

WP3: Juridical aspects - assessment and guidelines for practical implementation



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What has happened so far and is going to happen:

◀ Work on WP3 is performed by the Legal Team:

◀ Becker Büttner Held as a law firm



◀ University of Oxford



◀ Work started in summer 2011 with the Kick-Off Meeting:

◀ First: Inventory of all the provisions that may be relevant for any kind of harmonization approach;

◀ *No evaluation as yet, nor drawing any distinction between the different harmonization approaches: not prejudging the issues!*

◀ Second: Assessment of the defined harmonization approaches and policy pathways.

◀ **Next: Finalise a harmonization option (choosing among the possibilities) and provide a draft of how such an instrument might look.**



Objective (at this stage of the project) =

Explain the implications of the relevant EU legal provisions & restrictions for the adoption of any EU-level legislative instrument on renewables.

Background:

Different EU-level instruments can be envisaged:

- in *scope* (more or less “top down”), i.e. different levels of harmonisation ;
(*see the following slides*)
- in *type* (instrument): i.e. Regulation, Directive, Decision or non-binding measures.



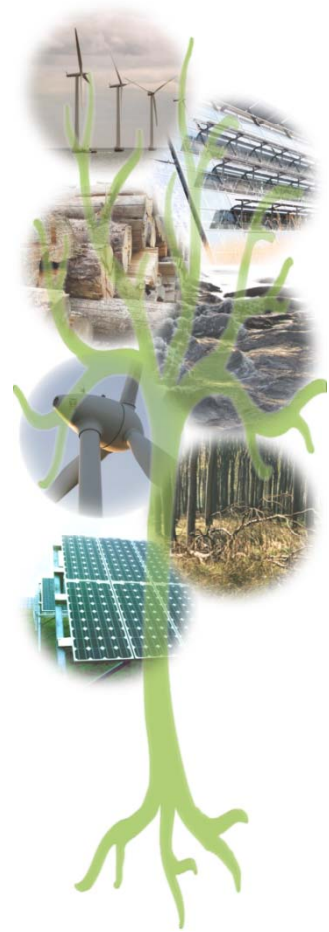
Harmonisation Approaches: *Overview*

Full Harmonisation

- One EU-wide target;
- One EU-wide support scheme;
- Harmonised framework conditions: incl.
 - Harmonised levels of support; and
 - Equalisation of the costs for support;and
- Harmonised design elements.

Medium Harmonisation

- One EU-wide target;
- One EU-wide support scheme;
- Additional MS support (within the scheme, or using an additional instrument);
- Harmonised framework conditions: incl.
 - Harmonised levels of support; and
 - Equalisation of the costs for support;and
- Harmonised design elements.



Harmonisation Approaches (continued) *overview*

Soft Harmonisation

- One EU-wide target;
- National targets;
- One EU-wide support scheme;
- Design elements may differ across the MS;
- Support levels may differ across the MS; and
- Possibly, some EU-wide minimum design elements (e.g. authorisation procedures and obligation to support different technologies).

Minimum Harmonisation

- One EU-wide target;
- National targets;
- Support schemes may differ across the MS;
- Design elements may differ across the MS;
- Support levels may differ across the MS; and
- Possibly, some EU-wide minimum design element (e.g. authorisation procedures and obligation to support different technologies).



An EU-level instrument requires:

- 1) a **legal basis**
- 2) compliance with existing EU law

Potential legal bases in the TFEU

- **Article 114 TFEU** (generic internal market provision)
no longer applicable here because of more specific provisions
- **Article 192 TFEU** (*lex specialis* for environmental concerns)
- **NEW Article 194 TFEU** (*lex specialis* for energy)



Article 194 TFEU

Legislative competence in the *energy* sector:

- incl. for measures on renewable energy sources (*see next slide*);
- “*Lex specialis*” nature confirmed in Case C-490/10 *Commission v. Council*.

Article 192 TFEU

Legislative competence for *environmental protection*:

- for measures with the environmental objectives listed in 191 TFEU;
- note: *unanimity voting in the Council required* for those measures with a significant impact on choice between different energy sources and the general structure of its energy supply;

➤ unlikely legal basis, see scope of Article 194 TFEU – yet possible.

Dual legal basis?

Only if the measure:

- pursues the objectives of both provisions **in equal measure**; and
- the provisions have the **same procedural requirements** (here = problematic).



Article 194 TFEU:

“1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the **functioning of the energy market**;*
- (b) ensure security of energy supply in the Union;*
- (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.”*

➤ Qualified majority voting required.

BUT ... Article 194(2) TFEU:

“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).”

➤ No alternative legislative procedure provided!



How to interpret Article 194(2) TFEU?

*“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).”

Member States’ “energy rights”



Suggested interpretations

Absolute competence block:

The EU measure shall *to no extent* affect Member States' "energy rights".

An EU measure the basis of Art. 194 is therefore subject to *serious limitations*.

✓ Result = **no, or some form of minimum harmonisation.**



Suggested interpretations

Threshold of some level:

An EU measure shall *not significantly* affect Member States' "energy rights".

An EU measure on the basis of Art. 194 is therefore subject to *some limitations*.

✓ Result = some form of **soft or minimum harmonisation**.

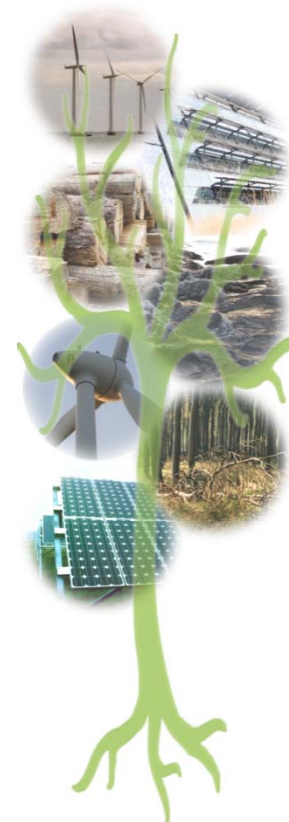
- Drawing a parallel with similar provisions

Art. 192(c) TFEU – unanimity voting for measures with a “significant effect” on a Member State’s choice between different energy sources and the general structure of its energy supply.

- Precedents for imposing an appreciability test:

Art. 101 TFEU – “appreciable extent” (Case C-22/71 *Béguelin Import Co*)

Art. 34 TFEU – market access test ? (Cases C-142/05 *Jetskis* and C-110/05 *Trailers*)



Suggested interpretations

Unanimity voting:

An EU measure shall not affect Member States' "energy rights" *unless all Member States agree*.

An EU measure on the basis of Art. 194 is therefore subject to *a veto*.

- ✓ Result = **any level of harmonisation (but full harmonisation likely to be vetoed)**.

- History of the Constitutional Treaty decision-making process suggests that unanimity voting was initially intended;
... however, this was not maintained throughout the process;
... explicit reference to unanimity voting in Art. 194(3) with regard to fiscal measures.



Suggested interpretations

Derogation options / an “opt out” clause in the EU measure:

An EU measure may (*significantly*) affect Member States’ “energy rights” *as long they can opt out* (thus protecting those “energy rights” adequately).

An EU measure on the basis of Art. 194 is subject to *derogations/ opting out*.

- ✓ Result = some form of **medium, soft or minimum harmonisation** (subject to the scope of the derogation or “opt out” possibilities).

- Drawing on Art. 114(4) and (5) TFEU derogation options.
- “Opt out” clause along the lines of the Commission’s proposal to amend the Deliberate Release of GMOs Directive.
- Problematic: derogations/ “opt outs” would limit the scope of the EU measure significantly; *and* would feed back into law-making process, encouraging Member States to insist on looser rules, exceptions, etc.



Interim Conclusion

Presumption: a measure on RES pursues primarily the objectives of Art. 194 (energy), and only secondarily those of Art. 191 (environmental protection).

- Full Harmonisation is deemed **not legally feasible**
 - *unless a unanimous vote in the Council is obtained.*
- Medium Harmonisation is deemed **not legally feasible**
 - *unless the derogation options or an “opt out” clause can be drafted so as to allow for this & without falling foul of Art. 194(2); or*
 - *unless a unanimous vote in the Council is obtained.*
- Soft Harmonisation is deemed **legally feasible**
 - *the measure arguably has no (significant) effect; or*
 - *an “opt out” clause / derogation options could be used.*
- Minimum Harmonisation is deemed **legally feasible**
 - *the measure most likely has no (significant) effect; or*
 - *an “opt out” clause / derogation options could be used.*



Compliance with EU law

Having concluded that only soft and minimum harmonization find a strong legal basis in the Treaties, we assess their compliance with EU law requirements.

In the inventory, we presented a list of provisions which may potentially be relevant or may conflict with harmonization.

In the assessment, we look at whether they actually do ...



Soft Harmonization (1)

- **Subsidiarity & proportionality.**
- **Free movement (esp. of goods):**
 - FITS, FIPS, Quotas etc. may restrict imports & exports;
 - ✓ However: Problems may arise rather from implementation by the Member States – not the soft harmonization legislation as such;
 - ✓ Thus: No problem.
- **State aid:**
 - ✓ Again: Problems to occur only – possibly – with national implementation (aid attributable to the Member States, not the EU);
 - ✓ Thus: No problem.
- **Fundamental Rights (e.g. freedom to conduct a business, right to property):**
 - ✓ However: Again, the problems are more likely to arise from implementation by the Member States – not the soft harmonization legislation as such;
 - ✓ Thus: No problem.



Soft Harmonization (2)

- **EU ETS Directive:**
 - Need for harmonious & coherent legal framework;
 - Take into account interaction between EU ETS & e.g. TGCs;
 - Take into account the impact of RES on carbon price.
- **Energy Efficiency Directive:**
 - Need for harmonious & coherent legal framework;
 - Take into account interaction between energy efficiency measures (tradable “white” certificates, co-generation) & RES support & carbon price under EU ETS.
- **EU Policies:**
 - Coherence with Policies will boost acceptability of the RES measure;
 - EU Energy Roadmap 2050 & 2013 Green Paper on RES [e.g. need to decarbonise; need to avoid market fragmentation; need for growth and jobs; etc.].



Minimum Harmonization

- **No real issues of compliance** (if at a less intrusive/intensive level than 'Soft Harmonization', etc).
- **Proportionality & subsidiarity likely to be ok.**
- **Since no EU-wide support scheme, no compliance issues with other EU law provisions.**
- **EU Policies:**
 - Emphasis on "consistent" support schemes for RES in 2013 Green Paper COM(2013) 169 final – arguably an indication that some level of harmonisation is required!



Other desirable EU-level developments, which could facilitate better/further RES-E deployment after 2020?

- EU free movement law implications for national RES-E promotion schemes:
 - potential impact of Joined Cases C-204 to 208/12 *Essent Belgium* (Opinion of AG Bot, 8 May 2013) and Case C-573/12 *Ålands Vindkraft* (pending before the CJEU)?
 - implications for EU legislative design?
- EU State aid law implications for national RES-E support schemes:
 - Case C-379/98 *PreussenElektra* [2001] ECR I-2099 and its implications for what counts as State aid (and, therefore, for Member State obligations to notify and justify national support measures, levels, etc);
 - Evolution of the Commission's decisional practice and recent case law (e.g. Case C-677/11 *Doux Élevage v. CIDEF* (CJEU, 30 May 2013) and Case C-262/12 *Vent de Colère* (AG Jääskinen, 11 July 2013);
 - implications for Commission review of EU legislation and Guidelines on State aid for renewables?



Conclusions

- Less far-reaching / ambitious EU-level mandatory rules seem likely to be more legally (and politically) feasible (especially after the advent of Article 194 TFEU).
- Care will need to be taken in articulating the goals and reach of any EU renewables legislation, to ensure (legal) compliance with subsidiarity and proportionality.
- Soft or Minimum Harmonization will leave significant leeway, *and responsibility*, to the Member State level, while requiring vigilant monitoring, information-gathering and (if necessary) enforcement by the Commission.
- Greater clarity concerning the free movement and State aid law implications for Member State measures would enhance stability and predictability for future renewables projects (investment, deployment, regulatory risk, etc).

