

The requirement of a "significant effect" indicates that only measures with an essential effect on the basic structure of energy supply or choice between the different sources fall under Article 192(2)(c) TFEU.[53] The assessment of a significant effect is left to the discretion of the EU institutions and is subject to only limited review by the European courts.[54] Thereby, Article 192(2)(c) TFEU has to be applied as soon as one Member State is significantly affected, not necessarily several or all Member States.[55] For instance, the possible existence of a significant effect was assessed and denied under: Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market;[56] Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants;[57] and Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC[58].[59]

Further, it has been argued that the effect has to be cumulative on the choice between the different energy sources and on the general structure of its energy supply,[60] and only measures directly

[51] S Breier, in: H-W Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht, Band I Allgemeines Umweltrecht*, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 2nd edition, 2003, § 13, para 23.

[52] For further description see paragraph a).

[53] Ruffer, M, 'Vorgaben des Europarechts und nationale Gestaltungsspielräume', in: Marburger, P (scientific director), *Energieversorgung und Umweltschutz, 25. Trierer Kolloquium zum Umwelt- und Technikrecht vom 30. August bis 1. September 2009*, Erich Schmidt Verlag, Berlin 2010, p. 13 (31); T Müller/C Bitsch, Die Umweltkompetenz nach Artikel 175 Abs. 2 EG, Die geplante Richtlinie zur Förderung Erneuerbarer Energien als erster Anwendungsfall? *EurUP* 2008, 220, 224; *J* Scherer/S Heselhaus, in: Dauses, Manfred A. (ed), *Handbuch des EU-Wirtschaftsrechts*, Band 2, C.H. Beck, 27. EL, October 2010, O., para 96.

[54] W Kahl, 'Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien', *NVwZ* 2009, 265, 268; Breier, in: Rengeling, Hans-Werner (ed.), *Handbuch zum europäischen und deutschen Umweltrecht*, Band I Allgemeines Umweltrecht, Carl Heymanns Verlag, Köln, Berlin, Bonn, München, 2. Auflage, 2003, § 13, para 28.

[55] W Kahl, Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien, *NVwZ* 2009, 265, 269.

[56] OJ L 283, 27.10.2001, p. 33–40.

[57] OJ L 309, 27.11.2001, p. 1–21.

[58] OJ L 114, 27.4.2006, p. 64–85.

[59] W Kahl, *Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien, NVwZ* 2009, 265, 268, see also his reference to a further overview by Jans Jans/Vedder Hans, *European Environmental Law*, 3rd edition, Europa Law Publishing, Groningen, 2008, p. 56 ff (and see now, by the same authors: *European Environmental Law – After Lisbon*, 4th edition, Europa Law Publishing, Groningen, 2012, at 59 ff).

[60] Meßerschmidt, Klaus, *Europäisches Umweltrecht*, C.H. Beck, 2010, § 2 para 148; Jahns-Böhm, Jutta, in Schwarz, Jürgen (ed.), *EU-Kommentar*, Nomos Baden-Baden, 1. Auflage 2000, Article 175, para 20; aA W Kahl, Alte und neue Kompetenzprobleme im EG-Umweltrecht – Die geplante Richtlinie zur Förderung Erneuerbarer Energien, *NVwZ* 2009, 265, 268.

affecting the area of energy supply fall under this provision.[61] It has also been suggested that the durability of a measure is a relevant criterion.[62]

However, the non-application of Article 192(2) TFEU in case of the Directive 2003/87/EC of the European Parliament and the European Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading further questions the function of Article 192(2)(c) TFEU, as this Directive obviously intends to change the energy mix.[63] This example provides a strong argument for the very narrow interpretation of the provision.

To conclude, the competence stipulated by Article 192(2)(c)TFEU only applies to measures with an essential effect on the choice between different energy sources and the general structure of energy supply in one Member State at least. Criteria such as the durability of a measure and its effects, the purpose of the measure and the directness of its effects have to be considered when the significance of the effect is assessed.

Article 192 TFEU provides a general competence to adopt measures pursuing environmental protection objectives. With regard to the promotion of renewable energy, the use of Article 192 is not definitely precluded by Article 194 TFEU and could thus still be applied. Legal acts can be adopted under this competence by ordinary legislative procedure with majority voting in the Council. For the particular cases of measures with an emphasis on taxes or measures essentially affecting a Member State's choices between different energy sources and the structure of its energy supply, a special legislative procedure with unanimous voting in the Council is necessary.

2.5 Article 194 TFEU – Energy

With the Lisbon Treaty's entry into force on 1st December 2009, we have seen the advent of a new energy chapter and the introduction of an explicit EU energy competence in Article 194 TFEU. As a result, Article 194 TFEU appears to be the most obvious legal basis for any kind of energy-related measure and, as has been indicated already, it applies as *lex specialis* before all other provisions. As described hereafter, the situation of a new Treaty provision, the lack of experience with the new competence and the limited extent of judicial review hitherto in this area creates certain difficulties for the legal analysis of this provision at this stage.

Article 194 TFEU provides:

"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;

(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] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 192, para 32; Ruffer, M, 'Vorgaben des Europarechts und nationale Gestaltungsspielräume', in: Marburger, P (scientific director), *Energieversorgung und Umweltschutz, 25. Trierer Kolloquium zum Umwelt- und Technikrecht vom 30. August bis 1. September 2009*, Erich Schmidt Verlag, Berlin 2010, p. 13 (31).

[62] SRU, German Advisory Council on the Environment, *Pathways towards a 100% renewable electricity system, Special Report*, October 2011, p. 189, retrieved on 7.11.2011 from http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html.

[63] K Meßerschmidt, *Europäisches Umweltrecht*, C.H. Beck, 2010, § 2 para 148;

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

   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).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature."

2.5.1 Article 194(1) TFEU

Article 194(1) TFEU establishes the objectives and scope of action for the EU to: ensure the functioning of the internal energy market; ensure security of energy supply; promote energy efficiency and energy saving; promote the development of new and renewable forms of energy; and promote the interconnection of energy networks. Any measure based on this Article must also comply with the principles mentioned in the *châpeau* of Article 194(1) TFEU: the establishment and functioning of the internal market; the preservation and improvement of the environment; and acting in a spirit of solidarity between Member States.

2.5.1.1 Article 194(2)(1) TFEU

The legal basis for the EU institutions to pursue the given objectives is found in Article 194(2)(1) TFEU. The provision confers the necessary competence to adopt legal acts and sets out the applicable legislative procedure. Measures under Article 194(2)(1) TFEU can be adopted using all instruments mentioned in Article 288 TFEU as well as all non-binding instruments, following the ordinary legislative procedure. Concerning the nature of this competence, Article 4(2)(j) TFEU establishes shared competences in the field of energy, thus rendering the EU competence exclusive once it has been exercised and to the extent of its exercise. However, a right for the Member States similar to the one found in Article 193 TFEU to adopt more stringent national protective measures does not exist in the field of energy.[64]

2.5.1.2 Article 194(2)(2) TFEU

Article 194(2)(2) TFEU might block the EU competence in the field of energy, as it restricts the EU power when the Member States' right to determine the conditions for exploiting their energy resources, the choice between different energy sources and the general structure of their energy supply are affected. The impact of this provision and its scope of application are subject to a comprehensive discussion in literature and practice.

First, disagreement exists on the meaning and impact of Article 194(2)(2) TFEU. In contrast to Article 192(2)(c) TFEU, Article 194(2)(2) TFEU does not provide a special decision-making procedure with unanimity voting in the Council to allow the EU nevertheless to legislate on those issues concerned. The lack of a special decision-making procedure has led some to the conclusion that the clause serves as an absolute limit of EU competence and as an indication of exclusive competence of the Member States in the areas mentioned.[65] The clear wording 'shall not affect a Member

[64] C Calliess, in: the same and Ruffert, *EGV/EUV*, 4. Auflage 2011, C. H. Beck, AEUV Art. 194 para 25.

[65] See S. Breier, in C O Lenz/ Borchardt K-D, *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5. Auflage 2010, Köln, Art. 194, para16; Ehricke/Hackländer, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrages von Lissabon', *ZEuS* Heft 4 2008, 579 (599); C Calliess, in: the same and Ruffert, *EGV/EUV*, 4. Auflage 2011, C. H. Beck, AEUV Art. 194 para 28; SRU, German Advisory Council on the Environment, *Pathways towards a 100% renewable electricity system, Special Report*, October 2011, p. 179, 181, retrieved on 7.11.2011 from

State's right' and the historic legislative process demonstrating the bargain of strong national interests in the field of energy resources[66] shows that, in this field, the Member States were just not ready to confer competence upon the EU.. Hence, reading the provision as an absolute competence limit and leaving exclusive competence with the Member States appears preferable. However, in the case of measures in the area of sustainable energy supply that can be based on both Articles 192(2) and 194(2) TFEU (as they pursue both environmental and energy objectives), it is possible that the measure could still be adopted based on Article 192(2)(c) TFEU and by unanimity decision-making.[67]

However, it might also be argued that under Article 194(2) a Member State may opt out of the national application of an EU legislative measure passed according to the procedure specified in that provision, but it may *not* veto the very adoption of that measure as EU law in the first place. This interpretation focuses upon the wording which refers to a "Member State's right", and suggests that the absence of the ability of the EU legislator to override such Member State rules or choices only by unanimity means that an EU-level decision-making veto was not what was intended.[68]

Disagreement also exists concerning the scope of application of Article 194(2). In comparison with Article 192(2)(c) TFEU (where the wording "significantly affecting" clearly requires a certain intensity of effect), Article 194(2)(c) TFEU seems to cover *any* effect on the Member States' right to determine the issues referred to therein. This approach, based on an argumentum *a contrario*, questions whether there is any matter in the field of energy that can be regulated by the EU without having an effect on the Member States' right in the fields of Article 194(2)(2) TFEU.[69] On the other hand, as an exceptional provision to the general rule of shared competence, the scope of application has to be interpreted in a narrow sense,[70] so that a certain threshold of significance seems appropriate.[71] The principle of the consistency of Union law[72] could provide an additional argument in favour of an interpretation in accordance with the significance threshold in Article 192(2)(c) TFEU.

Thus, it has been argued that Article 194(2)(2) TFEU is only applicable when the exploitation, the choice between the different energy sources and the general structure of energy supply are *significantly* affected.[73] The wording indicates that the effect has to be felt, not on the *mere use* of a certain energy source, but on the *exercise of the right to choose* between different energy sources as such.[74] From that point of view, the choice between different energy sources is only affected when certain energy sources are totally excluded or when a certain energy mix is imposed on the Member States (for instance, when certain energy sources can be used to a perceptibly lower extent only).[75] Similarly, concerning the general structure of energy supply it has been argued that system-

http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html.

[66] Compare H Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy', *European Energy Journal, Volume* 1, Issue 1, October 2011, 33 (35, 36).

[67] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 1. Auflage 2009, Baden-Baden, p. 404.

[68] See, e.g., the approach of J-C Pielow and BJ Lewendel, 'Beyond Lisbon: EU Competences in the Field of Energy Policy', in Delvaux, B, Hunt, M, and Talus, K (eds), *EU Energy Law and Policy Issues: The ELRF Collection, Volume 3* (Intersentia, Antwerp, 2011), 268-269.

[69] S Schulenberg, *Die Energiepolitik der Europäischen Union, Eine kompetenzrechtliche Untersuchung unter besonderer Berücksichtigung finaler Kompetenznormen*, Nomos, 2009, Baden-Baden, p. 402.

[70] See Footnote 49.

[71] C Calliess, in: the same and Ruffert, *EGV/EUV*, 4th edition, 2011, C. H. Beck, AEUV Art. 194 para 28.

[72] See for further description chapter 5.3.

[73] *Neveling, ET 2004, 340 (343),* S Schulenberg, p. 402.

[74] S Schulenberg, p. 402.

[75] S Schulenberg, p. 402.

atic changes and fundamental decisions on single issues are possible as long as they do not affect the principles of national energy supply structures.[76]

For systematic reasons, an absolute competence limit without any threshold would be incompatible with Article 192(2)(c) TFEU. As elaborated above, the caveat 'without prejudice to the application of other provisions of the Treaties' indicates that the competence limit only applies to the extent to which the Member States have not yet transferred competences by other Treaty provisions.[77] Thus, the competence limit needs to be interpreted in line with Article 192(2)(c) TFEU, which again applies the threshold of the significant effect. This reasoning is further supported by the argument of narrow interpretations of exceptional provisions and the principle of the consistency of Union law given above.

Historic reasons support this position as well. The intention to establish a formally visible energy competence and to increase legal certainty without substantially changing competences seems to indicate that the Member States did not want to restrict the leeway which has been already given for the measures adopted in the past.[78] The conditions for exploiting energy resources have been already subject to EU law, such as the Directive 94/22/EC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons[79] and the Directives on the liberalization of the electricity and gas market.[80] It is hardly imaginable that the Member States wanted to establish a competence limit that would *ex post* take away the competence to adopt pre-existing measures and rather prohibit the adoption of any future measures under the Lisbon Treaty by officially creating a new competence (as this would be a paradox!).

Despite the differences between the wording of Articles 192(2)(c) and 194(2)(2) TFEU, the restrictive interpretation establishing the requirement of a relevance threshold should, it is suggested, be followed, on the basis of systematic and historic reasons. While the competence limit in that Article does (on one interpretation) prevent EU action and provide for areas of remaining exclusive Member State competence, it cannot be understood as applying in all cases of *any* effect, however small. While this is ultimately for the Courts to decide, the application of a threshold of "significantly affecting", in parallel to the pre-existing restriction under Article 192(2) TFEU, appears reasonable.

Whether the provision constitutes an absolute bar to EU legislation and leaves all competence in this area to the Member States or whether it grants a veto to the Member States to opt out of any EU legislation, it is clearly possible that this provision may have an impact upon the behaviour of any Member State during discussions of Commission (legislative) proposals on various aspects of energy and environmental policy as well as on the application of EU legislation adopted in this area, although it remains to be seen in what way and how easily certain proposed actions will be discouraged, blocked or undermined by national objections based upon the wording of Article 194 TFEU. On the other hand, it is not impossible that Member States might seek to make use of the provisions on enhanced co-operation (see Article 20 TEU) when addressing sensitive energy and/or environmental issues where the potential constraints of Article 194 TFEU may apply.[81]

[76] S Schulenberg. 403.

[77] For further discussion, see chapter 2.2

[78] Compare the considerations given under chapter 2.2; and see J-C Pielow and BJ Lewendel, 'Beyond Lisbon: EU Competences in the Field of Energy Policy', in Delvaux, B, Hunt, M, and Talus, K (eds), *EU Energy Law and Policy Issues: The ELRF Collection, Volume 3* (Intersentia, Antwerp, 2011), 267-268.

[79] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, OJ L 164, 30.6.1994, p. 3–8.

[80] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p. 94–136.

[81] A Johnston, 'The Interface between EU Energy, Environmental and Competition Law in the UK' (UK national report for the XXVth FIDE Congress, Tallinn, 2012) (2012) 10 OGEL, Issue 4, Article 5.

2.5.2 Article 194(3) TFEU

For measures primarily of a fiscal nature, Article 194(3) TFEU requires a unanimous decision by the Council after consultation of the European Parliament. Again, this provision stresses the Member States' sovereignty in the field of taxation and budgetary policy.[82] By way of consistent interpretation[83] with Article 192(2)(a) TFEU, the term "primarily of a fiscal nature" has to be understood in a narrow sense, so to include only taxes, but not charges, fees, contributions or other duties.[84] As mentioned above in paragraph 2.1, the particular characteristics of taxes are the nature of payment obligations and the intention to provide means for the public budget without a right to specific performances in return. Notably, as the *lex specialis* for the energy sector, it excludes the application of Articles 113 TFEU and 115 TFEU in this respect.

2.5.3 The Interaction of Article 194 TFEU with other provisions

Article 194(2) TFEU establishes a competence "without prejudice to other provisions of the Treaty". However, it is the *lex specialis* in the field of energy, so that it excludes — for the objectives it specifically covers — the application of other provisions of the Treaty. Those other provisions can only be used where the proposed measure falls within their objectives, either fully — and more than it relates to the energy objectives — or insofar as it is at least intrinsically linked to, and cannot be treated separately from, the energy objective. Where the decision-making procedures (e.g. ordinary legislative with co-decision and QMV in Council) are identical, the proposed measure can be based jointly upon Article 194 and the other relevant provision; but where this would lead to different, mutually inconsistent procedures, then a choice of *the* appropriate legal basis will have to be made (see, further, chapter 3, below).

To conclude, Article 194(2)(1) TFEU empowers the EU to adopt measures in the field of energy. On one interpretation, EU measures significantly affecting a Member State's right to determine the conditions for exploiting its energy resources, the choice between different energy sources and the general structure of their energy supply cannot be adopted based on Article 194(2) TFEU. Under the alternative approach to this provision, such measures could be adopted, but a Member State which finds itself significantly affected could choose to opt-out from the application of such measures, relying upon Article 194(2) TFEU. Under the condition of an existing significant effect, recourse to other legal bases is basically possible, given that any kind of measure falls within the ambit of those other legal bases. Measures primarily introducing taxes in the field of energy can be adopted only based on Article 194(3) TFEU and under the condition of unanimity voting in the Council.

2.6 Article 352 TFEU – flexibility clause

Article 352 TFEU provides:

"1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

[82] See for futher consideration chapter 2.4.2.1.

[83] S. Breier, in C O Lenz/ Borchardt K-D, *EU-Verträge, Kommentar nach dem Vertrag von Lissabon*, 5. Auflage 2010, Köln, Art. 194, para 18.

[84] W Kahl, in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, C.H. Beck, München 2003, Art. 175 EGV, Rn. 18.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union."

Article 352 TFEU functions as a flexible competence basis, conferring legislative power upon the EU in order to pursue the EU's objectives when the given specific competences turn out to be insufficient. When action of the Union proves to be necessary to attain the objectives of the Treaties and the necessary competence is not provided by the Treaties themselves, the so-called "flexibility clause" thus provides the necessary competence.

As provided in Article 352(2) TFEU, for measures adopted on the basis of the flexibility clause, compliance with the subsidiarity principle is particularly important to minimise the risk of competence creep. Article 352(2) TFEU underlines the importance of the principle of subsidiarity and requires the EU Commission to inform the national parliaments about all proposals based on Article 352(1) TFEU.

According to Article 352(3) TFEU, the competence under Article 352(1) TFEU must not be used to circumvent restrictions established under other competence-conferring provisions. Thus, measures based on the flexibility clause have to comply with the competence limits provided for elsewhere in the Treaties. For instance, such competence limits can be derived from Article 194(2)(2)TFEU. Thus, and in particular with the competence limit in that Article being complete and leaving exclusive competence to the Member States (at least on one interpretation), Article 352 TFEU cannot be used to circumvent it.

Regarding the legislative procedure to be followed, it should be stressed that measures under Article 352 TFEU have to be adopted unanimously in the Council on a proposal from the Commission and after obtaining the consent of the European Parliament.

Article 352 TFEU could provide the necessary powers to adopt any kind of measure if other competences (such as in the field of environmental protection, energy or approximation of laws) do not suffice. As a flexibility clause, the competence conferred is tied to the objectives of the EU and the procedural requirement of unanimity voting in the Council and consent of the European Parliament. Further, following from the wording of Article 352(3) TFEU, this competence cannot be used to fill any competence gaps which exist due to explicit competence limits provided for in the Treaties, as for instance (on one interpretation) in the field of significant effects on a Member States' right to determine the conditions for exploiting its energy resources, the choice between different energy sources and the general structure of its energy supply due to Article 194(2)(2) TFEU.

2.7 Use of legal bases hitherto

To illustrate which legal bases have successfully been used in the past, a few examples of secondary legislation in a similar context are given below.

Directive 2009/72/EC concerning common rules for the internal market in electricity[85]

The Directive is based on the multiple legal bases of Article 47(2) EC (now Article 53(1) TFEU), 55 EC (now Article 62 TFEU) and 95 EC (now Article 114 TFEU) and thus on internal market competences.

According to its Article 1, the Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisation and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.

Directive 2009/73/EC concerning common rules for the internal market in natural gas [86]

The Directive is based on the multiple legal bases of Article 47(2) EC (now Article 53(1) TFEU), 55 EC (now Article 62 TFEU) and 95 EC (Article 114 TFEU) and thus on internal market competences.

Accordingly to its Article 1 this Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisation for transmission, distribution, supply and storage of natural gas and the operation of systems.

Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community[87]

Both the initial and the amending Directive are based on Article 175(1) TFEU (now Article 192(1) TFEU) and thus on the environmental competence.

Following its Article 1, Directive 2003/87/EC establishes a scheme for greenhouse gas emission allowance trading within the EU in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

Interestingly, although in Recital 8 of the latest amending Directive 2009/29/EC some internal market aspects are also mentioned, and despite the legal basis being the environment competence:

> *"[w]hile experience gathered during the first trading period shows the potential of the Community scheme and the finalisation of national allocation plans for the second trading period will deliver significant emission reductions by 2012, a review undertaken in 2007 has confirmed that a more harmonised emission trading system is imperative in order to better exploit the benefits of emission trading, to avoid distortions in the internal market and to facilitate the linking of emissions trading systems. Furthermore, more predictability should be ensured and the scope of the system should be extended by including new sectors and gases with a view to both reinforcing a carbon price signal necessary to trigger the neces-*

[85] **Directive 2009/72/EC** of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC Text with EEA relevance, Official Journal L 211 , 14/08/2009 P. 0055 – 0093.

[86] **Directive 2009/73/EC** of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC Text with EEA relevance, Official Journal L 211 , 14/08/2009 P. 0094 – 0136.

[87] **Directive 2009/29/EC** of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (Text with EEA relevance), OJ L 140, 5.6.2009, p. 63–87.

sary investments and by offering new abatement opportunities, which will lead to lower overall abatement costs and the increased efficiency of the system."

Directive 2009/28/EC on the promotion of the use of energy from renewable sources [88]

The Directive is based on Article 175(1) EC (now Article 192(1) TFEU), and Article 95 EC (now Article 114(1) TFEU) only when it comes to Articles 17, 18 and 19 of this Directive.

Overall, the Directive imposes binding national renewable energy targets on the Member States and makes some provisions on framework conditions to be created for the facilitation and support of renewables deployment, but leaves the exact implementation of any kind of support measure to the Member States, and even with regard to the framework conditions refers to what they consider appropriate.

Those provisions (Articles 17 to 19) which are based on the internal market competence concern sustainability criteria for biofuels and bioliquids, verification of compliance with the sustainability criteria for biofuels and bioliquids and the calculation of the greenhouse gas impact of biofuels and bioliquids.

Recital 94 explains in this regard, that:

"*[s]ince the measures provided for in Articles 17 to 19 also have an effect on the functioning of the internal market by harmonising the sustainability criteria for biofuels and bioliquids for the target accounting purposes under this Directive, and thus facilitate, in accordance with Article 17(8), trade between Member States in biofuels and bioliquids which comply with those conditions, they are based on Article 95 of the Treaty.*

Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products [89]

The Directive is based on Article 95 EC (Article 114 TFEU).

According to its Article 1, the Directive establishes a framework for the setting up of Community ecodesign requirements for energy-related products with the aim of ensuring the free movement of such products within the internal market. The Directive provides for requirements which the energy-related products covered by implementing measures must fulfil in order to be placed on the market and/or put into service.

Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply[90]

This Regulation is based on Article 194(2) TFEU.

According to its Article 1, the Regulation establishes provisions aimed at safeguarding the security of gas supply by ensuring the proper and continuous functioning of the internal market in natural gas (gas), by allowing for exceptional measures to be implemented when the market can no longer deliver the required gas supplies and by providing for a clear definition and attribution of responsi-

[88] **Directive 2009/28/EC** of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62

[89] **Directive 2009/125/EC** of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products Text with EEA relevance Official Journal L 285 , 31/10/2009 P. 0010 – 0035.

[90] **Regulation (EU) No 994/2010** of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, *OJ L 295, 12.11.2010, p. 1–22.*

bilities among natural gas undertakings, the Member States and the Union regarding both preventive action and the reaction to concrete disruptions of supply.

Recital 5 of the Regulation however also refers to the internal market objective by providing:

> *"… under the current measures regarding the security of gas supply that have been taken at Union level, Member States still enjoy a large margin of discretion as to the choice of measures. Where the security of supply of a Member State is threatened, there is a clear risk that measures developed unilaterally by that Member State may jeopardize the proper functioning of the internal gas market and the supply of gas to customers. Recent experience has demonstrated the reality of that risk. In order to allow the internal gas market to function even in the face of a shortage of supply, it is necessary to provide for solidarity and coordination in the response to supply crises, both concerning preventive action and the reaction to concrete disruptions of supply."*

The proposed directive on Energy Efficiency

The recent **proposal for a directive on energy efficiency**[91] should also be based on Article 194(2) TFEU.

According to its draft Article 1, the Directive would lay down rules designed to remove barriers in the energy market and overcome market failures that impede efficiency in the supply and use of energy, and provides for the establishment of indicative national energy efficiency targets for 2020. However, when it comes to the implementation of those targets, as well as to the implementation of measures such as the requirement that Member States establish an energy savings obligation system, the proposal refers extensively to the discretion of the Member States.

Conclusion

The given examples of secondary legislation adopted in the relevant field confirm the interpretation of the potential legal bases set out above: EU measures concerning market issues and product standards have tended to be based on internal market competences and the harmonization competence of Article 114 TFEU. EU measures establishing environmental targets and introducing instruments not directly affecting or regulating trade of goods or services have been based on the environmental competence of Article 192(2) TFEU. Apparently, trade in emission allowances was not considered an internal market issue, but the environmental objective prevailed.[92] On the other hand, the chosen legal basis of Article 114 TFEU for sustainability criteria on biofuels under Directive 2009/28/EC confirms the relevance of the internal market in the case of direct impacts on trade in goods.

However, since the introduction of the new energy competence, this one has been used, both for market as for security supply objectives, thus confirming that this is now the appropriate basis and applies as *lex specialis*.

The given examples of secondary legislation adopted in the relevant field show that measures concerning market issues and product standards tend to be based on the harmonization competence while measures establishing environmental targets and introducing instruments not directly affecting or regulating trade of goods or services have been based on the environmental competence.

[91] European Commission, *Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC*, COM/2011/0370 final, Brussels, 22.6.2011.

[92] Similarly, the rules in the Renewable Energy Directive on statistical transfer have not been considered internal market issues, and the 2008 Commission proposal for this Directive, which featured tradable green certificates was neither supposed to be based on market competences: for discussion, see A Johnston *et al.* 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' [2008] EELRev 126.

However, they also confirm that nowadays, the energy competence in article 194 TFEU should be used as *lex specialis*.

3 Single or multiple legal basis

3.1 Use of dual legal bases

The European Court of Justice decided that "by way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases"[93]. The recourse to a dual legal basis is not only voluntary but necessary when the given conditions are fulfilled.[94] However, the use of a dual legal basis is not appropriate when the procedures laid down for each legal basis are incompatible with each other.[95]

The use of dual or multiple legal bases in practice shows that the situation of measures simultaneously pursuing several objectives which are inseparably linked is not rare. The most relevant example is the current Directive 2009/28/EC on the promotion of the use of energy from renewable sources, which is based on Article 175(1) EC (now Article 192(1) TFEU), and Article 95 EC (now Article 114(1) TFEU) in relation to Articles 17, 18 and 19 of this Directive. In the latter case, the dual objectives of environmental protection and the internal market have been inseparably linked and the legislative procedures were compatible with each other. Further, the Directives on internal energy market liberalization are based on the multiple legal bases of Article 47(2) EC (now Article 53(1) TFEU), 55 EC (now Article 62 TFEU) and 95 EC (Article 114 TFEU). Due to the wide-ranging effects of these liberalization measures, the choice of multiple legal bases appears justified.

[93] ECJ Opinion 2/00, referring to Case C-300/89 *Commission v Council* [1991] ECR I-287, paras 13, 17 and to Case C-42/97, *Parliament* v *Council* [1999] ECR I-869, para 38); see also Case C-94/03, *Commission v Council* [2006] ECR I-1, para 36, and Case C-178/03 *Commission v Parliament* [2006] ECR I-107, para 43.

[94] Cases: C-94/03, *Commission v Council* [2006] ECR I-1, para 36, C-178/03 *Commission v Parliament* [2006] ECR I-107, para 43.

[95] Case C-210/03, *Swedish Match v Secretary of State for Health* [2004] ECR I-11893, para 44.

4 Legislative Procedures

The provisions of the TFEU on legislative procedures are relevant to any kind of measure, since every legal act has to be adopted following certain procedural requirements which can have significant effect on the success of any legal proposal and the length of procedures until its adoption.

Article 294 TFEU defines the ordinary legislative procedure, which will be relevant for an adoption of any kind of measure based on Article 114(1), 192(1) and 194(2) TFEU.

Article 294 TFEU provides:

"1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.

4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:

(a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;

(b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;

(c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

    In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11."

In the first reading procedure, the European Parliament adopts its position by a majority of the votes cast (Article 231 TFEU), while the Council acts by the majority of its component members (Article 238(1) TFEU). Although a veto power is available to the European Parliament at this stage, it has been used only sparingly.[96] If, in the process of the adoption of any kind on measure, the Council intends to adopt a measure amending the proposal of the Commission, it may be dependent on the enhanced role of the Parliament. This is the case, because Article 194 TFEU (read in conjunction with Article 293(1) TFEU) requires unanimity in the Council if it seeks to amend a Commission proposal, while only a qualified majority is necessary where the Council accepts amendments from the European Parliament.[97]

[96] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 129.

[97] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 129.

In addition to the procedural requirements set out above, any kind of measure under Articles 192(1) and 194(2) TFEU can be adopted only after consultation of the Economic and Social Committee and the Committee of the Regions. In the case of an adoption based on Article 114(1) TFEU, only the Economic and Social Committee must be consulted.

In general, the Commission has considerable power within the ordinary legislative procedure. The Commission can withdraw a proposed measure before it is adopted and submit a modified version; this enables it to shape the legislative process, ensuring that no measure fundamentally conflicting with its opinion will be adopted.[98]

In contrast, the special legislative procedure (as mentioned in certain provisions of the TFEU) means that, according to Article 289(2) TFEU, a regulation, directive or decision can be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.

Article 192(2) sentence 1 TFEU does not provide for the ordinary legislative procedure, but provides for a special one. Pursuant to this, the Council decides by unanimity after having heard the opinions of the European Parliament, the European Economic and Social Committee and the Committee of the Regions. However, Article 192(2) sentence 2 TFEU introduced an alternative legislature procedure. The Council is able to decide by unanimity that the ordinary legislature procedure is to be followed, also after having heard the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Still, no matter which of the procedures is to be followed, this decision-making process 'under the shadow of the veto' in the Council shapes the legislative process by forcing the institutions towards a compromise acceptable to all Member States,[99] in all cases where there is a significant effect on the sovereignty over energy mix and supply of a Member State.

Under Article 194(3) TFEU, measures of a primarily fiscal nature have also to be adopted by unanimous decision in the Council after consulting the European Parliament. This also applies to measures under Articles 113 and 115 TFEU. It has to be noticed that under the taxation competences of Articles 113 and 115 TFEU the Economic and Social Committee has to be consulted additionally.

Under Article 352 TFEU, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it is clarified by Article 352(1) TFEU that the Council shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

From the considerations given above, it can be summarised that measures based on Articles 114(1), 192(1) and/or 194(2) TFEU can be adopted following the ordinary legislative procedure. Measures in the sensitive field of fiscal policies as well as in the field of energy sources and the general structure of energy supply require unanimity in the Council. Finally, the flexible competence of Article 352 TFEU also only can be used with unanimity in the Council.

[98] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 129.

[99] Compare Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, 5th edition, Oxford University Press, Oxford and New York 2011, p. 129.

5 Relevant legal provisions of EU primary legislation that need to be obeyed

Any kind of EU legislative measure would not only need to have a legal basis, but it would also need to fit into the framework of existing EU primary law. Thus, in this section the relevant provisions will be set out (in ascending numerical order as they appear in the Treaty), together with a brief interpretation with a view to their potential impact on EU legislation on support for renewables.

5.1 Article 5(3) TEU - Principle of Subsidiarity

Article 5(3) TEU provides:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."

The competence of the European Union is limited by the principle of subsidiarity, meaning that the Union may only act if the objectives of the proposed action cannot be sufficiently achieved by the Member States and, due to the scale or the effects of the proposed action, can be better achieved by the EU.[100] This principle was first introduced across the Treaties in 1993, as the Member States feared "competence creep", in particular in the context of the application of broad competences such as the one in Article 114 TFEU.

Article 5(3) TEU establishes a threefold test, beginning with the idea that the Union can take action only if the objectives of that action cannot be sufficiently achieved by the Member States.[101] Second, the Union must further be able better to achieve the action than the Member State could, because of the scale or effects of the proposed measure.[102] Finally, the actions of the Union may not go beyond what is necessary to achieve the objectives pursued.[103]

However, Article 5 (3) TEU expressly states that the subsidiarity principle does not apply to areas that fall under the exclusive competence of the Union: thus, subsidiarity will not operate in cases in which the Member States have — in the course of the European integration — transferred all their competence to the Union.

The subsidiarity principle also has an impact on the form of action. In general, the Union acts through directives rather than regulations.[104] This leaves greater scope for discretion to the Member States to implement the measure in a way that suits their potential and circumstances best. It also

[100] Compare: Art. 5 TFEU.

[101] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 94.

[102] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 94.

[103] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 94.

[104] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 95.

fits better into the concept of competition between different legal systems, among which the market actors can freely choose.[105] However, as the degree of constraint does not always correspond to the form of the legislative instrument, compliance with the subsidiarity principle will be determined based on the effects of the legal act.

Still, there have been only some 10 cases in which a measure's compliance with subsidiarity has been challenged in the nearly 20 years since the principle of subsidiarity was first officially introduced. Rather, the European Court of Justice has developed almost a "formula" with the mere repetition of which compliance with the principle of subsidiarity and proportionality can be achieved. The choice whether or not action should be taken by the EU seems to have become a political choice and the principle of subsidiarity accordingly seems to have merely a political nature.[106] Consequently, as long as there are some qualitative and quantitative indicators favouring EU action recited in the legislative act, it appears that — "absent manifest miscalculation or illogicality" — it is almost impossible for the Courts to intervene.[107] In practice, the Commission's Impact Assessments mostly respond to those requirements of presenting some indicators, so that the Court will most probably not intervene.[108]

With the entry into force of the Lisbon Treaty, national parliaments have an increased and formalized role in securing compliance with the principle of subsidiarity.[109] National parliaments will get the legislative proposals and can express their concerns with regard to compliance with the principle of subsidiarity within 8 weeks in the form of a reasoned statement.[110] The European Institutions are obliged to take account of the reasoned opinion; moreover, the draft must be reviewed when the reasoned opinions represent at least one third of all the votes allocated to the national Parliaments, in accordance with the second subparagraph of paragraph 1 of the relevant Protocol.[111] In the case of mandatory review, the European Institution from which the draft legislative act originates may decide (and if so must justify why it intends) to maintain, to amend or to withdraw the proposal.[112] As set out in Article 7(3)(b) of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, under certain conditions the Council and or the European Parliament can block the draft legislative act. While it was not clear whether this power to comment would now be used more frequently by the national parliaments, the system seems to work, and the national parliaments do express their concerns, in particular when it comes to more (politically) sensitive areas.[113] Also, Member States may bring an infringement procedure alleging a breach of the principle of subsidiarity before the Court of Justice in accordance with the rules laid down in

[105] See, e.g., Case C-212/97 *Centros* (1999) I-2835, para 27.

[106] Former President of the Court, Gil Carlos Rodriguez Iglesias in this sense "came clean" in his Article 'The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication' 15 European Business Law Journal 1115 (2004), 1117; also discussed in: S. Weatherill, 'The limits of legislative harmonization ten years after Tobacco Advertising', 12 German Law Journal 03 (2011), p. 827-864, p. 847.

[107] S. Weatherill, 'The limits of legislative harmonization ten years after Tobacco Advertising", 12 German Law Journal 03 (2011), p. 827-864, p. 847.

[108] Impact Assessment Guidelines, SEC(2009)92, at. 5.1.

[109] P. Kiiver, 'The early warning system for the principle of subsidiarity: the national parliament as a conseil d'etat for Europe' (2011) 36 European Law Review 98. See also critical: S. Weatherill, 'The limits of legislative harmonization ten years after Tobacco Advertising', 12 German Law Journal 03 (2011), p. 827-864, p. 852.

[110] Generally, thereafter if one third of the national parliaments join the reasoned statement, then the question of subsidiarity has to be re-examined. This examination will be handed over to the EU legislators with the proposal and they will take it into consideration in their vote. See Protocol No. 2, Article 7.

[111] Article 7(1),(2) of the Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality30.10.2010, Official Journal of the European Union C 83/207 f.; Koen Lenaerts and Piet van Nuffel, Robert Bray (eds), *Constitutional Law of the European Union,* second edition, 2005, Sweet & Maxwell Limited, London, p. 108.

[112] Koen Lenaerts and Piet van Nuffel, Robert Bray (eds), *Constitutional Law of the European Union*, second edition, 2005, Sweet & Maxwell Limited, London, p. 108.

[113] For example, the draft market abuse Directive, as it would introduce an EU wide criminal sanctions system, faced opposition, e.g. by the Germans: http://www.juramagazin.de/-1-Satz-1-GO-wurde-das-Fr%C3%BChwarndokument-als-Vorlage-51833-an-den-Europaausschuss-%C3%BCberwiesen.

Article 263 of the Treaty on the Functioning of the European Union (Article 8(1) of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality).

It can be concluded from experience with existing secondary legislation that compliance with the principle of subsidiarity particularly depends on the level of ambition of the EU measure, which needs to be sufficiently high to justify both the EU action and the restriction of the scope of discretion left to the Member States. Respect for subsidiarity is also clearly crucially dependent upon the roles played by national governments in the Council and now, after the Treaty of Lisbon, the contribution made by national parliaments to the scrutiny and analysis of EU legislative proposals.

Specifically with regard to the EU targets of a 20% minimum share of renewable energy sources in final energy consumption by 2020, the level of ambition of the EU measures has been considered sufficiently high, also allowing EU regulation in other fields such as administrative procedures, planning, construction and information and training.[114] In this respect, the European Commission stated in its proposal for the Directive 2009/28/EC: *'[an EU] approach to promoting renewables by these means is proportionate, because the level of ambition of the target requires coordinated action which addresses the sectors where most progress can be made.'*[115]

In addition to EU targets in the field of environment and energy, other aspects such as investor uncertainty have been considered in defining the necessary level of ambition.[116]

Further, in the context of the Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading, compliance with the principle of subsidiarity has been assessed and confirmed in relation to the real economic benefit achievable with an EU-wide approach.[117]

The principle of subsidiarity requires that the Union takes action only if the objectives of that action cannot be sufficiently achieved by the Member States, if the EU is able to better achieve the action than the Member State and if the Union's action does not go beyond what is necessary to achieve the objectives pursued (i.e. is proportionate). In practice, the level of ambition of a measure, as well as the scope of discretion left to the Member States constitute important factors. By means of special procedural rights in the legislative process and before the Court, national parliaments have a recently increased role in securing compliance with the principle of subsidiarity.

5.2 Article 5 (4) TEU Principle of Proportionality

Article 5 (4) TEU provides:

"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

The Treaty on the European Union states in its Article 5 (4) that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". The legal act

[114] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources*, COM(2008) 19 final, Brussels, 23.1.2008, p. 9.

[115] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources*, COM(2008) 19 final, Brussels, 23.1.2008, p. 9.

[116] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources*, COM(2008) 19 final, Brussels, 23.1.2008, p. 9.

[117] European Commission, *Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, COM/2001/0581 final, p. 17.

must be "appropriate" meaning capable of attaining the intended objective, and "indispensable".[118] A measure is suitable when there is a clear link established between the measure and the objective.[119] Indispensability is present where the measure cannot be replaced by an alternative form of action which would be equally effective with regard to the intended aim and less restrictive to another aim or interest protected by Union law.[120] Further, a third criterion — that the measure must be proportionate to the aim — is applied by the ECJ.

The principle of proportionality as a general principle of Union law becomes relevant within several legal aspects of EU primary law, such as, for example: fundamental rights, freedoms of movement in the internal market, State aid or principles of environmental law. Thus, in the course of assessing compliance with the principle of proportionality, all effects of the measure and almost all aspects of legal compatibility come together, joining into an overall proportionality assessment.

In practice, the European Commission has stated that, when it comes to legislation in the field of energy, the problems existing in the sector are threatening the EU as a whole, thus pressing towards action to be taken at the EU level.[121] From the European Commission's assessment in the context of the promotion of renewable energy, it can be concluded (that the Commission, at least, considers) that even detailed EU measures can be justified by those problems.

In order to maintain sufficient flexibility for the Member States, the instrument of a directive is chosen by the European Commission in most cases. Again, taking the example of the current Directive 2009/28/EC, the measure as a whole is considered as an appropriate means because the objectives have been defined, but implementation and the choice of means for renewable energy promotion have been left to the Member States.[122]

Similarly, within the Directive on greenhouse gas emission allowance trading, the establishment of a common framework was deemed necessary to eliminate barriers within the internal market, subject, however, to the condition that only those elements necessary for the proper functioning of the instrument should be regulated at EU level and that as far as possible decisions on implementation are left to the Member States.[123] Experience with the application of the EU's emissions trading system, however, has laid to increased harmonization (in both breadth and depth) of a number of the criteria to be applied.

The principle of proportionality requires that the legal act is capable of attaining the intended objective, but may not be replaceable by an alternative form of action which would be equally effective with regard to the intended aim but less restrictive to another aim or interest protected by Union law. Finally, the level of constraint must be proportionate to the objective intended or the result achieved.

[118] Koen Lenaerts and Piet van Nuffel, Robert Bray (ed), *Constitutional Law of the European Union*, second edition, 2005, Sweet & Maxwell Limited, London, p. 111.

[119] Compare J Vans/Vedder H, *European Environmental Law*, 3rd edtition, Europa Law Publishing, Groningen 2008, p. 252.

[120] Compare Case 240/83 *ADBHU* [1985] ECR I-3303, para 13; Koen Lenaerts and Piet van Nuffel, Robert Bray (ed), *Constitutional Law of the European Union*, second edition, 2005, Sweet & Maxwell Limited, London, p. 111. Such interests include fundamental rights and freedoms, as now acknowledged with legal force by the EU's Charter of Fundamental Rights (itself greatly inspired by the European Convention on the Protection of Human Rights and Fundamental Freedoms).

[121] European Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM(2008) 19 final, Brussels, 23.1.2008, p. 10.

[122] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources*, COM(2008) 19 final, Brussels, 23.1.2008, p. 10.

[123] European Commission, *Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, COM/2001/0581 final, p. 17.

5.3 Article 7 TFEU – Consistency between the Union's Policies and Activities

According to Article 7 TFEU, the Union shall ensure the consistency of its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. The Union is bound by its law and policies to that extent that it shall pursue its objectives in the most consistent way possible.[124] The compatibility of EU measures with EU law also comes into play, as the European Court of Justice can review the legality of legislative acts of the Council and the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers (Article 263 TFEU).

In conclusion, any kind of measure must be consistent with EU primary and secondary law and EU policies.

5.4 Article 11 TFEU – Integration of Environmental Protection

Article 11 TFEU requires that environmental protection must be integrated into the definition and implementation of EU policies and activities. Further, not only under Article 11 TFEU but also in the light of the wording in Article 3 TFEU,[125] the Union must follow the principle of sustainability, which requires the integration of economic, social and environmental considerations.[126] Thus, any kind of measure must respond to environmental aspects as well as to meeting essential human needs, to economic growth and to perceived needs such as socially- and culturally-determined patterns of energy use.[127]

Environmental protection must be integrated as a basic principle into the definition and design of any kind of measure. Additionally and as a part of environmental protection, the principle of sustainability must be incorporated.

5.5 Article 12 TFEU – Consumer Protection

Pursuant to Article 12 TFEU, consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities. Consumer protection particularly implies protecting the health, safety and economic interests of the consumer (Article 169(1) TFEU). Consumer interests might be affected under any kind of measure relating to electricity prices, consumption choices, transparency of pricing and guarantees of origin. Basically, consumers are affected as soon as any kind of measure includes charges imposed on the consumer.

In this context, the legal requirements established by the Directive 2009/28/EC[128] should be upheld and further developed, depending on the scope of action and implementation distributed between

[124] Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, para 41.

[125] " … It shall work for the sustainable development of Europe based on balanced 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 promote scientific and technological advance."

[126] World Commission of Environment and Development (WCED), *Our Common Future, Chapter 2: Towards Sustainable Development, From A/42/427. Our Common Future: Report of the World Commission on Environment and Development,* http://www.un-documents.net/ocf-02.htm#IV (retrieved on 19 December 2011).

[127] Katelijn Van Hende, Internal and External Policy and Legal Challenges in the EU in Achieving a Sustainable, Competitive and Secure Internal Energy Market and the Integration of Electricity from Renewable Energy Sources into the Energy system, *Nordic Environmental Law Journal* 2011 (2), p. 53, 64; Referencing to World Commission of Environment and Development (WCED), *Our Common Future, Chapter 2: Towards Sustainable Development, From A/42/427. Our Common Future: Report of the World Commission on Environment and Development,* http://www.un-documents.net/ocf-02.htm#IV (retrieved on 19 December 2011).

[128] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, Official Journal L 140 , 05/06/2009 P. 0016 – 0062.

the Union and Member States under any kind of measure. In this respect in particular, the following existing provisions of the Directive 2009/28/EC are worth mentioning and reflect the consumer protection aspects which Article 12 TFEU requires to be taken into account:

"Article 14 (1):

Member States shall ensure that information on support measures is made available to all relevant actors, such as consumers, builders, installers, architects, and suppliers of heating, cooling and electricity equipment and systems and of vehicles compatible with the use of energy from renewable sources.

Article 15 (12):

Where energy suppliers market energy from renewable sources to consumers with a reference to environmental or other benefits of energy from renewable sources, Member States may require those energy suppliers to make available, in summary form, information on the amount or share of energy from renewable sources that comes from installations or increased capacity that became operational after 25 June 2009."

Consumer protection constitutes a further requirement to be considered when any kind of measure is being designed.

5.6 Article 18 TFEU - Principle of Non-Discrimination

Under Article 18 TFEU, any discrimination on grounds of nationality shall be prohibited within the scope of application of the Treaties, and without prejudice to any special provisions contained therein. The general principle of equality precludes comparable situations from being treated differently unless the difference in treatment is objectively justified. However, the principle of non-discrimination confers protection only upon Union citizens, not to third country nationals.[129]

For cases concerning consumers and undertakings, the non-discrimination approach can be found and has been implemented to a large extent in the provisions on the freedom of movement in the internal market (see chapter 5.7, below). However, it may be that a separate consideration is required, depending on the concrete measures to be adopted.

The principle of non-discrimination under Article 18 TFEU means that any discrimination against Union citizens on grounds of nationality is prohibited, unless it is objectively justified. It can also be found developed more fully in the freedoms of movement in the internal market.

5.7 Article 28ff. TFEU - Freedoms of movement in the internal market

The Union obligation to ensure consistency between its policies and activities and to take all of its objectives into account necessarily includes the freedoms of movement in the internal market, as set out in Articles 28ff, so that the Union itself is bound by those rules, particularly in the course of the adoption of secondary law of the Union.[130] Thus, the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Union institutions.[131]

[129] A Epiney, in: Calliess C/Ruffert M (eds), *EUV AEUV*, 4th edition, 2011, C.H. Beck, Article 18 AEUV, para 45.

[130] Compare joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* (C-154/04) [2005] ECR I-06451, para 47.

[131] Compare Case C-51/93 *Meyhui* [1994] ECR I-3879, para 11; Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, para 37, Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para 27.

However, the Union institutions have wide discretion as to the adoption and design of harmonization measures which aim at the functioning of the market.[132] With regard to judicial review, the legality of a measure can only be challenged if the measure is "manifestly inappropriate", having regard to the objective which the competent institution is seeking to pursue, particularly in an area which entails political, economic and social choices on its part, and in which the EU institutions are called upon to undertake complex assessments.[133] On the other hand, the European Court of Justice has ruled that 'while the procedure provided for in Articles 92 [*now Article 114 TFEU*)] and 93 [*now Article 108 TFEU*] leaves wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that the procedure must never produce a result which is contrary to the specific provisions of the Treaty' and thereby clarified the outer limits of discretion.[134]

The European Court of Justice ruled in *Iannelli & Volpi SpA* that obstacles covered by State aid law do not fall under the prohibition of obstacles established by the free movement of goods, persons, services and capital.[135] In other — notably more recent — cases, however, the European Court of Justice did not hesitate to review the national measures in the light of both State aid law and the freedoms of the market.[136] From the different rulings it follows that measures with a severable discriminating element can fall under both sets of provisions.[137] Thus, it has to be ensured that any kind of measure must not be contrary to the specific provisions of the Treaty, in particular either the freedoms of movement under internal market law or State aid law.[138] The provisions constitute limitations upon the discretion of the EU institutions when legislating. Therefore, it is crucial to evaluate all aspects of a measure under both State aid and free movement law in a consistent manner.[139]

The EU institutions have wide discretion as to the adoption and design of harmonization measures. However, they are obliged to ensure that any kind of measure must not be contrary to the specific provisions of the Treaty, in particular neither the free movement rules nor State aid law.[140]

5.8 Articles 34 and 35 TFEU[141]

Article 34 provides:

"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

[132] Case C-51/93 *Meyhui* [1994] ECR I-3879, para 13-21; Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para 37; Case 37/83 *Rewe-Zentrale/Landwirtschaftkammer Rheinland* [1984] ECR 1229, para 20

[133] Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* (C-154/04) and *The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* (C-155/04) [2005] ECR I-6451, para 52.

[134] Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, para 41.

[135] Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* [1977] ECR 557, paras 11, 12.

[136] Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità sanitaria locale Nº 2 di Carrara* [1990] ECR I-889, para 20; Case C-263/85 *Commission v Italy* [1991] ECR I-2457, par. 2..

[137] R-E Himmer, *Energiezertifikate in den Mitgliedstaaten der Europäischen Union, Eine rechtsvergleichende und europarechtliche Analyse quotengestützter Zertifikatshandelssysteme zur Förderung erneuerbarer Energien*, Nomos, Baden-Baden 2005, p. 388; A Schwab, in: F Montag/ F J Säcker, *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht), Band 3 Beihilfen- und Vergaberecht*, C. H. Beck, München 2011, Article 107 AEUV, para 45.

[138] Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, para 41.

[139] Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, para 41.

[140] Case C-225/91 *Matra SA v Commission* [1993] ECR I-3203, para 41.

[141] For detailed analysis of these provisions, and possible exceptions and derogations, see P Oliver (gen ed), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing, Oxford, 2010).

Article 35 provides:

"Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."

Articles 34 and 35 TFEU concern quantitative restrictions on imports and exports, and all measures having equivalent effect to such restrictions, which have as their specific object or effect the restriction of patterns of imports or exports and thereby the establishment of a difference in treatment between the domestic trade within a Member State and its import or export trade, in such a way as to provide a special advantage for national production or for the domestic market of the Member State in question.[142]

Measures having equivalent effect are defined as measures "which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[143]. As clarified in the *Dassonville* judgment, distinctly and indistinctly applicable measure fall under Article 34 TFEU.

In that respect, electricity is a good in the sense of Article 34 TFEU.[144] Legislation requiring electricity supply undertakings to purchase electricity at fixed prices produced from renewable energy sources within the scope of that statute and within the respective supply area of each undertaking concerned was considered by the ECJ to be capable of hindering intra-community (now intra-Union) trade.[145]

A negative effect on intra-Community trade is difficult to prove when a non-discriminatory EU measure harmonises the market conditions seeking to enable intra-Community trade.[146] While a negative effect from a differential treatment of trade within a Member State, on the one hand, and trade between Member States, on the other, is clearly subject to the prohibition in Articles 34-35 TFEU, a negative effect merely caused by modified market conditions for competitors without specific implications for trade between Member States does not fall under the prohibition.[147] The definition of the necessary effect on intra-Union trade is relevant, because it delineates the restrictions on EU competences and because the ECJ differentiates between the principles of free movement of goods and freedom of competition, and the fundamental right of freedom of trade.[148]

According to the *Keck and Mithouard* judgment, "the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".[149] Rules concerning "selling arrangements" are those that impose an equal burden on all undertakings seeking to sell goods in a particular territory, that do not impose extra costs on the importer, whose purpose is not to regulate trade and who do not prevent access to the market.[150]

[142] See, for export-related measures: Case C-47/90 *Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA* [1992] ECR I-3669, para 12.

[143] Case 8/74 *Dassonville* [1974] ECR 837 para 5.

[144] Case 393/92 *Almelo* [1994] ECR I-1477, para 28; Case C-397/98 *PreussenElektra* [2001] ECR I-2099, para 68 ff.

[145] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para 71.

[146] Scheffer, Urban, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers*, Peter Lang GmbH Europäischer Verlag der Wissenschaften, Frankfurt am Main, 1996, pp. 144-147.

[147] R-O Schwemer, *Die Bindung des Gemeinschaftsgesetzgebers an die Grundfreiheiten*, Peter Lang GmbH Europäischer Verlag der Wissenschaften, Frankfurt am Main, 1995, p. 97; Scheffer, Urban, *Die Marktfreiheiten des EG-Vertrages als Ermessensgrenze des Gemeinschaftsgesetzgebers*, Peter Lang GmbH Europäischer Verlag der Wissenschaften, Frankfurt am Main, 1996, pp. 144-147 with further references.

[148] Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531, para 9.

[149] Joined Cases C-267/91 and C-268/91 *Keck Mithouard* [1993] ECR I-6097, para 16.

[150] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 655.

Regarding the latter requirement the European Court of Justice also found an infringement of Article 34 TFEU when there was an impediment of access to the market rather than prevention.[151] Accordingly, it can be stated that Article 34 TFEU covers and prohibits those national measures that discriminate, those that impose product requirements and those that hinder or inhibit market access to a sufficiently significant extent.[152]

According to the Treaty and the case law, there are in general three ways in which restrictions in conflict with Articles 34 and 35 TFEU may be justified.

First, and based on the Treaty, by means of Article 36 TFEU, measures contrary to Article 34 TFEU can be justified under certain conditions.

Article 36 provides:

"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Article 36 TFEU derogations have to be interpreted narrowly, as a derogation from a fundamental Treaty freedom.[153]

Environmental protection is not expressly mentioned in the exhaustive list of Article 36 TFEU, so that it cannot be deemed as justifiable ground under the latter Article.[154] Further, only measures directly aiming at the protection of health and life of humans, animals or plants may justify a prohibition or restriction.[155] Restrictions based on the aim to ensure a minimum supply of energy at all times are also regarded as not merely economic considerations but as being capable of constituting an objective covered by the reason of public security under Article 36 TFEU.[156] Once the objective of public security is included, the fact that the measure also seeks to achieve other objectives does not exclude the application of Article 36 TFEU.[157]

Pursuant to Article 36 TFEU, prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Furthermore, the prohibiting or restricting measures may be justified on the basis of Article 36, but those measures must also be proportionate to the aim pursued and not attainable by measures less restrictive of intra-EU trade.[158]

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[151] Case C-189/95 *Criminal Proceedings against Franzen* [1997] ECR I-5909, para 71-73; Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK Heimdienst Sass GmbH*, 2000 ECR I-151, para 29.

[152] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 662.

[153] A Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts*, Nomos, Baden-Baden 2011, pp. 314 f.

[154] Although see the rather vague reasoning of the ECJ in Case C-379/98 *PreussenElektra v Schleswag* [2001] ECR I-2099, which on one reading might be taken to have squeezed environmental protection into Article 36 TFEU. For discussion, see A Johnston *et al*, 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' [2008] EELRev 126, esp. 131ff.

[155] Case C-169/89 *Criminal proceedings against Gourmetterie Van den Burg* [1990] ECR I-2143, para 3 ff.

[156] Case C-72/83 *Campus Oil Ltd v Minister of Industry and Energy* [1984] ECR 2727, para 35; although note that the circumstances will need to be exceptional: see the Opinion of Advocate General Cosmas in Cases C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, C-158/94 *Commission v. Italy* [1997] ECR I-5789, C-159/94 *Commission v. France* [1997] ECR I-5815, and C-160/94 *Commission v. Spain* [1997] ECR I-5851: at 5740-5748, esp 5746ff..

[157] Case C-72/83 *Campus Oil Ltd v Minister of Industry and Energy* [1984] ECR 2727, para 36.

[158] Case C-189/95 *Criminal Proceedings against Franzen* [1997] ECR I 5909, para 75, with further references to *Cassis de Dijon*, cited above; Case C-470/93 *Verein gegen Unwesen in Handel und Gewebe Köln v Mars* [1995] ECR 1-1923, paragraph 15; Case C-368/95 *Familiapress* [1997] ECR 1-3689, para 19; and Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR 1-3843, para 45.

However, there are other options to justify measures restricting the free movement of goods.

First, measures can be justified pursuant to Article 106(2) TFEU.

Article 106 (2) TFEU provides:

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

While this provision expressly refers to the rules on competition, in the case law of the ECJ it has been applied to free movement law as well.[159] However, when applied, as a derogation from fundamental Treaty provisions, Article 106(2) TFEU has to be applied restrictively.[160]

As a central requirement, the obligations imposed on the undertaking to be regarded as falling within the particular tasks entrusted to it, must be linked to the subject-matter of the service of general economic interest in question and have to make a direct contribution to satisfying the general economic interest.[161] According to the ECJ, this is not the case with obligations concerning the environment and regional policy imposed on undertakings entrusted with supplying the country with electricity and gas, unless such obligations are specific to those undertakings and to their business.[162]

Since this requirement is not fulfilled by any kind of measure which would by definition not apply to one specific undertaking, Article 106(2) cannot be used, so any further discussion of Article 106(2) TFEU goes beyond the scope of this inventory.

Second, and more importantly, the prohibitions contained in Articles 34 and 35 TFEU, do not preclude — in the absence of harmonization — obstacles to free movement within the EU resulting from disparities between the national laws relating to the market, which must be accepted insofar as such rules, equally applicable to domestic and imported products, may be recognized as being necessary in order to satisfy mandatory requirements recognized by EU law (*Cassis de Dijon principle*).[163] Structurally, since grounds of justification are part of Article 34 TFEU, so that even if a *prima facie* trade restriction is found as a result of a Member State measure, if it can be justified by a mandatory requirement, then it will, in the final analysis, not amount to a breach of Article 34. Traditionally, such mandatory requirements have been available only to justify indirectly or non-discriminatory national measures.[164] Examples of such mandatory requirements accepted by the ECJ include: the effectiveness of fiscal supervision, the protection of health, the fairness of commercial transactions and the defence of the consumer.[165] The ECJ has already held in an established body of case law that the protection of the environment is indeed such a mandatory requirement, which may as such justify certain limitations of the principle of the free movement of goods.[166]

[159] Case C-159/94 *Commission v French Republic* [1997] ECR I-05815, paras 46 ff.; Case C-158/94 *Commission v Italian Republic* [1997] ECR I-05789, paras 41 ff.

[160] Case C-340/99 *TNT Traco SpA v Poste Italiane SpA and Others* [2001] ECR I-4109, para 56.

[161] Case C-159/94 *Commission v French Republic* [1997] ECR I-5815, para 68.

[162] Case C-159/94 *Commission v French Republic* [1997] ECR I-5815, para 69.

[163] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fuer Branntwein* [1979] ECR 649, para 14.

[164] Case 302/86 *Commission v Denmark (Danish Bottles)* [2988] ECR 4607, para 9, although see cases like Case C-379/98 *PreussenElektra v Schleswag* [2001] ECR I-2099, which have muddied the waters somewhat.

[165] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fuer Branntwein* [1979] ECR 649, para 8.

[166] Case 302/86 *Commission v Kingdom of Denmark* [1988] ECR 4607, para 8; Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531, para 13; Case C-2/90 *Commission v Kingdom of Belgium* [1992] ECR I-4431 para 29-31; Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, para 64; Case C-524/07 *Commission v Austria* [2008] ECR I-187*, para 57.

However, the distortive effects of such rules must be proportionate to the aim pursued. In its famous *PreussenElektra* judgment, the Court of Justice ruled that the necessity and proportionality of the German Feed-In support scheme were to be assessed in the light of progress achieved with respect to the opening of electricity markets and to the harmonization of support schemes.[167] The ruling implies that the necessity and proportionality of any kind of measure is to be assessed in the light of the actual status of the opening of the renewable energy market and the competitiveness of renewable energy. However, as already mentioned, by virtue of the wide discretion conferred on the Union legislator in case of harmonization measures, this question of the necessity and proportionality of the restrictions on the free movement of goods will be subject to only limited review by the Court of Justice. The ECJ has also stated that, where the evaluation of a complex economic situation is involved, the Union institutions enjoy a wide measure of discretion.[168] Reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it is not vitiated by a manifest error or misuse of power, or whether the institution in question has not manifestly exceeded the limits of its discretion.[169]

As a second general requirement, the justifiable prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[170]

That being respected, any kind of measure otherwise *prima facie* contrary to the freedom of goods might be justified by the objective of environmental protection, although subject to the slightly vague position concerning whether this mandatory requirement is available to only indirectly and non-discriminatory trade restrictions, or to address discriminatory rules as well.

Measures imposing quantitative import and export restrictions, or which are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade, are prohibited by Articles 34 and 35 TFEU. As far as the measure establishes selling arrangements and does not directly concern the product itself, it does not fall under the prohibition in first place. Exemptions exist for undertakings entrusted with the operation of services of general economic interest. A measure pursuing mandatory requirements such as environmental protection might also be justified, provided that it is equally applicable to domestic and imported products, necessary and proportionate.

5.9 Article 63 TFEU

Article 63 TFEU prohibits all restrictions on the movement of capital between Member States and between Member States and third countries, as well as all restrictions on payments between Member States, and between Member States and third countries. The Treaty does not define the movement of capital. However, the ECJ has suggested that the differentiation between the freedom of goods and the free movement of capital and payments follows the presence of an equivalence of the subject at issue to currency.[171] Further reference can be made to the non-exhaustive indicative list in Directive 88/361.[172] This list includes: transactions in securities and other instruments on the money market, credits related to commercial transactions and other guarantees. Article 63 TFEU

[167] Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

[168] Case C-354/95 *The Queen v Minister for Agriculture, Fisheries and Food,* ex parte *National Farmers' Union and Others*, [1997] ECR I-4559, para 50.

[169] Case C-354/95 *The Queen v Minister for Agriculture, Fisheries and Food,* ex parte *National Farmers' Union and Others*, [1997] ECR I-4559, para 50; Joined Cases C-296/93 and C-307/93 *France and Ireland v Commission* [1996] ECR I-795, para 31.

[170] Case 152/78, *Commission v French Republic* [1980] ECR 02299, para 17.

[171] Case 7/78, *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss* [1978] ECR 2247, paras 27, 28.

[172] Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661, para 12; Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753, paras 178-179.

covers not only discriminatory measures, but also other measures impeding the free movement of capital.[173]

As one of the main exceptions, the taxation provisions of the Member States do not fall under Article 63 TFEU (Article 65(1)(a) TFEU). Pursuant to Article 65(1)(b) TFEU, measures relating to the effective administration and enforcement of the tax system and the effective supervision thereof constitute the other main exception. Also, certain restrictions can be justified on the basis of reasons of public policy and public security: under this exception, which is to be interpreted narrowly and for which the Member States have the burden of proof, restrictions can be justified in terms of national public interest of a kind referred to in Article 65(1) TFEU or by reasons of overriding public interest.[174]

5.10 Article 107 TFEU – Prohibition of State aids

Article 107 TFEU provides

"1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

[173] Case C-367/98 *Commission v Portuguese Republic*, 2002 ECR I-04731, para 45-46; Case C-174/04 *Commission v Italian Republic* [2005] ECR I-4933, para 12.

[174] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text: Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 697. Case C-326/07 *Commission v Italian Republic* [2009] ECR I-2291, para …; Case C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius*, [2009] ECR I-9021, para 25.

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

A measure falling under the definition of Article 107(1) TFEU is unlawful unless it falls under an exemption and/or has been notified to the Commission. The Commission will assess whether notified aid is compatible with the common market and may then clear the measure.

To come within the ambit of Article 107 TFEU, the measure at issue must concern an aid granted by a Member State or through State resources. The wording of the Article 107 TFEU clearly indicates that EU aids are not directly subject to the provision.[175] Regarding the differentiation between a Member State and an EU aid, the unilateral and autonomous intervention by the State constitutes the decisive criterion. To the extent that the relevant Union legislation imposes a clear and precise obligation on the Member States to set up a system to be implemented in the same way by each of the Member States, the measure is considered an EU measure or EU aid, is not deemed imputable to the Member State and thus does not fall within the ambit of Article 107 TFEU.[176] Conversely, the aid cannot be deemed imputable to the EU insofar as the EU confers discretion upon the Member States concerning the calculation and distribution of the aids.[177]

5.10.1 State aid

Article 107(1) TFEU does not provide a clear definition of **State aid**. Rather, it sets out four criteria for when aid is incompatible with the market and Article 108 TFEU gives exclusive competence to the Commission to determine whether a measure falls within or outside the scope of the prohibition on such aid. Those four criteria are: first, that there is "aid"; second, that it is "granted by a Member State or through State resources"; third, it "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods"; and, fourth, that it "affects trade between Member States".

Concerning the first criterion — the "**aid**" — the rationale of the aid and its form (whether as direct subsidy, tax exemption, preferential interest rates, and exemptions from charges or dividend guarantees) are not relevant.[178] The decisive factor is whether an advantage is transferred to the recipient which it would not have obtained under normal market conditions.[179] In examining this, there is a need to determine what level would count as normal remuneration. The ECJ has ruled in *Italian Republic v Commission* that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid.[180] Based on this, the so called **'private-investor test'** presupposes an economic analysis, taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the product provided.[181] In that context, the prospects of profitability in the longer term can be considered.[182] Furthermore, if

[175] W Cremer, in: Calliess/Ruffert (ed.), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 107, para 80; U Ehricke, in: U Immenga/E-J Mestmäcker, *Wettbewerbsrecht, Band 1/Teil 1 EG, Kommentar zum Europäischen Kartellrecht*, C.H. Beck, München, 4. Auflage 2007, p. 84/ para 32.

[176] Case C-460/07 *Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz* [2009] ECR I-3251, para 70; Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047, paras 100, 101.

[177] Compare European Commission, Decision of 28 January 2009 on aid implemented by Luxembourg in the form of the creation of a compensation fund for the organisation of the electricity market (C 43/02 (ex NN 75/01)) (notified under document number C(2009) 230), (2009/476/EC), OJ 20.06.2009, L 159/11, para 57.

[178] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 1088. The rationale becomes relevant at a later stage, when determining whether an admitted State aid is justifiable under EU law.

[179] Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases and Materials*, fifth edition, Oxford University Press, Oxford and New York 2011, p. 1088.

[180] Case C-303/88, *Italian Republic v Commission*, 1991 ECR I-01433, para 20.

[181] Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, para 60ff.

[182] Joined Cases C-329/93, C-62/95 and C-63/95 *Federal Republic of Germany, Hanseatische Industrie-Beteiligungen GmbH and Bremer Vulkan Verbund AG v Commission* [1996] ECR I-5151, para 36.

the State's conduct cannot be compared with the conduct of a private undertaking other criteria of comparison have to be determined.[183] Since the private-investor-test involves a complex economic appraisal, review by the courts is confined to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.[184]

Furthermore, a measure is not considered State aid when the support is granted in order to offset public service obligations under the conditions set up in the *AltmarkTrans* judgment[185]. The latter specifies, in paragraphs 89 to 93:

> "The undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations and
>
> where the undertaking which is to discharge the public service obligations, in a specific case, is not chosen pursuant to public procurement procedure which would allow for the selection of the tenderer capable of providing those services at least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking well run and adequately provided with the necessary means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations."

Article 3(2) of Directive 2003/54/EC allowed Member States to impose on undertakings operating in the electricity sector public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection." This position continues under Article 3(2) of Directive 2009/72/EC. For example, a security of supply obligation has been considered as a public service obligation in practice,[186] but cases relating to promotion schemes for the production of renewable energy do not exist, yet.

Second the application of Article 107(1) TFEU requires the grant of the aid by a **'Member State or through State resources'**. As the provision covers advantages granted by the State as well as granted by public or private bodies designated or established by the State, the guiding principle is that the State actually exercises control over the undertaking and is involved in the adoption of the measure.[187]

Third, Article 107(1) TFEU requires that the aid measure **distorts or threatens to distort competition by favouring certain undertakings or certain goods**. Under this requirement, the position of the relevant undertaking prior to the receipt of the aid must be considered, in order to assess

[183] Commission Decision 2002/64/EC *Reebok*, on alleged State aid for the American group Reebok in connection with its establishment in Rotterdam, the Netherlands, para 29 ff.

[184] Joined Cases C-328/99 and C-399/*00 Italian Republic and SIM 2 Multimedia SpA v Commission*, 2003 ECR I-04035, para 39; referencing Case C-56/93 *Belgium v Commission* [1996] ECR 1-723, paragraph 11.

[185] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

[186] Compare Commission Decision of 24 April 2007 on the State aid scheme implemented by Slovenia in the framework of its legislation on qualified energy producers — Case No C 7/2005 (notified under document number C(2007) 1181), (2007/580/EC), paras 101-104.

[187] Case C-482/99 *French Republic v Commission* [2002] ECR I-04397, para 35-43 ; Case 290/83, *Commission v French Republic*, [1985] ECR 439, para 14.

whether this position has been improved.[188] It also includes a requirement that the measure involves a certain specificity or selectivity, i.e. that the aid favours certain undertakings or the production of certain goods and/or services.[189]

Finally, under State aid law it must be analyzed whether the scheme **affects trade between Member States**. Here, it will be relevant if the aid strengthens the financial position of the undertaking as compared to others within the EU.[190] It is sufficient for the application of Article 107(1) TFEU that such trade might be affected: proof of an effect is not necessary and the relatively small amount of a given aid does not exclude the possibility of an effect on trade.[191] Also, aid may be of such a kind as to affect trade between Member States and distort competition even if the recipient undertaking does not itself participate in cross-border activities.[192]

All measures falling under Article 107(1) TFEU are *prima facie* unlawful and need to be notified to the Commission.

However, a first and general exemption from the notification obligation is provided in Article 107(2) in the case of social aid, aid to make good damage from environmental disaster and some aid in the context of the German reunification.

A second general exemption from that obligation is provided by the above-discussed Article 106(2) TFEU.

A third exemption can be found under the **General Block Exemption Regulation (GBR)**.[193] Where the GBR applies, this would mean that the measure need not be notified to the Commission. In particular, it provides an exemption under Article 23 for environmental investment aid for the promotion of energy from renewable energy sources.

If none of these three exemptions is available, the measure has to be notified and the Commission will examine on a case-by-case basis whether the aid is nonetheless compatible with the common market. In this respect, Article 107(3)(c) TFEU declares that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, is deemed compatible. Based on this, **the Community Guidelines on State aid for environmental protection**[194] (hereinafter referred to as the "Environmental Aid Guidelines") lay down the criteria for the Commission's assessment under Article 107(3)(c) TFEU of State aid in the field of environment.

The rules applicable to operating aid for the production of power from renewable sources are contained in paragraphs 48-50 and 101-111 of the Environmental Aid Guidelines. Under these rules, operating aid for the production of renewable energy will usually be compatible with EU law. The Commission takes the view that such aid qualifies for special treatment because of the difficulties these sources of energy have sometimes encountered in competing effectively with conventional sources. It must also be borne in mind that it is EU policy to encourage the development of these sources of energy, notably on environmental grounds. Aid may be necessary in particular where the technical processes available do not allow energy to be produced at unit costs comparable to those of conventional sources. Operating aid may be justified in order to cover the difference between

[188] Case 173/73 *Italy v Commission* [1974] ECR 709, paras 14ff.

[189] Favourable treatment granted to a given sector within the scope of general taxation will normally be regarded as an aid (Case 70/72 *Commission v Germany* [1973] ECR 813) but may also be sometimes objectively justified as a response to market forces (Case 67/85 *Van der Kooy* [1988] ECR 219, although that justification was not established in the case itself).

[190] Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, para 11; Joined cases T-81/07, T-82/07 and T-83/07 *Jan Rudolf Maas and Others v Commission* [2009] ECR II-2411, para 76.

[191] Case C-310/99 *Italian Republic v Commission* [2002] ECR I-2289, paras 84-86.

[192] Case T-55/99 *CETM v Commission* [2000] ECR II-3207, para 86.

[193] Commission Regulation 800/2008/EC of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty.

[194] European Commission, *Community guidelines on state aid for environmental protection*, (2008/C 82/01), OJ C 82, 1.4.2008, p.1.

the cost of producing energy from renewable energy sources and the market price of that energy. Thereby, the Commission takes account of the competitive position of each form of energy involved. Pursuant to paragraph 107 of the Environmental Aid Guidelines, Member States may grant operating aid to compensate for the difference between the production cost of renewable energy and the market price of the form of power concerned.

Paragraph 109(a) of the Environmental Aid Guidelines provides that Member States may grant operating aid to compensate for the difference between the cost of producing energy from renewable sources, including depreciation of extra investments for environmental protection, and the market price of the form of energy concerned. Operating aid may then be granted until the plant has been fully depreciated according to normal accounting rules. Any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital. Thus, the compensation must be limited to covering the difference between the production cost of the RES-E from the respective technology and the market price of electricity, and it must be limited to covering plant depreciation.[195]

According to paragraph 110 of the Environmental Aid Guidelines, support for renewable energy sources may be also granted by using market mechanisms, such as green certificates or tenders if it can be shown that support: is essential to ensure the viability of the renewable energy sources concerned, does not in the aggregate result in overcompensation and does not dissuade renewable energy producers from becoming more competitive.

Regarding any instrument under any kind of measure, it must be remembered that Article 108(3) TFEU requires the Member States to notify any plans to grant or alter an aid, when the national measure falls within the ambit of Article 107(1) TFEU. The notification obligation, however, only applies to cases of State aid according to that provision and imputable to the Member States.

Some examples may give an overview over how the State aid rules are applied to support schemes for renewable energy.

First and quite famously, the German Feed-In law (Stromeinspeisungsgesetz, StREG) was held not to be State aid and thus neither subject to the notification requirement nor needing any justification.[196] The Court found that no aid was granted "by the State or through State resources", as the money was collected and distributed by market players in the market.

However, not all Feed-In Tariffs automatically escape the prohibition on State aid.[197] Rather, it turns on the questions: where does the funding come from, and how is it managed? In this way, the Feed-In Tariff scheme in Austria, where — unlike the German system — the purchase prices are managed by the government-controlled Green Electricity Settlement Centre. It sets the price, collects it from traders and passes it on to the producers. In addition, a levy is collected from all consumers. Ultimately, those two last aspects, namely the levy and the management of the fund by the publicly controlled body, led the Commission to conclude that the system constituted State aid.[198] However, the aid could be justified in line with the Environmental Aid Guidelines when it came to the production of renewable energy. In the latest Commission Decision, however, the exemption from sharing in the costs for the support for renewables for the energy-intensive industry was rejected, as it could not be justified.[199]

[195] Compare European Commission, State aid N 571/2006 – Ireland. RES-E support programme, Brussels 25.9.2007, C(2007)4317 final, para 42ff.; State aid N 478/07 – The Netherlands, "Stimulating renewable energy, modification and prolongation of the MEP (N 707/02) and MEP stimulating CHP (N 543/05)", Brussels 21.12.2007, C(2007) 6875, para 33f.

[196] Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

[197] Compare for example: Commission Decision of October 18th, 2011, State Aid AA.31861 (2011/N) –Ireland; also: Commission Decision of March 3rd 2011, State Aid SA.31107 2011/N - Finland.

[198] Commission Decision (2006) State Aid NN 162/B/2003 and State Aid N 317/B/2006.

[199] Commission Decision of March 8th, State Aid N 446/08 - Austria, para 130.

For quota obligations and tradable green certificates, on the other hand, the European Commission's Decision concerning the UK scheme is most prominent. In the UK, what triggered the finding of State aid was the penalty payment (the so-called "buy-out") that was imposed on electricity suppliers who did not meet their renewable energy obligation. This payment was again made into a fund, then distributed among renewable energy producers. As the fund was, again, publicly managed, the criterion of a transfer of resources controlled by the State was considered met.[200] Nonetheless, in this case the aid was also held compatible and in line with the Environmental Aid Guidelines.

Tendering, as in the Netherlands, is a more straightforward case, where the transfer or funds was easily established. Here again, the aid was also found to be compatible.[201]

At present, the application of the State aid rules to renewables support is a much-discussed topic. Not only is the Commission revising the Environmental Aid Guidelines as well as the Block Exemption, but there is at least one new complaint in the field of Feed-In Tariffs,[202] and there are two references for a preliminary ruling pending before the ECJ.[203]

What can be concluded on support schemes for renewables in general, is that most of them constitute *prima facie* aid, as most involve a publicly-controlled fund somewhere in their respective systems. Still, to this day, most renewable energy support systems have been found compatible with the EU law on State aid and the internal market, being justified by their environmental protection objectives.

Any kind of measure adopted may not constitute a prohibited State aid. The prohibition of State aid under Article 107(1) TFEU applies to Member State implementation measures following any kind of measure which leaves the establishment and design of support schemes to the discretion of the Member States. Unless the transfer of capital corresponds to normal market conditions, or unless it is granted in order to offset public service obligations, the prohibition under Article 107 TFEU applies. The prohibition covers any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and which affects trade between Member States. However, a measure found to be State aid might still be deemed compatible with the internal market if the aid does not adversely affect trading conditions to an extent contrary to the common interest. Pursuant to the EU's Guidelines on State aid for environmental protection and the criteria established therein, operating aid for the production of renewable energy is in principle compatible with EU law.

5.10.2 EU aid

When an aid is being granted from European Union resources and implemented at EU level, the Union must follow its own objectives and principles,[204] which include the rules of a competitive market.[205] The main objective for the European Union is the obligation to establish the internal market and to "work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social

[200] Commission Decision (2005) State Aid N 362/2004.

[201] Commission Decision N 265/2005.

[202] A German Energy Consumer association (Bund der Energieverbraucher; BdEV) submitted a complaint alleging that the exemption for the energy-intensive industry from the so-called "EEG-Umlage" (the costs for the renewable energy support being passed on to the consumers) is in fact State aid, and thus, as never notified, illegal (SA.22995 2011/CP).

[203] One of them from France, where the pre-existing Feed-In system is being challenged, and one from Belgium, which mainly concerns questions about Guarantees of Origin and a potential obligation to open up (quota) support schemes (Related Cases C-204 to C-208/12 *Essent Belgium*).

[204] See Article 7(1) TFEU and Article 3(3) TEU.

[205] U Ehricke, in: U Immenga/E-J Mestmäcker, *Wettbewerbsrecht, Band 1/Teil 1 EG, Kommentar zum Europäischen Kartellrecht*, C.H. Beck, München, 4. Auflage 2007, p. 84/ para 32; W Cremer, *Forschungssubventionen im Lichte des EGV, Zugleich ein Beitrag zu den gemeinschaftsrechtlichen Rechtsschutzmöglichkeiten gegenüber Subventionen*, Nomos, Baden-Baden, p. 190.

progress, and a high level of protection and improvement of the quality of the environment" (Article 3(3) TEU).

In search of the concrete legal conditions for EU aids, an analogue application of the Member States' obligations under State aid law is not possible.[206] Despite the need to ensure consistency of the Union's policies and activities (Article 7 TFEU), the principles and objectives of the Treaties, and the fundamental freedoms as well as basic competition law principles, the clear wording of Article 107(1) TFEU and the objective to prevent discrimination between undertakings in the internal market do not allow for application of those provision to EU aids.[207]

Instead, the objective of a competitive market[208] and the freedoms of the market will function as the legal framework for an EU aid under any kind of measure.[209] As far as a restriction on intra-Union trade is not proven under the freedoms of the market, the European Court of Justice analyses any potential restrictive effect on the freedom of trade and of competition.[210] The European Court of Justice has held that a possible restriction of the freedom of trade and of competition "must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest".[211] Further, EU aid will be also held incompatible with the objective of the common market and the principle of proportionality when it can be established that the recipient would have also undertaken the same investment without the aid or that other undertakings of the sector or region could have pursued the followed Union objective without the financial aid.[212]

Under the required proportionality test, it will be necessary to consider the decisions and economic appraisals made in the Guidelines on Environmental Aid, as set out above. Regarding the necessary appraisal of complex economic facts, the EU institutions have to exercise considerable discretion, and as a result are subject only to limited review by the European courts.[213]

Furthermore, EU aids must be compatible with the fundamental rights.[214]

Further, certain principles can be retrieved from EU guidelines for the grant of EU financial aid, such as the Regulation 67/2010/EC laying down general rules for the granting of EU financial aid in the field of trans-European networks.[215] Elements of the guiding principles therein are:

- the grant of the financial aid on multiannual basis to prevent uncertainties;[216]

[206] P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen Gemeinschaftsrechts*, Nomos, Baden-Baden 2002, p. 157; similarily W Cremer, *Forschungssubventionen im Lichte des EGV, Zugleich ein Beitrag zu den gemeinschaftsrechtlichen Rechtsschutzmöglichkeiten gegenüber Subventionen*, Nomos, Baden-Baden, p. 190.

[207] P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen Gemeinschaftsrechts*, Nomos, Baden-Baden 2002, pp. 155ff (with further references).

[208] Joined Cases 41 to 44-70 *NV International Fruit Company and others v Commission* [1971] ECR 411, paras 68, 69.

[209] M Rodi, *Die Subventionsrechtsordnung*, J.C.B. Mohr (Paul Siebeck), Tübingen 2000, p. 283; P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen Gemeinschaftsrechts*, Nomos, Baden-Baden 2002, pp. 158ff

[210] Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531, para 15.

[211] Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* (ADBHU) [1985] ECR 531, para 15; compare also Case 139/79, *Maizena GmbH v Council of the European Communities* [1980] ECR 3393, para 22.

[212] W Cremer, *Forschungssubventionen im Lichte des EGV, Zugleich ein Beitrag zu den gemeinschaftsrechtlichen Rechtsschutzmöglichkeiten gegenüber Subventionen*, Nomos, Baden-Baden, p. 191.

[213] W Cremer, *Forschungssubventionen im Lichte des EGV, Zugleich ein Beitrag zu den gemeinschaftsrechtlichen Rechtsschutzmöglichkeiten gegenüber Subventionen*, Nomos, Baden-Baden, p. 191.

[214] P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen Gemeinschaftsrechts*, Nomos, Baden-Baden 2002, pp. 175 ff.

[215] Regulation 67/2010/EC of the European Parliament and of the Council of 30 November 2009, laying down general rules for the granting of Community financial aid in the field of trans-European networks.

[216] Regulation 67/2010/EC, Recitals 9. 12

- cost/benefit analysis; grant of the financial aid in relation to the contribution to the objectives of the aid, taking also into account other aspects such as effects on public and private finance or direct and indirect socio-economic effects;[217]
- compatibility with Union policies;[218] and
- determination of powers and responsibilities with regard to financial control.[219]

Financial support granted directly or indirectly by the EU has to comply with the rules of a competitive market and the fundamental freedoms of the internal market, yet not by application of Article 107(1) TFEU. Instead, an EU aid under any kind of measure will be assessed in the light of those free movement provisions and of fundamental rights. In particular, the EU aid might be deemed incompatible with the freedom of trade and competition if it is discriminatory or if it goes beyond the inevitable restrictions which are justified by the pursuit of the general interest objective of environmental protection.

5.11 Article 191(2)(1) TFEU – Principles of Environmental Law

Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent[220] (**precautionary principle**). By definition, in a situation of scientific uncertainty when the precautionary principle is applied, a risk assessment cannot be required to provide the Union institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality.[221] Conversely, a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.[222] Hence, a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure is adopted.[223] According to the European Commission, the judgement on the acceptable level of risk for society is subject to political responsibility.[224] Judicial review of such a decision is limited and does not imply that the Union judicature can substitute its assessment for complex assessments of a scientific and technical nature by the Union institutions.[225]

Article 191(2) TFEU lays down that the **principle that environmental damage should as a matter of priority be remedied at source**.[226] Accordingly, intervention shall take place as early as possible within the causal chain leading to environmental damage.[227]

Under the **"polluter-pays-principle"** (Article 191(2)(1) TFEU), natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures that are

[217] Regulation 67/2010/EC, Recital 10, 13.

[218] Regulation 67/2010, Recital 14.

[219] Regulation 67/2010, Recital 15.

[220] Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise,* ex parte *National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd* [1998] ECR I-2211, para 63.

[221] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305, para 142.

[222] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305, para 143.

[223] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305, para 144.

[224] European Commission, *Communication on the Precautionary Principle*, Brussels, 2.2.2000, COM(2000) 1 final, p.3.

[225] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305, para 323.

[226] Case C-2/90 *Commission v Kingdom of Belgium* [1992] ECR I-04431, para 34.

[227] Javier de Cendra Larragán, *Research project Emissions Trading and Equal competition, EU greenhouse gas emission trading and legal principles*, Research Institute METRO, Maastricht University, 5 April 2005, p. 14.

necessary to eliminate that pollution or to reduce it, so as to comply with the standards or equivalent measures which enable quality objectives to be met or, where there are no such objectives, so as to comply with the standards or equivalent measures laid down by public authorities.[228] Consequently, environmental protection should not in principle depend on policies which rely on grants of aid and place the burden of combating pollution on the Union.[229] A polluter has been defined as someone who directly or indirectly damages the environment or who creates conditions leading to such damage.[230] In order for the necessary causal link to be established between the environmental damage and the polluter, the competent authority must have plausible evidence capable of justifying its presumption.[231]

The basic principles of environmental law provide rules on the design of measures for environmental protection. The polluter-pays-principle is of particular importance to any kind of measure as it requires that the burden of costs for pollution elimination is borne by the polluter.

5.12 Article 310 TFEU- EU budget implementation

Article 310 TFEU provides:

"1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget.

The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314.

The revenue and expenditure shown in the budget shall be in balance.

2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 322.

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.

4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.

5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.

6. The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union."

The adoption of all EU measures with budget implications basically requires that the EU institutions must ensure that the revenues and expenditures are included in the annual budget and the multiannual financial framework.

[228] 75/436/Euratom, ECSC, EEC: *Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters*, Official Journal L 194 , 25/07/1975 P. 0001 – 0004, para 2.

[229] 75/436/Euratom, ECSC, EEC: *Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters*, Official Journal L 194 , 25/07/1975 P. 0001 – 0004, para 2.

[230] 75/436/Euratom, ECSC, EEC: *Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters*, Official Journal L 194 , 25/07/1975 P. 0001 – 0004, para 3.

[231] Case C-378/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others* [2010] ECR I-1919, para 56.

According to Article 310 TFEU, all revenues and expenditures have to be comprised in the budget, which has to be established annually following a special legislative procedure envisaged in Article 314 TFEU. Within this procedure, the European Parliament has the last say on the budget and can adopt it without the Council, or reject it despite the Council's positive vote in last reading. Further, pursuant to Article 312 TFEU the annual budget has to comply with the multiannual financial framework. Article 310(4) TFEU then sets the outer limit for EU expenditures: the Union cannot spend more than what it has available and in the budget from its own resources.

Based on those provisions, expenditures and revenues stemming from any kind of measure must be annually envisaged by the budget. Only measures without budgetary implications do not trigger Article 310. Further provisions applicable to the general budget are established in the financial Regulation pursuant to Article 322(1)(a) TFEU. They contain rules on the authorisation of the expenditure for the annual budget (Article 310(2) TFEU), the principles and the rules on establishment, structure, implementation, control and auditing of the accounts.[232]

A central function of the budget is the control of policy-making by the European Parliament and the provision of necessary financial information to ensure economically sound political discussion and decision-making.[233] Further, Article 310 TFEU primarily aims to ensure that the EU budget remains in balance and therefore establishes a procedural framework.[234] Thus, subsidiary EU budgets separate from the overall budget are not in principle compatible with the Article 310 TFEU ff..[235] However, separate funds such as the European Development Fund exist and demonstrate the general possibility of exceptions if justified by legitimate objectives.[236]

Thus, whether a separate fund fed by certain financial means belongs to the EU budget depends on the effects on possible control mechanisms and the risk of imbalances in the EU budget. And if such a fund is created by any kind of measure, then it would need to comply with the budgetary rules of the Treaty.

Pursuant to Article 310 TFEU, all revenues and expenditures stemming from an EU measure must be annually envisaged in the budget which has to be approved by the European Parliament. The establishment of the budget follows a special procedure with a great involvement by the European Parliament.

5.13 Article 311 TFEU – The Union's own resources

Article 311 TFEU provides:

"The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

[232] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, p. 127.

[233] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article 310 TFEU, paras 9,10, 21.

[234] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article 310 TFEU, paras 9,10.

[235] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article 310 TFEU, paras 21.

[236] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4th edition, 2011, C.H. Beck Article 310 TFEU, paras 21.

The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament."

The EU public finances architecture is based on a system of own resources with a multiannual financial framework and an annual budgetary procedure, independent from the Member States, which retain their financial sovereignty. As stated in Article 311 TFEU, the EU provides itself with the means necessary to attain its objectives and policies. As defined further on in Article 311 TFEU, the "means" for the budget shall be obtained from own resources.[237]

The characteristic nature of the own resources system can be best understood when compared with the former system based on contributions from the Member States. In the Commission's words, "*the EU's own resources may be defined in this connection as revenue allocated irrevocably to the Union to finance its budget and accruing to it automatically without the need for any subsequent decision by the national authorities*".[238] While the decision on the own resources system still depends on the Member States, the quantitative allocation of means and the calculation of the payments by the Member States follow automatically from the yearly budget established by the Parliament and the Council pursuant to Articles 310 and 314 TFEU.[239] Thus, after the adoption of the decision on the own resources system, the level of resources of the European Union is guaranteed in principle and is independent from national approval procedures.

The own resources system is to be established by a decision of the Council (Article 311(3) TFEU). In view of the specific procedure for adoption, the decision on the EU's own resources is in fact equivalent to primary legislation.[240] By means of unanimous decision-making, the Member States exercise absolute control in this field, while the European Parliament is merely consulted. Further, the decision must be ratified by the national parliaments in accordance with their respective constitutional requirements. Although supported by the duty of co-operation and loyalty (Article 4(3) TEU), this requirement of ratification still constitutes a crucial criterion in view of political and procedural feasibility.[241]

The decision on own resources, currently Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources,[242] sets the overall ceiling for own resources and imposes a limit on any increases in expenditure. The current own resources system is composed of:

- traditional own resources, which result directly from the existence of a unified customs area and are not attributable to the Member States for legal (and practical) reasons (meaning sugar levies, and agricultural and customs duties);
- VAT-based own resources, derived from application of a call rate to a VAT base determined uniformly for the Member States;

[237] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, p. 131.

[238] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, p. 135.

[239] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, pp. 140 f.

[240] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, p. 125; Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 311 TFEU, para 5.

[241] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 311 TFEU, para 5.

[242] OJ L 163 of 23.6.2007.

- GNI-based own resources, resulting from application of a set call rate to total EU GNI; and
- correction mechanisms granting particular Member States a reduction of their contribution to the EU budget.[243]

Other revenue sources include taxes paid by officials, fines imposed on firms by the EU and interest on late payments.[244]

The means of own resources do not have to constitute "own" resources in the strict sense, meaning resources from EU revenue.[245] This becomes apparent with regard to the current categories mentioned above: while agricultural and customs duties constitute traditional own resources, VAT-based resources are revenues of the Member States transferred to the EU.[246]

However, based on the financial sovereignty of the Member States and the EU's own resources system envisaged in Article 311 TFEU, it is not possible to impose a financial burden on the Member States without their participation and consent. This becomes relevant in particular when a financial burden imposed on a Member State by EU legislative action exceeds the normal administrative costs of the Member States and a direct contribution to the EU budget certainly constitutes an issue.[247]

Still, in theory, new categories of own resources can be established and existing categories can be abolished by the special legislative procedure described above, thus requiring unanimity in the Council and ratification in the Member States' parliaments. Further, the obligation of the EU to provide itself with the means necessary imposes a further limit to the already limited right to establish new categories of own resources: those new categories must be revenues from EU's policies and must not constitute means equivalent to Member States' contributions which primarily serve the financing of the budget.[248] In order to preserve the system of own resources, new categories of means must not replace the existing own resources (Article 311, 2nd sentence TFEU). Due to the Member States' financial sovereignty, this would be the procedure which would have to be followed where any kind of legislative measure would have budgetary implications as discussed above in the context of Article 310 TFEU.

The EU's own resources system under Article 311 TFEU defines the resources available for the EU budget. In order to ensure the Member States' financial sovereignty, changes to this system are conditioned upon special legislative procedures, with unanimous decision-making in the Council and the requirement of ratification in the Member States.

Whether the creation of new financial means substantially constitutes an introduction of a new own resource of the EU budget depends on its effects on the budget and the intention to use it as revenue for expenditures from the EU budget.

5.14 Article 345 TFEU - Member States' systems of property ownership

According to Article 345 TFEU, the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

[243] European Commission, *European Union Public Finance*, 4th edition, Office for Official Publications of the European Communities, Luxembourg: 2008, retrieved 22 December 2011 from: http://ec.europa.eu/budget/library/biblio/publications/public_fin/EU_pub_fin_en.pdf, p. 136.

[244] http://europa.eu/legislation_summaries/budget/l34007_en.htm.

[245] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 311 TFEU, para 7.

[246] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 311 TFEU, para 7.

[247] Compare P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen* Gemeinschaftsrechts, Nomos, Baden-Baden 2002, p. 52.

[248] Waldhoff, C in: Calliess, C/ Ruffert, M (eds), *EUV AEUV*, 4. Auflage 2011, C.H. Beck Article 311 TFEU, para 12; Bieber, R, in von Groeben, H/ Schwarze, J (eds), *EUV/EGV*, Band 4, Artikl-189-314, 6th edition, Nomos, Baden-Baden 2004, Artikel 269, para 36; Magiera, S, in: Grabitz E/Hilf, M, *Das Recht der Europäischen Union*, Band III EUV/EGV, 40. Ergänzungslieferung, C. H. Beck, München 2009, Artikel 269, para 34

Through a restrictive interpretation of this provision, the Union is not deprived from adopting measures determining the social responsibility of ownership and interfering with property rights by regulating access to infrastructures, for instance.[249] Article 345 TFEU limits Union competences only insofar as a Member State's right to determine the system of property ownership in principle may not be affected and they cannot be obliged to change ownership of undertakings from public to private or vice versa.[250]

However, on the other hand, according to the European courts the protection of the Member States' systems of property ownership under Article 345 TFEU shall not have the effect of providing a justified exemption from the fundamental rules of the Treaty and thus cannot restrict the scope of the application of State aid rules under Article 107 TFEU or the scope of application of the fundamental freedoms to Member State measures.[251]

Article 345 TFEU protects the Member States' systems of property ownership so that a Member State's right to determine its system of property ownership in principle may not be affected and in particular that it cannot be obliged to change ownership of undertakings and their property from public to private or vice versa.

5.15 Fundamental rights

According to Article 6 TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007. The Charter of Fundamental Rights of the European Union could be particularly relevant to any kind of measure with regard to the freedom to conduct a business (Article 16), the right to property (Article 17) and equality before the law (Article 20).

In general, restrictions upon the fundamental rights can be justified, *inter alia* based on reasons of environmental protection.[252] For instance, the ECJ has established that the property rights must be viewed in the light of the social function of the property and activities protected thereunder, and thus are always subject to limitations laid down in accordance with the overall objectives pursued by the Union, on conditions that: the interference is not disproportionate and intolerable, and that the substance of these rights is left untouched.[253] It must be examined whether restrictions upon the right correspond to objectives of the EU interest and do not impair the very substance of that right.[254]

Hence, the compatibility of any kind of measure basically depends on the outcome of a balancing exercise of the interests involved and a proportionality assessment.

[249] Opinion of Mr Advocate General Mischo in Case C-363/01 *Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG* [2003] ECR I-11893, para 37.

[250] Calliess, Christian, in: the same (ed.), *EUV AEUV*, 4th edition, 2011, C.H. Beck, Article, 345, para 11.

[251] Joined Cases C-92/92 and C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145, para 23; Joined Cases T-116/01 and T-118/01, *P & O European Ferries (Vizcaya), SA (T-116/01) and Diputación Foral de Vizcaya (T-118/01) v Commission* [2003] ECR II-2957, para 151 ff; referring by analogy to Case 182/83 *Fearon* [1984] ECR 3677, para 7, Case C-302/97 *Konle* [1999] ECR I-3099, para 38, Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, para 44, and Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, para 48.

[252] Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531, para 13.

[253] Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 00491, para 14; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415, para 73.

[254] Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994] ECR I-4973, para 81.

5.16 The principle of legal certainty, the protection of legitimate expectations and the prohibition of retroactivity

The principle of legal certainty is a basic principle of the European Union. Since any kind of measure will significantly change entire national legal regimes for renewable energy and thus will affect individual rights and obligations, the principle of legal certainty constitutes an important concern.

Generally, the principle of legal certainty requires that the law is certain, clear and precise, and its legal implications must be foreseeable. Following from this, the principle of legitimate expectations protects the rights of individuals in this context of changes to legal regimes.[255] They may rely on what they legitimately could foresee, and may thus take their investment decisions accordingly. As the adoption of a new support scheme for renewables is necessarily connected to the abolition of pre-existing national support schemes, the principle of legitimate expectations might become relevant to any kind of measure proposing such a new scheme.

The principle has been recognized by the European courts as a general and superior principle of Union law for the protection of the individual.[256] Pursuant to several judgments of the ECJ in particular in the field of the common agricultural policy, the right to property thus safeguarded within the EU legal order by legal certainty and legitimate expectations does not comprehend the right to dispose, for profit, of an advantage which does not derive from the assets or occupational activity of the person concerned.[257] However, it will be necessary to consider the positions of the entities involved, so that a certain balancing of interests is necessary. As the Court further held, the principle cannot hinder the Union to adjust already existing legislation,[258] but it may become necessary to provide for rules enabling a step-by-step adaptation to a new scheme.[259] In all cases, for the EU law principle to apply, the frustration of expectations must be attributable to the Union.[260]

The principle can be invoked particularly in cases of retroactive or immediate application of laws, but also in other contexts when the Union has created legitimate expectations by the proximate cause of the conduct of the institutions or of previous legislation.[261]

The most important aspect of the principle of legitimate expectations is its interaction with the retroactivity of law. However, a measure with retroactive effect does not frustrate any legitimate expectations if it is reasonably foreseeable that the measure is likely to have retroactive or immediate application.[262] In areas of market regulation where constant adjustments are needed, the foreseeability of measures with retroactive or immediate application is usually given.[263] Binding EU targets, such as the target to reduce greenhouse gas emissions following the EU commitment under

[255] The question concerning the origin of the principle from the fundamental rights or from the principle of legal certainty or the nature of a principle by its own shall not be subject to further consideration at this point. See: W Frenz, 'Grundrechtlicher Vertrauensschutz – nicht nur ein allgemeiner Rechtsgrundsatz', *EuR* 2008, Heft 4, p. 468, 470

[256] Joined Cases C-104/89 and C-37/90 *J. M. Mulder and others and Otto Heinemann v Council and Commission*, 1992 ECR I-3061, para 15.

[257] J Weigt, *Die Förderung der Stromerzeugung aus erneuerbaren Energien in der Europäischen Union, Probleme und Herausforderungen im Spannungsfeld zwischen Binnenmarkt und Umweltschutz*, Peter Lang GmbH, Frankfurt am Main, 2009, p. 147.with references to the cases, e.g. case C-44/89 *Georg von Deetzen v Hauptzollamt Oldenburg* [1991] ECR I-5119, para 27.

[258] Case C-149/96 Portuguese Republic v Council of the European Union, (1999) ECR I-8395, para 75.

[259] J Weigt, *Die Förderung der Stromerzeugung aus erneuerbaren Energien in der Europäischen Union, Probleme und Herausforderungen im Spannungsfeld zwischen Binnenmarkt und Umweltschutz*, Peter Lang GmbH, Frankfurt am Main, 2009, p. 188ff.

[260] Case C-299/94, *Anglo-Irish Beef Processors International and others v Minister for Agriculture, Food and Forestry* [1996] ECR I-01925, para 35.

[261] T Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford University Press, Oxford 2006, pp. 251ff, 266.

[262] Case C-108/81 *G.R. Amylum v Council of the European Communities* [1982] ECR-3107, para 21; Case C-110/97 *Kingdom of the Netherlands v Council of the European Union* [2001] ECR I-8763, para 156.

[263] T Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford University Press, Oxford 2006, p. 266.

the United Nations Framework Convention on Climate Change and the Kyoto-Protocol, may cause foreseeable, and constant, (re-)adjustments.[264]

A measure with retroactive effects is further not prohibited by the principle of legitimate expectations if two strict conditions are fulfilled: (a) the purpose of the measure requires it; and (b) the legitimate expectations of those affected are duly respected.[265] For instance, disturbances in the Union market have been held to provide an overriding objective which such retroactivity might legitimately seek to attain.[266] A retroactive measure must give a statement of reasons on the necessity of retroactivity.[267] A measure with retroactive effects incompatible with EU law will be declared invalid or at least non-binding insofar it has retroactive effect.[268]

Member States are equally bound by the principle of legitimate expectations when they act within the scope of application of Union law.[269]

The principle of legal certainty requires that the law is certain, clear and precise, and that its legal implications must be foreseeable. The rights of individuals regarding the protection of their position under the law are defined by the principles of legitimate expectations. The principle of legitimate expectations can in particular be invoked in cases of the retroactive or immediate application of laws, but also in other contexts when the Union has created legitimate expectations by the proximate cause of conduct of the institutions or of previous legislation. Despite existing legitimate expectations, immediate or retroactive changes in law might be possible if justified by overriding legitimate objectives or if the legitimate expectations of those affected are duly respected.

[264] W Frenz, 'Grundrechtlicher Vertrauensschutz – nicht nur ein allgemeiner Rechtsgrundsatz', *EuR* 2008, Heft 4, pp. 468, 482.

[265] Case C-110/97 *Kingdom of the Netherlands v Council of the European Union*. 2001 ECR I-08763, para 151, with further references.

[266] Case C-110/97 *Kingdom of the Netherlands v Council* [2001] ECR I-8763, para 155.

[267] Case 1/84 R *Ilford SpA v Commission* 1984 ECR 423, para 19.

[268] Compare Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431, para 33.

[269] T Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford University Press, Oxford 2006, p. 286.

6 EU Secondary Legislation and Policies

In addition to the provisions of primary EU law, secondary EU legislation and policy in the respective policy fields of any kind of measure has to be considered. As already elaborated under chapter 5.3, Article 7 TFEU obliges the European Union to ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

6.1 Directives on the internal energy market

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity establishes a comprehensive set of measures to accelerate the process of liberalization and opening of the national energy markets.[270] The measures provided by the Directive range from unbundling of transmission systems and transmission system operators, unbundling of distribution system operators, unbundling and transparency of accounts, the strengthening and Europeanization of energy authorities, to consumer protection rules. As the scope of the Directive covers basic issues of generation and distribution of electricity, thus affecting every energy producer that intends to feed energy into the grid, the provisions are relevant to any kind of measure. In this context, it is particularly important to mention the following provisions.

Article 8 provides for tendering for new capacity:

"1. Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. Those procedures may, however, be launched only where, on the basis of the authorisation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply.

2. Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, of tendering for new capacity on the basis of published criteria. Such tendering may relate to new capacity or to energy efficiency/demand-side management measures. A tendering procedure may, however, be launched only where, on the basis of the authorisation procedure the generating capacity to be built or the measures to be taken, are insufficient to achieve those objectives.

3. Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures shall be published in the Official Journal of the European Union at least six months prior to the closing date for tenders.

The tender specifications shall be made available to any interested undertaking established in the territory of a Member State so that it has sufficient time in which to submit a tender.

With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender. Those specifications may also relate to the fields referred to in Article 7(2).

[270] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93.

4. In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.

5. Member States shall designate an authority or a public or private body independent from electricity generation, transmission, distribution and supply activities, which may be a regulatory authority referred to in Article 35(1), to be responsible for the organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4 of this Article. Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure. That authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders."

Article 15 lays down certain rules on dispatching and balancing:

"1. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the transmission system operator shall, where it has such a function, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which shall be approved by national regulatory authorities where competent and which must be objective, published and applied in a non-discriminatory manner, ensuring the proper functioning of the internal market in electricity. The criteria shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.

3. A Member State shall require system operators to act in accordance with Article 16 of Directive 2009/28/EC when dispatching generating installations using renewable energy sources. They also may require the system operator to give priority when dispatching generating installations producing combined heat and power."

Article 32 addresses the obligation to provide third-party access:

"1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies area approved — are published prior to their entry into force.

2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information."

Article 33 covers the issues of market opening and reciprocity:

"1. Member States shall ensure that the eligible customers comprise:

(a) until 1 July 2004, the eligible customers as specified in Article 19(1) to (3) of Directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of those eligible customers;

(b) from 1 July 2004, all non-household customers;

(c) from 1 July 2007, all customers.

2. To avoid imbalance in the opening of electricity markets:

(a) contracts for the supply of electricity with an eligible customer in the system of another Member State shall not be prohibited if the customer is considered as eligible in both systems involved; and

(b) where transactions as described in point (a) are refused because the customer is eligible in only one of the two systems, the Commission may, taking into account the situation in the market and the common interest, oblige the refusing party to execute the requested supply at the request of the Member State where the eligible customer is located."

Directive 2009/72/EC aims to ensure free and undistorted competition in order to establish and maintain a functioning internal energy market. Since the concept of the internal market in electricity requires fair and non-discriminatory market conditions in principle, the advantageous position of renewable energy producers granted by any kind of measure may be deemed incompatible with those ideas. However, as can be seen from the provisions mentioned above, Directive 2009/72/EC itself allows for special treatment in appropriate situations as envisaged, for instance, in its Articles 8(2) and 15(3). Thus, exceptions based on reasons of environmental protection or secure energy supply are basically accepted as possible by internal energy market legislation. Renewable energy is even explicitly mentioned in Article 15(3). Nevertheless, striving for the integration of renewable energy into the internal energy market, any kind of measure will have to be designed in a way which is as compliant as possible with the general market principles.

Regulation (EC) No 714/2009 aims at setting fair rules on cross-border exchanges in electricity and facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in electricity.[271] This applies to energy transmission in general. For instance, the compensation granted to the transmission system operators for costs incurred as a result of hosting cross-border flows of electricity on their networks does not differentiate by reference to the type of energy source. Due to its general application and effect, however, the compensation mechanism does not establish requirements or obstacles to the design of any kind of measure.

Pursuant to its Article 1, **Directive 2005/89/EC** concerning measures to safeguard security of electricity supply and infrastructure investment aims to ensure the proper functioning of the internal market with an adequate level of generation capacity, an adequate balance between supply and demand and an appropriate level of interconnection between Member States for the development of the internal market.[272] Further, Member States shall take measures to encourage the adoption of real-time demand management technologies, such as advanced metering systems and to encourage energy conservation measures (Article 5(2)(d)(e)). In particular, those latter provisions could merge with or provide a basis for any kind of measure. As the Commission has to ensure coherence in its acts, the provisions of the one have to be properly aligned with the provisions of the other, and vice versa.

[271] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003,
OJ L 211, 14.8.2009, p. 15–35.

[272] Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L 33, 4.2.2006, p. 22–27.

Internal energy market legislation demands fair and non-discriminatory market conditions, in particular regarding: access to the grids and unbundling of transmission systems and transmission system operators, unbundling of distribution system operators, unbundling and transparency of accounts and consumer protection. Further, EU secondary legislation provides rules on cross-border exchanges and security of energy supply and infrastructure investment. While they do not in principle stand in the way of any kind of measure, co-ordination and integration may be required.

6.2 ETS Directive

The EU's greenhouse gas emission trading system has been created as one element of the EU's overarching objective and policy to fight climate change. Originally established by Directive 2003/87/EC,[273] the emissions trading system (EU ETS) has been further developed by Directive 2009/29/EC.[274]

The current EU ETS mainly consists of one overall cap on total greenhouse gas emissions split into national caps by means of a burden-sharing agreement. Through national allocation plans, emission caps are defined for sectors and installations. The EU ETS covers CO2 emissions from installations such as power stations, combustion plants, oil refineries and iron and steel works, as well as factories making cement, glass and other materials, and from 2012 onwards airlines too. By converting the caps into the so-called 'allowances', greenhouse gas emissions permits are issued by the competent authorities in order to authorize companies to emit greenhouse gases from installations. The established trading scheme enables companies that exceed individual emissions targets to buy allowances from those other companies that are able to cut their emissions and willing to sell their spare allowances.

The provisions under the EU ETS are not directly relevant to any kind of measure. However, their interactions have to be carefully considered. First, when defining targets and promotion levels for any kind of measure it should be considered that, according to Article 10(3)(a) and (b) of the Directive 2009/29/EC, revenues from the EU ETS should be used, *inter alia*, for the promotion of renewable energy, and demonstration projects of innovative renewable energy technologies should be preferentially treated when allowances are granted (Article 10a(8)).[275] Second, the use of renewable energies for power generation automatically reduces greenhouse gas emissions when compared to (e.g.) generation from coal, possibly creating windfall profits and a surplus in allowances. For example, the fact that the current price is at about 6,50 EUR for 1 ton of carbon reflects this problem, as well as the Commission's latest proposal to delay the auctioning of new allowances to stabilize the market. Accordingly, the targets for renewables and the caps for the emission trading system should be adjusted in order to keep the carbon price at an appropriate level to incentivize carbon emission reduction.

[273] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.

[274] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 5.6.2009, p. 63–87.

[275] From an opposite perspective, the adoption of any kind of measure may make amendments to the ETS necessary, in particular in the form of tightening the cap. For more on that see: D. Fouquet, J. Nysten "Changing Energy Policy – the proposed Energy Efficiency Directive and its consequences for renewable energy and EU emission trading" European Energy Journal 1, 2012, p. 38ff.

6.3 Directive 2009/28/EC

Directive 2009/28/EC on the promotion of the use of energy from renewable sources[276] determines the current EU legal framework on renewable energy support, by setting binding national targets that each Member State has to achieve by 2020, although the *how* to reach those targets is largely left to the Member States. The Directive only establishes some framework conditions in this regard to facilitate the deployment of renewables and provides for flexibility and co-operation mechanisms. While, in a way, the Directive expires in 2020, when the targets are reached and thus the objective of the legislation is fulfilled, and with the Commission having to report in 2018 on whether and how to proceed thereafter, this does not exclude that the principles of the Directive continue to apply. Thus, exactly those framework conditions created by the Directive 2009/28/EC, in principle applicable without fixed termination date, are relevant in the context of any kind of measure.

Among these framework conditions, the following two provisions are important examples.

First, Article 13 requires the Member States to have administrative procedures in place that do not stand in the way of renewables deployment:

"1. Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products, are proportionate and necessary.

Member States shall, in particular, take the appropriate steps to ensure that:

(a) subject to differences between Member States in their administrative structures and organisation, the respective responsibilities of national, regional and local administrative bodies for authorisation, certification and licensing procedures including spatial planning are clearly coordinated and defined, with transparent timetables for determining planning and building applications;

(b) comprehensive information on the processing of authorisation, certification and licensing applications for renewable energy installations and on available assistance to applicants are made available at the appropriate level;

(c) administrative procedures are streamlined and expedited at the appropriate administrative level;

(d) rules governing authorisation, certification and licensing are objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies;

(e) administrative charges paid by consumers, planners, architects, builders and equipment and system installers and suppliers are transparent and cost-related; and

(f) simplified and less burdensome authorisation procedures, including through simple notification if allowed by the applicable regulatory framework, are established for smaller projects and for decentralised devices for producing energy from renewable sources, where appropriate.

2. Member States shall clearly define any technical specifications which must be met by renewable energy equipment and systems in order to benefit from support schemes. Where European stan-

[276] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.

dards exist, including eco-labels, energy labels and other technical reference systems established by the European standardisation bodies, such technical specifications shall be expressed in terms of those standards. Such technical specifications shall not prescribe where the equipment and systems are to be certified and should not impede the operation of the internal market.

3. Member States shall recommend to all actors, in particular local and regional administrative bodies to ensure equipment and systems are installed for the use of electricity, heating and cooling from renewable energy sources and for district heating and cooling when planning, designing, building and renovating industrial or residential areas. Member States shall, in particular, encourage local and regional administrative bodies to include heating and cooling from renewable energy sources in the planning of city infrastructure, where appropriate.

4. Member States shall introduce in their building regulations and codes appropriate measures in order to increase the share of all kinds of energy from renewable sources in the building sector.

   In establishing such measures or in their regional support schemes, Member States may take into account national measures relating to substantial increases in energy efficiency and relating to cogeneration and to passive, low or zero-energy buildings.

   By 31 December 2014, Member States shall, in their building regulations and codes or by other means with equivalent effect, where appropriate, require the use of minimum levels of energy from renewable sources in new buildings and in existing buildings that are subject to major renovation. Member States shall permit those minimum levels to be fulfilled, inter alia, through district heating and cooling produced using a significant proportion of renewable energy sources.

   The requirements of the first subparagraph shall apply to the armed forces, only to the extent that its application does not cause any conflict with the nature and primary aim of the activities of the armed forces and with the exception of material used exclusively for military purposes.

5. Member States shall ensure that new public buildings, and existing public buildings that are subject to major renovation, at national, regional and local level fulfil an exemplary role in the context of this Directive from 1 January 2012 onwards. Member States may, inter alia, allow that obligation to be fulfilled by complying with standards for zero energy housing, or by providing that the roofs of public or mixed private-public buildings are used by third parties for installations that produce energy from renewable sources.6.

   With respect to their building regulations and codes, Member States shall promote the use of renewable energy heating and cooling systems and equipment that achieve a significant reduction of energy consumption. Member States shall use energy or eco-labels or other appropriate certificates or standards developed at national or Community level, where these exist, as the basis for encouraging such systems and equipment.

   In the case of biomass, Member States shall promote conversion technologies that achieve a conversion efficiency of at least 85 % for residential and commercial applications and at least 70 % for industrial applications.

   In the case of heat pumps, Member States shall promote those that fulfil the minimum requirements of eco-labelling established in Commission Decision 2007/742/EC of 9 November 2007 establishing the ecological criteria for the award of the Community eco-label to electrically driven, gas driven or gas absorption heat pumps.

   In the case of solar thermal energy, Member States shall promote certified equipment and systems based on European standards where these exist, including eco-labels, energy labels and other technical reference systems established by the European standardisation bodies.

In assessing the conversion efficiency and input/output ratio of systems and equipment for the purposes of this paragraph, Member States shall use Community or, in their absence, international procedures if such procedures exist."

As becomes apparent from those provisions, in principle, those framework conditions are intended as facilitations for the deployment of renewables. Taking administrative procedures addressed in paragraph 1 as an example, and considering that it can take up to 10 years for a renewables plant to get all the necessary permits and authorizations, it is a quite basic, but important provision. However, due to the fact that reference is made to what the Member States consider "proportionate and necessary", these elements are not implemented to the same extent and definitely not in the same way in all Member States.

As a second example, Article 16 (on access to and operation of the grids) provides:

"1. Member States shall take the appropriate steps to develop transmission and distribution grid infrastructure, intelligent networks, storage facilities and the electricity system, in order to allow the secure operation of the electricity system as it accommodates the further development of electricity production from renewable energy sources, including interconnection between Member States and between Member States and third countries. Member States shall also take appropriate steps to accelerate authorisation procedures for grid infrastructure and to coordinate approval of grid infrastructure with administrative and planning procedures.

2. Subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities:

(a) Member States shall ensure that transmission system operators and distribution system operators in their territory guarantee the transmission and distribution of electricity produced from renewable energy sources;

(b) Member States shall also provide for either priority access or guaranteed access to the grid-system of electricity produced from renewable energy sources;

(c) Member States shall ensure that when dispatching electricity generating installations, transmission system operators shall give priority to generating installations using renewable energy sources in so far as the secure operation of the national electricity system permits and based on transparent and non-discriminatory criteria. Member States shall ensure that appropriate grid and market-related operational measures are taken in order to minimise the curtailment of electricity produced from renewable energy sources. If significant measures are taken to curtail the renewable energy sources in order to guarantee the security of the national electricity system and security of energy supply, Members States shall ensure that the responsible system operators report to the competent regulatory authority on those measures and indicate which corrective measures they intend to take in order to prevent inappropriate curtailments.

3. Member States shall require transmission system operators and distribution system operators to set up and make public their standard rules relating to the bearing and sharing of costs of technical adaptations, such as grid connections and grid reinforcements, improved operation of the grid and rules on the non-discriminatory implementation of the grid codes, which are necessary in order to integrate new producers feeding electricity produced from renewable energy sources into the interconnected grid.

Those rules shall be based on objective, transparent and non-discriminatory criteria taking particular account of all the costs and benefits associated with the connection of those producers to the grid and of the particular circumstances of producers located in peripheral regions and in regions of low population density. Those rules may provide for different types of connection.

4. Where appropriate, Member States may require transmission system operators and distribution system operators to bear, in full or in part, the costs referred to in paragraph 3. Member States shall review and take the necessary measures to improve the frameworks and rules for the bearing and sharing of costs referred to in paragraph 3 by 30 June 2011 and every two years thereafter to ensure the integration of new producers as referred to in that paragraph.

5. Member States shall require transmission system operators and distribution system operators to provide any new producer of energy from renewable sources wishing to be connected to the system with the comprehensive and necessary information required, including:

   (a) a comprehensive and detailed estimate of the costs associated with the connection;

   (b) a reasonable and precise timetable for receiving and processing the request for grid connection;

   (c) a reasonable indicative timetable for any proposed grid connection.

   Member States may allow producers of electricity from renewable energy sources wishing to be connected to the grid to issue a call for tender for the connection work.

6. The sharing of costs referred in paragraph 3 shall be enforced by a mechanism based on objective, transparent and non-discriminatory criteria taking into account the benefits which initially and subsequently connected producers as well as transmission system operators and distribution system operators derive from the connections.

7. Member States shall ensure that the charging of transmission and distribution tariffs does not discriminate against electricity from renewable energy sources, including in particular electricity from renewable energy sources produced in peripheral regions, such as island regions, and in regions of low population density. Member States shall ensure that the charging of transmission and distribution tariffs does not discriminate against gas from renewable energy sources.

8. Member States shall ensure that tariffs charged by transmission system operators and distribution system operators for the transmission and distribution of electricity from plants using renewable energy sources reflect realisable cost benefits resulting from the plant's connection to the network. Such cost benefits could arise from the direct use of the low-voltage grid.

9. Where relevant, Member States shall assess the need to extend existing gas network infrastructure to facilitate the integration of gas from renewable energy sources.

10. Where relevant, Member States shall require transmission system operators and distribution system operators in their territory to publish technical rules in line with Article 6 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning the common rules for the internal market in natural gas."

These rules on access to and operation of the grids constitute a first step towards EU legislation on support to renewables, as grid access is crucial. Also, they demonstrate the reciprocal relationship between the internal energy market rules and the legal regime on the promotion of renewable energy. In particular, priority or guaranteed access (Article 2(b)) and priority under dispatching (Article 2(c)) play a crucial role within this reciprocity relation, which is also subject to consideration under paragraph 6.1. However, not all Member States have implemented this provision thus far.

Provisions on flexibility and co-operation mechanisms are provided for in Articles 6 to 11 of Directive 2009/28/EC. The content and meaning of these provisions, and their potential relevance to any kind of measure, are subject to closer consideration later on in this report.

6.4 Directive 2006/32/EC

The Directive 2006/32/EC on energy end-use efficiency and energy services[277] establishes the legal framework for energy efficiency policy development. In Article 4, the Directive imposes an indicative target according to which each MS should demonstrate 9% improvement by 2016 to be reached by cost-effective, practicable and reasonable measures designed to contribute towards achieving this target. Article 14 of the Directive provides rules on national energy efficiency plans (NEEAP), which are to describe the energy efficiency improvement measures planned to reach the targets set out in Article 4(1) and the measures to comply with the provisions on the exemplary role of the public sector, and provision of information and advice to final customers.

As described in paragraph 5 (below), the European Commission has proposed a new Directive repealing the current Directive 2006/32/EC. As long as the proposed Directive is not adopted in its original or amended form, the current Directive will continue to apply.

With regard to any kind of measure, ensuring the coherence of energy efficiency policy and the promotion of renewable energy will be necessary. While direct interferences are, except from priority access issues under the new proposal,[278] not very likely, the economic coherence of all policies with regard to the effect on renewable energy targets, electricity prices and the emissions trading system is crucial and needs to be considered for a corresponding adaptation of secondary legislation.

However, the current Directive is to be replaced by the new Directive on energy efficiency, as and when the EU legislature is able to agree the text (scheduled for autumn of 2012).

6.5 The proposed Directive on Energy Efficiency

The proposed Directive on Energy Efficiency, which is expected to be adopted by Parliament and Council in autumn 2012, would repeal Directive 2006/32/EC, so the content of the proposal is relevant for any kind of measure in the future.

The Directive would introduce a non-binding overall target for energy efficiency, and it would leave it to the Member States to take the measures necessary to reach that target. In this respect, there has already been criticism that the target is insufficiently ambitious, and would lead only to an increase in EU-wide energy efficiency of about 15-17% by 2020, in contrast with the minimum target of 20%. It would also introduce an energy savings obligation, but allow the Member States flexibility in their implementation when it comes to the concrete design of any such obligation.

Despite this question (which relates more to the level of ambition of any kind of measure), the Directive also provides rules on grid access and dispatch. In this respect, the following rule in Article 12(5) needs to be highlighted:

> "Without prejudice to Article 16(2) of Directive 1009/28/EC and taking into account the provisions of Article 15 of Directive 2009/72/EC and the need to ensure continuity in heat supply, Member States shall ensure that, subject to requirements relating to the maintenance of the reliability and safety of the grid, based on transparent and non-discriminatory criteria defined by the competent national authorities, transmission system operators and distribution system operators when they are in charge of dispatching the generating installations in their territory:
>
> guarantee the transmission and distribution of electricity from high-efficiency cogeneration;
>
> provide priority or guaranteed access to the grid of electricity from high-efficiency cogeneration;

[277] Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJ L 114, 27.4.2006, p. 64–85.

[278] For further information, see chapter 6.7, below.

when dispatching electricity generating installations, provide priority dispatch of electricity from high-efficiency cogeneration in so far as the secure operation of the national electricity system permits.

Member States shall ensure that rules relating to the ranking of the different access and dispatch priorities granted in their electricity systems are clearly explained in detail and published. When providing priority access or dispatch for high efficiency cogeneration, Member States may set rankings as between, and within different types of, renewable energy and high-efficiency cogeneration and shall in any case ensure that priority access or dispatch for energy from variable renewable energy sources is not hampered. (…)"

Thus, the proposed Directive would confirm the priority for renewables and extend it beyond the (temporary) scope of Directive 2009/28/EC, thereby again placing it within the rules for the internal energy market, so that any kind of legislative measure on renewables support would have to respect and build on this provision.

6.6 Directive 2003/96/EC

Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity[279] provides, according to its Article 1, that Member States shall impose taxation on energy products and electricity in accordance with the Directive. The Directive establishes minimum levels of taxation and allows for preferential treatment of renewable energy by means of tax exemptions by the Member States (Recital 25 and Article 15(1)(b)).

EU secondary legislation on emissions trading, the promotion of renewable energy, energy efficiency and taxation on energy products and electricity provides a comprehensive legal framework in the field of energy and environmental protection. The legal framework contains the establishment of targets, such as in the field of greenhouse gas emission reductions and energy savings, and several legal and economic instruments with rather indirect relevance to any kind of measure. However, with all of them, but in particular with the ETS and the Energy Efficiency Directives, one needs properly to assess and take into account the potential interactions. Most importantly, the current Directive 2009/28/EC on the promotion of renewable energy contains basic framework conditions on issues such as dispatching and it establishes a framework on cooperation mechanisms to enhance the convergence of national support schemes.

6.7 EU Policies

Finally, EU policies in the field of environmental and renewable energy policy are relevant to any kind of measures.

As one aspect, EU renewable energy policy is guided by the overall international commitments to combat climate change. The connection of renewable energy policy to climate change efforts is based on the fact that energy related emissions represent almost 80% of the EU's total greenhouse gas emissions.[280]

In this context, as early as March 2007, the European Council approved the target of reducing greenhouse gas emissions by at least 20% by 2020 compared to 1990 levels, and further by 30 % by 2020 compared to 1990 levels, on condition that other developed countries undertook to set

[279] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity , OJ L 283, 31.10.2003, p. 51–70.

[280] EU press office, *Background European Council 4 February 2011, EU Energy Policy*, p. 2, Retrieved from: http://www.european-council.europa.eu/media/171257/ec04.02.2011-factsheet-energy-pol_finaldg.en.pdf.

comparable reduction targets, depending on their respective responsibilities and capacities.[281] At the same time, and in the same context, two other targets were set: to increase the share of renewable energy to at least 20% in 2020 and to make at least a 20% improvement in energy efficiency. Those targets have formed the basis for the wider renewables and energy efficiency legislation adopted in recent years and with their commitment to them, the Member States have laid the foundation for the future energy policy of the EU.

In October 2009, the European Council further confirmed this commitment and added as a long-term objective a decarbonisation path with a target for the EU and other industrialised countries of 80 to 95% cuts in emissions by 2050 compared to 1990 levels.[282]

A second aspect that needs to be considered is the EU's energy policy, in particular the internal energy market policy of the EU. In this regard, the Commission's Communication, *Energy 2020, a strategy for competitive, sustainable and secure energy* of November 2010 is important.[283] In it, the European Commission estimated that the existing strategy is unlikely to achieve all the 2020 targets and is inadequate for meeting the longer-term challenges.[284] The Commission underlined its role in ensuring that support schemes are sustainable, consistent with technological progress and not hindering innovation or competition, and the aim to ensure the required degree of convergence or harmonization between national schemes.[285] At the same time, the European Commission aims to ensure the correct and timely implementation of the existing internal energy market and a forceful competition policy, and it demands the further consolidation of the regulatory framework, including complementary actions such as market coupling, target model development and a framework for traded markets through effective transparency and oversight.[286]

In the context of the objective of the internal energy market, the European Council concluded in February 2011 that the internal market should be completed by 2014 and that renewables should compete with traditional sources.[287] This was confirmed in the latest Commission Communication, *Renewable Energy: A major player in the European energy market*,[288],where it repeated that, while effective and well-targeted support systems may be necessary beyond 2020, fragmentation of the internal market should be avoided as much as possible. This is relevant to any kind of measure, as the Communication's conclusion illustrates the political prioritization of the internal market objective and the need for undistorted competition in the internal energy market, thereby aiming at increased consistency. The same idea is also to be found in the progress report 2011 of the European Commission,[289] wherein, the European Commission calls for greater convergence of national support schemes to facilitate trade and development towards a more '*pan-European approach*' concerning

[281]Presidency Conclusions, Brussels, 8/9 March 2007, 7224/1/07 REV 1, retrieved 16 February 2012 from: http://register.consilium.europa.eu/pdf/en/07/st07/st07224-re01.en07.pdf, para1 30-32.

[282] EU press office, *Background European Council 4 February 2011, EU Energy Policy*, p. 2, Retrieved from: http://www.european-council.europa.eu/media/171257/ec04.02.2011-factsheet-energy-pol_finaldg.en.pdf.

[283] Commission, Communication to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Region, *Energy 2020 A strategy for competitive, sustainable and secure energy*, COM/2010/0639 final.

[284] Commission, Communication to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Region, *Energy 2020 A strategy for competitive, sustainable and secure energy*, COM/2010/0639 final, p.3.

[285] Commission, Communication to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Region, *Energy 2020 A strategy for competitive, sustainable and secure energy*, COM/2010/0639 final, p.9.

[286] Commission, Communication to the European Parliament, the Council. The European Economic and Social Committee and the Committee of the Region, *Energy 2020 A strategy for competitive, sustainable and secure energy*, COM/2010/0639 final, p.11.

[287] European Council, Conclusions of the Meeting 4 February 2011, EUCO 2/1/11, REV 1, Brussels, 8 March 2011, p. 2.

[288] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Renewable Energy: a major player in the European energy market" COM(2012/271 final.

[289] Commission, Communication to the European Council and the European Parliament, *Renewable Energy: Progressing towards the 2020 target*, COM/2011/0031 final.

renewable energy.[290] Also, in the recent *Energy Roadmap 2050* the European Commission stated that "public support schemes in Member States should be clearly targeted, predictable, limited in scope, proportionate and include phase-out provisions."[291]

The aspect of energy efficiency policies should not be underestimated either, and any kind of measure would need to be coordinated, as for example the decreased energy consumption could help the Member States, and thus the EU, to reach their targets on the share of energy from renewable sources as established under Directive 2009/28/EC.[292] Thus, EU legislator will have to shape the legal regimes of energy efficiency and promotion of renewable energy in a consistent manner.

In this regard, the Commission's *Energy Roadmap 2050*[293] will be relevant to any kind of measure. The *Energy Roadmap 2050* explores different scenarios towards decarbonisation of the energy system and gives an indication of the level of effort and change which will be required to achieve the necessary emissions reduction, while maintaining a competitive and secure energy sector. While the document, and in particular the impact assessment and the scenario work therein, have already received a lot of criticism (for example, as there is no combined renewables and high efficiency scenario), it still gives an outlook for the future and the principles and "no regrets" options — decarbonisation, renewables and energy efficiency, flexible infrastructure and security of supply — identified therein should be respected in any kind of measure.

Various EU policies in the field of energy and environmental policy are relevant to any kind of measures. The long-term commitment of the European Council to the decarbonisation path (with a target for the EU and other industrialized countries of 80 to 95% cuts in emissions by 2050 compared to 1990 levels) constitutes the overall policy objective. Further, the long-term consistency with policies in energy efficiency and energy infrastructure, as well as the objective to ensure a secure energy supply within the EU, need to be kept by any kind of measure.

[290] Commission, Communication to the European Council and the European Parliament, Renewable Energy: Progressing towards the 2020 target, COM/2011/0031 final, p. 11.

[291] European Commission, COM(2011) 885/2, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy Roadmap 2050*

{SEC(2011) 1565}, {SEC(2011) 1566}, {SEC(2011) 1569} p. 17.

[292] *Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC*, COM/2011/0370 final, p. 2.

[293] European Commission, *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Energy Roadmap 2050*, COM/2011/0885 final.

7 Flexibility and Cooperation Mechanisms

7.1 Current legal framework for flexibility and cooperation mechanisms

The basic framework of flexibility and cooperation mechanisms is established by Articles 6 to 11 of Directive 2009/28/EC. The mechanisms envisaged therein are statistical transfers, joint projects between Member States as well as between Member States and third countries, and joint support schemes between Member States. Joint projects between Member States and third countries will not be subject to further analysis at this point, as their relevance for any kind of EU legislation on renewables support in the EU is low.

All mechanisms can be voluntarily used by the Member States but require notification to the Commission. The legal framework provided for in Articles 6 to 11 of Directive 2009/28/EC sets out general accounting rules for target compliance, but leaves the detailed design and implementation of the mechanisms to the Member States and the general legal framework.[294]

For statistical transfers between Member States, Article 6 of Directive 2009/28/EC provides:

> "1. Member States may agree on and may make arrangements for the statistical transfer of a specified amount of energy from renewable sources from one Member State to another Member State. The transferred quantity shall be:
>
> (a) deducted from the amount of energy from renewable sources that is taken into account in measuring compliance by the Member State making the transfer with the requirements of Article 3(1) and (2); and
>
> (b) added to the amount of energy from renewable sources that is taken into account in measuring compliance by another Member State accepting the transfer with the requirements of Article 3(1) and (2).
>
> A statistical transfer shall not affect the achievement of the national target of the Member State making the transfer.
>
> 2. The arrangements referred to in paragraph 1 may have a duration of one or more years. They shall be notified to the Commission no later than three months after the end of each year in which they have effect. The information sent to the Commission shall include the quantity and price of the energy involved.
>
> 3. Transfers shall become effective only after all Member States involved in the transfer have notified the transfer to the Commission."

As the achievement of national targets must not be affected by statistical transfer, only the national *surplus* of renewable energy not required for the target achievement of the transferring Member State can be traded to the receiving Member State. The statistical transfer is exercised by subtraction and addition of the amounts from and to the statistical figures that are used for measuring the compliance of the Member States. Statistical transfers do not affect national support schemes and thus require low implementation effort. On the other hand, statistical transfer can only contribute to the support of renewable energy production in cases of a production surplus in

[294] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, 4679 ff.

Member States, and thus can only occur post-production and support, and the mechanism does not provide incentives for private investment in technology development.[295]

For joint projects between Member States, Article 7 of Directive 2009/28/EC provides

"1. Two or more Member States may cooperate on all types of joint projects relating to the production of electricity, heating or cooling from renewable energy sources. That cooperation may involve private operators.

2. Member States shall notify the Commission of the proportion or amount of electricity, heating or cooling from renewable energy sources produced by any joint project in their territory, that became operational after 25 June 2009, or by the increased capacity of an installation that was refurbished after that date, which is to be regarded as counting towards the national overall target of another Member State for the purposes of measuring compliance with the requirements of this Directive.

3. The notification referred to in paragraph 2 shall:

(a) describe the proposed installation or identify the refurbished installation;

(b) specify the proportion or amount of electricity or heating or cooling produced from the installation which is to be regarded as counting towards the national overall target of another Member State;

(c) identify the Member State in whose favour the notification is being made; and

(d) specify the period, in whole calendar years, during which the electricity or heating or cooling produced by the installation from renewable energy sources is to be regarded as counting towards the national overall target of the other Member State.

4. The period specified under paragraph 3(d) shall not extend beyond 2020. The duration of a joint project may extend beyond 2020.

5. A notification made under this Article shall not be varied or withdrawn without the joint agreement of the Member State making the notification and the Member State identified in accordance with paragraph 3(c)."

On the effects of joint projects between Member States, Article 8 provides:

1. Within three months of the end of each year falling within the period specified under Article 7(3)(d), the Member State that made the notification under Article 7 shall issue a letter of notification stating:

(a) the total amount of electricity or heating or cooling produced during the year from renewable energy sources by the installation which was the subject of the notification under Article 7; and

(b) the amount of electricity or heating or cooling produced during the year from renewable energy sources by that installation which is to count towards the national overall target of another Member State in accordance with the terms of the notification.

2. The notifying Member State shall send the letter of notification to the Member State in whose favour the notification was made and to the Commission.

[295] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4682.

3. For the purposes of measuring target compliance with the requirements of this Directive concerning national overall targets, the amount of electricity or heating or cooling from renewable energy sources notified in accordance with paragraph 1(b) shall be:

   (a) deducted from the amount of electricity or heating or cooling from renewable energy sources that is taken into account, in measuring compliance by the Member State issuing the letter of notification under paragraph 1; and

   (b) added to the amount of electricity or heating or cooling from renewable energy sources that is taken into account, in measuring compliance by the Member State receiving the letter of notification in accordance with paragraph 2."

What would qualify as an "eligible joint project" is not defined in detail by these provisions. Rather, the provisions only enable the statistical transfer of renewable energy amounts between host and recipient Member States. The design of the project-specific support scheme can be defined by the Member States involved.[296] By concluding an agreement, the co-operating Member States can provide rules to balance costs and benefits for the host and recipient Member State, such as on cost-reflective splits, fees or premiums on the transfers, compensation by target shares or financial contributions and the like.[297] By addressing private investors in project development for renewable energy production, governments can promote the proactive realization of opportunities in other countries regardless the effectiveness of support schemes of the latter.[298]

A critical issue of joint projects is the compatibility of project-specific support schemes with EU primary law, as private undertakings might be involved and effects on intra-Union trade cannot be ruled out. Further, under the current European and national legal frameworks the interference between domestic support schemes and project-specific support schemes might undermine the effectiveness and efficiency of domestic support schemes.[299]

For joint support schemes, Article 11 of the Directive 2009/28/EC provides:

"1. Without prejudice to the obligations of Member States under Article 3, two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes. In such cases, a certain amount of energy from renewable sources produced in the territory of one participating Member State may count towards the national overall target of another participating Member State if the Member States concerned:

   (a) make a statistical transfer of specified amounts of energy from renewable sources from one Member State to another Member State in accordance with Article 6; or

   (b) set up a distribution rule agreed by participating Member States that allocates amounts of energy from renewable sources between the participating Member States. Such a rule shall be notified to the Commission no later than three months after the end of the first year in which it takes effect.

2. Within three months of the end of each year each Member State having made a notification under paragraph 1(b) shall issue a letter of notification stating the total amount of electricity or heating or cooling from renewable energy sources produced during the year which is to be the subject of the distribution rule.

[296] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, 4684.

[297] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4686.

[298] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4685.

[299] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4685.

3. For the purposes of measuring compliance with the requirements of this Directive concerning national overall targets, the amount of electricity or heating or cooling from renewable energy sources notified in accordance with paragraph 2 shall be reallocated between the concerned Member States in accordance with the notified distribution rule."

Without specifying the details, the European framework merely provides two alternatives for reallocating produced renewable energy: (a) by statistical transfer; or (b) by setting up an individual distribution rule. While enabling deployment at the most cost-efficient sites, joint support schemes bear the burden of complex implementation and intense co-ordination requirements.[300] The national parliaments of at least two Member States have to agree on the required level of incentives matching the costs and benefits of different technologies in all participating Member States. Also, the participating governments might have difficulties in adjusting their joint support scheme in reaction to market dynamics and actual levels of target achievement.[301] On the other hand, the scope of manoeuvre left to the Member States enables them to decide on a step-by-step implementation of a joint support scheme and to envisage the *ex ante* inclusion of correction measures in the joint scheme itself.[302]

The question of the balancing of costs and benefits in joint support schemes is likely to prove the most difficult part of the negotiations between the participating Member States. Possible instruments could be cross-border exchanges by financial transfers and reallocation of renewable energy volumes regarding solely surplus and shortage of renewable energy production (basically statistical transfer), or a common fund into which participating Member States pay in accordance with their national renewable energy targets and which is redistributed along the realized new RES exploitation.[303] The costs to be offset by the means of the common fund could be calculated with or without consideration of purely national or local benefits. Still, and especially with the establishment of a common fund, issues are likely to arise with regard to compliance with EU State aid law and the free movement provisions.

Further possible subjects of the bi- or multilateral agreement on the joint support scheme are likely to be the inclusion of rules on non-compliance and agreement on the common tools of technical and administrative assistance.[304]

In the comparison of the different flexibility and cooperation mechanisms which has been briefly introduced in the preceding paragraphs, only the mechanism of joint support schemes creates a larger market for renewable energy and provides valuable opportunities for improved economies of scale for investors. However, this cooperation option requires extensive co-ordination and faces high barriers in the fields of financial costs, and legal and policy adjustment.

Directive 2009/28/EC provides a legal framework for flexibility and cooperation mechanisms to be used voluntarily by the Member States. These mechanisms are statistical transfers, joint projects between Member States as well as between Member States and third countries, and joint support schemes between Member States. The relevant provisions in Directive 2009/28/EC basically provide general accounting rules for target compliance, but leave the detailed design and implementation of the mechanisms to the Member States.

[300] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4687.

[301] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4687.

[302] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4687.

[303] C Klessmann, P Lamers, M Ragwitz, G Resch, "Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4689.

[304] C Klessmann, P Lamers, M Ragwitz, G Resch, 'Design options for cooperation mechanisms under the new European renewable energy directive', *Energy Policy* 38 (2010), 4679-4691, p. 4689.

7.2 Examples of regional harmonization and its consequences for the European legal framework

The joint Swedish-Norwegian certificate scheme has been planned since 2003. It provides for a quota-based, mandatory support system in both countries, open to all technologies and new plants, quota obligations on electricity suppliers, linked registers and similar fees.[305] However, the negotiations between Sweden and Norway first broke up in particular as an agreement on financial issues of burden-sharing could not be achieved.[306]

On June 29 2011, after several years of on-again, off-again negotiations, the governments of Norway and Sweden finally signed an agreement on a joint green certificate market that is designed to bring an additional 26.4 TWh of renewable energy production into the Nordic market by 2020.[307] As co-operation with Norway as a non-EU Member State does not fall under Article 11 of the Directive 2009/28/EC, it required some additional practical steps before the joint market could become a reality, and the start of the joint support scheme hinged on Norway and the European Commission agreeing on how Norway would adopt the European Union's 2009 renewable energy Directive.[308] However, on January 1 2012 the scheme came into operation. Under the joint system, operators of power plants which enter into service after the joint market is operating, and which are approved under the joint system, will be entitled to receive certificates for 15 years.[309] Concerning administrative requirements, the joint system energy authorities in the country where the plant operates remain responsible for granting approvals, but the requirements are the same in both countries.[310] While the year-long negotiations in particular on the burden-sharing clearly point to the core problem of this harmonized support scheme, its benefits remain to be seen in the future.

Further, Germany and Spain founded the *International Feed-In Cooperation*. Slovenia and now Greece have also joined. The co-operating countries have implemented national feed-in tariffs for renewable energy and intend: to exchange their experience; to improve their systems where necessary; to support other countries in their endeavours to develop and improve feed-in systems; to contribute knowledge to the international policy area; and to increase the share of renewable energies in the overall national and global primary energy supply.[311] On 6 October 2005, representatives from Spain and Germany signed a Joint Declaration in Madrid, being joined by Slovenia on 29 January 2007.[312] In the third paragraph of the *Joint Declaration* between Germany and Spain, they particularly agreed that, in case of joint projects, research institutions from both countries should be involved and that, without prejudice to different agreements in concrete projects, every country bears the costs related to their own participation and the participation of their research institu-

[305] M Hegg Gundersen, *Experience with the Swedish-Norwegian Certificate Market*, Workshop presentation, Brussels, June 20, 2007, p. 5, retrieved 28 December 2011 from: http://www.futures-e.org/Hegg%20Gundersen.pdf.

[306] C Klessmann, P Lamers, M Ragwitz, G Resch, 'Design options for cooperation mechanisms under the new European renewable energy directive", *Energy Policy* 38 (2010), 4679-4691, p. 4688; M Hegg Gundersen, *Experience with the Swedish-Norwegian Certificate Market*, Workshop presentation, Brussels, June 20, 2007, p. 11, retrieved 28 December 2011 from: http://www.futures-e.org/Hegg%20Gundersen.pdf.

[307] See 'Norway, Sweden strike deal creating joint green tags market', *platts Renewable Energy Report*, Issue 234 / July 11, 2011, pp. 1,3, retrieved 30 December 2011 http://www.platts.com/IM.Platts.Content/ProductsServices/Products/renewableenergyreport.pdf.

[308] See 'Norway, Sweden strike deal creating joint green tags market', *platts Renewable Energy Report*, Issue 234 / July 11, 2011, p. 1, retrieved 30 December 2011 http://www.platts.com/IM.Platts.Content/ProductsServices/Products/renewableenergyreport.pdf.

[309] See 'Norway, Sweden strike deal creating joint green tags market', *platts Renewable Energy Report*, Issue 234 / July 11, 2011, p. 3, retrieved 30 December 2011 http://www.platts.com/IM.Platts.Content/ProductsServices/Products/renewableenergyreport.pdf.

[310] See 'Norway, Sweden strike deal creating joint green tags market', *platts Renewable Energy Report*, Issue 234 / July 11, 2011, p. 3, retrieved 30 December 2011 http://www.platts.com/IM.Platts.Content/ProductsServices/Products/renewableenergyreport.pdf.

[311] Compare: http://www.feed-in-cooperation.org/wDefault_7/index.php (retrieved 29 December 2011).

[312] Compare: http://www.feed-in-cooperation.org/wDefault_7/index.php (retrieved 29 December 2011).

tions.[313] In comparison to the Swedish-Norwegian approach and to the possible room for cooperation given by the Directive 2009/28/EC, the *International Feed-In Cooperation* can be categorized as a mere declaration of intent with an emphasis on experience exchange but without instruments of statistical transfer, concrete joint projects or a joint support system. The *Joint Declaration* does not mention the aim to co-ordinate national feed-in tariff systems and it is limited to mutual learning based on the development of best practices. And it is very clear that each country bears its own costs.

Examples of regional harmonization of support schemes for renewable energy production are rare. The given examples of the planned joint Swedish-Norwegian certificate scheme and the *International Feed-In Cooperation* do not provide considerable experience on the implementation of flexibility mechanisms. Results are still to come. However, in particular with regard to hard harmonization, the difficult negotiation process between Norway and Sweden on the highly contentious issue of financial burden-sharing gives a foretaste of the necessary negotiation efforts any similar projects will face.

[313] *Joint Declaration Spain-Germany,* 6 October 2005, Madrid, Spain, retrieved 29 December 2011 from: http://www.feed-in-cooperation.org/wDefault_7/content/founding-declarations.php.