

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.*

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

◀ Results on of the assessment to be expected beginning 2013.



The objective of the work package is to assess the “legal feasibility” of the different harmonization approaches and policy pathways.

◀ “Legal Feasibility” has two aspects:

- ◀ There must be a legal basis for the EU legislator to legislate:
 - ◀ Principle of conferral of powers (Art. 5(1) TEU).
- ◀ The measure must comply with and fit into the framework of EU primary and secondary law:
 - ◀ Principle of consistency of EU law (Art. 7 TFEU)
- ◀ *Thus: All those provisions which could be relevant under the former or the latter heading have been listed and explained in the Inventory.*

The results of the assessment will then feed into the Multi-Criteria Factor Analysis.

However: If the conclusion is drawn that some approach is not legally feasible – it will not be followed any further – so *legal feasibility establishes the framework and sets some of the directions* in the course of this project!



Article 5(1) TEU:

“The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.”

◀ European Court of Justice:

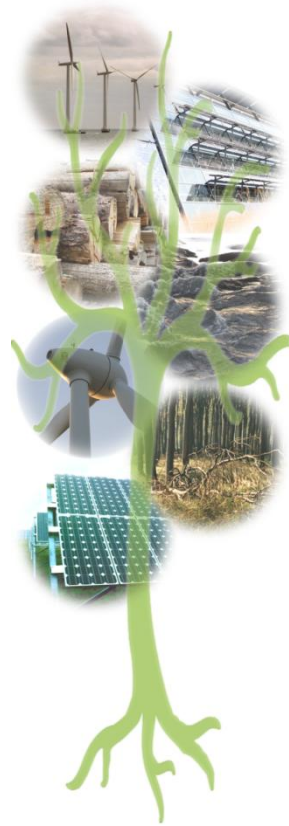
◀ Choice of legal basis *“must be based on objective factors which are amenable to judicial review”* while *“those factors include in particular the aim and content of the measure”*.

◀ Thus: Possible to challenge a measure where it was adopted on the wrong legal basis or if it lacks a proper legal basis.

◀ Incorrect/lack of legal basis can lead to action for *annulment* of the act:

◀ European Court of Justice:

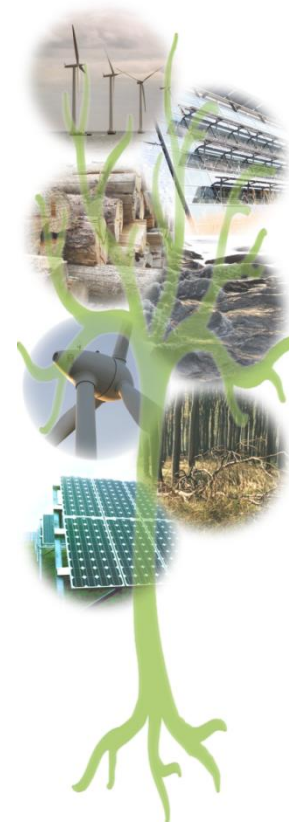
◀ Annulment if the choice of the legal basis does *not constitute a mere formal defect*, and that error in basis has *led to different procedural consequences* from those which would have applied under the correct legal basis.



Article 7 TFEU:

“The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

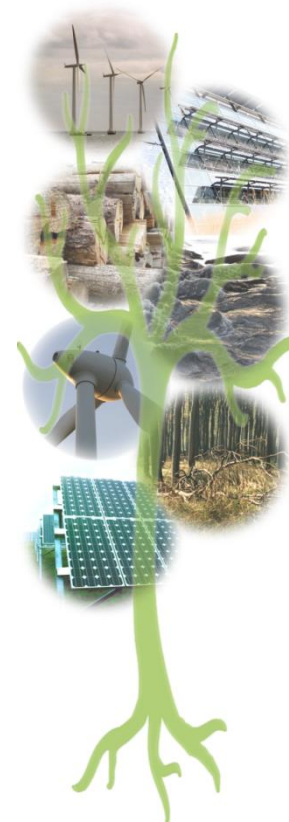
- ◀ THUS: The Union is bound by its law and policies and shall pursue its objectives in the *most consistent way possible*.
- ◀ Compatibility of EU measures with EU law is also challengeable in Court!
 - ◀ European Court of Justice can review the legality of legislative acts of the Council and the Commission 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; *and* remember references for a preliminary ruling under Article 267 TFEU).



Article 114 TFEU:

“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.”

- ◀ Has been used as a “fall-back” legal basis in the past:
 - ◀ BUT: requires *internal market objective!*
 - ◀ AND: cannot be used if there is a “lex specialis”
- ◀ Approximation of laws allows for different degrees of harmonization:
 - ◀ From *full harmonization with national deviation completely excluded or only allowed within the limits of safeguard clauses*, down to *optional or minimum harmonization, only providing minimum standards but allow for more stringent national measures and differing rules* applied only within the territory of the respective Member State.



Article 192(1) TFEU:

Legislative competence in order to adopt measures for:

*“- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”*

◀ Has been used as legal basis for the current Directive 2009/28/EC.

◀ BUT: After the entry into force of the Lisbon Treaty – *Article 194 TFEU = lex specialis!*

◀ Though there are *debates in legal literature* whether, for the promotion of renewable energy, Article 192 TFEU could still be used:

◀ The term *“development” in Article 194 TFEU can be interpreted narrowly so as to refer only to technical development*, including e.g. measures such as in the European Commission’s SET-Plan, but not covering operational economic support.



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.”*

◀ Since the entry into force of the Lisbon Treaty = *lex specialis* for energy legislation

◀ Normally comes with the *ordinary legislative procedure*:

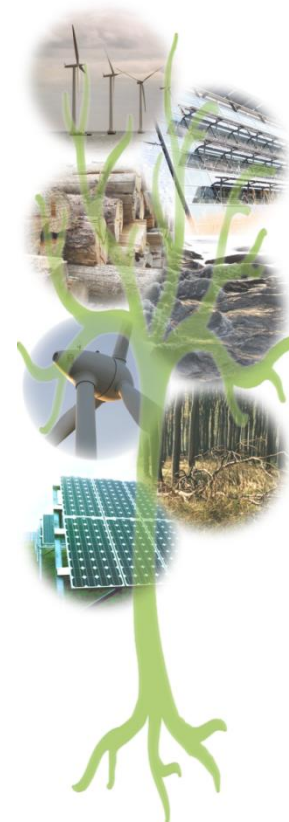
◀ Qualified Majority Voting in the Council.



BUT: Article 194 TFEU comes with a caveat – 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).”

- ◀ Imposes a competence limit upon the EU legislator:
 - ◀ Member States were just *not ready to confer all their own national legislative competence* to the EU on those sensitive issues, but wanted to retain *their right to make their own provisions*.
 - ◀ Further confirmed in *Protocol 35* to the Lisbon Treaty, wherein Member States explicitly vest the right for themselves to adopt and keep in place measures concerning security of supply.
- ◀ *No alternative legislative procedure provided!*
- ◀ However, has been interpreted as not to mean each and every measure:
 - ◀ A certain *threshold of significance* is advocated by legal literature:
 - ◀ *“shall not significantly affect ...”*



“shall not significantly affect...”?

◀ Legal literature suggests:

- ◀ 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*.
 - ◀ The choice between different energy sources is certainly affected when *certain energy sources are totally excluded* or when a *certain energy mix is imposed* on the Member States: e.g. when *certain energy sources can be used to a perceptibly lower extent only*.
- ◀ Effect on the general structure of energy supply shall mean *effect on the principles of national energy supply structures*, so that certain systematic changes and fundamental decisions on single issues could still be adopted.
- ◀ BUT: The effect need not be on all Member States and *it suffices if one or other Member State feels that its sovereignty is affected!*

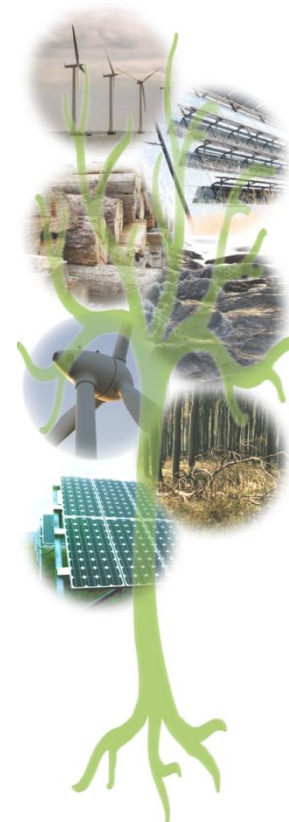


And – the environmental competence comes with a similar caveat:

“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:*
 - 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.”

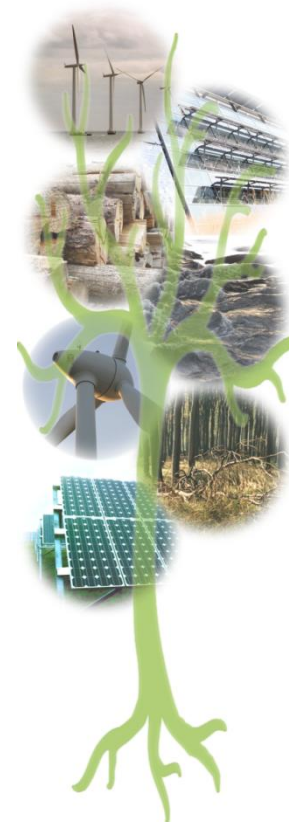


Legislative competence in the *energy* sector is found in Article 194 TFEU:

- ◀ So a measure with the objectives mentioned there should be based on this provision:
 - ◀ *development of new and renewable forms of energy;*
 - ◀ *functioning of the internal energy market.*
 - ◀ BUT: *No legislation possible if significantly affecting conditions for exploiting energy resources, choice between different energy sources and the general structure of energy supply!*

Legislative competence for *environmental protection* is found in Article 192 TFEU:

- ◀ So a measure with environmental protection objectives should be based on this provision
 - ◀ AND: Here *legislation possible despite* significant impact on choice between different energy sources and the general structure of its energy supply
 - ◀ BUT: *unanimity voting in the Council required* = question of political feasibility



Legislative competence for *internal market objectives*:

- ◀ Article 194 TFEU explicitly mentions the internal energy market as an objective and applies as *lex specialis*;
- ◀ Article 114 TFEU is thus no longer applicable!
 - ◀ *THUS: Cannot be used to circumvent competence limit in Article 194 TFEU!*

Dual legal basis?

- ◀ Idea to base some parts of the legislation on one provisions and others on another provision in the Treaty:
 - ◀ European Court of Justice:
 - ◀ *“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.”*
 - ◀ HOWEVER:
 - ◀ *This is not possible if the procedures laid down for each legal basis are incompatible with each other!*
 - ◀ *E.g. different rights for the European Parliament.*



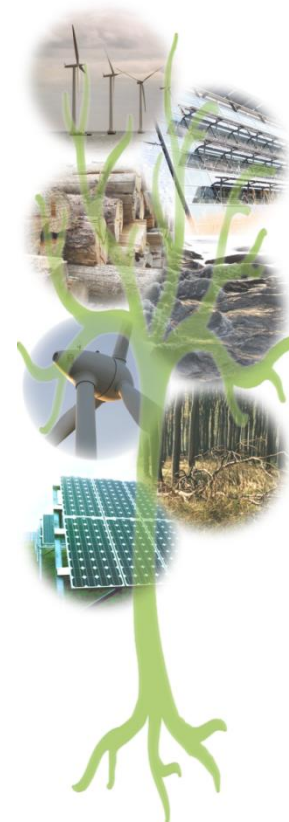
Having set out what potential legal bases there are, one has to *turn to the harmonization approaches and the policy pathways, and look at what their objectives are, as well as what their impacts are:*

- ◀ that way, we can find out whether there *is* a legal basis; and
- ◀ decide which would be the *appropriate* legal basis.

Thus, *for the legal basis it is much more relevant which degree of harmonization is pursued than what the different policy pathways are:*

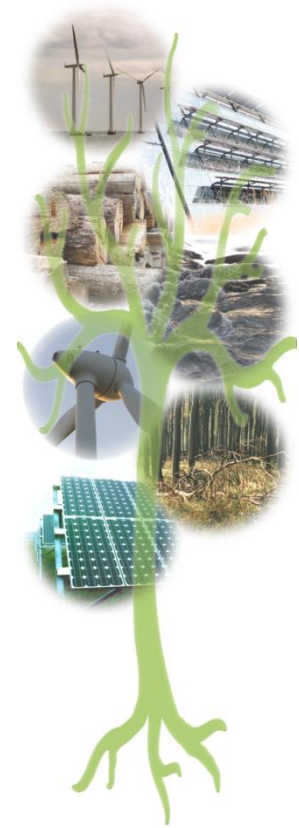
- ◀ differences between the policy pathways will be more relevant when it comes to consistency with EU law and policy;
- ◀ EU law defines harmonization, and even different degrees of harmonization:
 - ◀ **THUS:** one has to *place the approaches taken in the course of the project into the right categories as they are defined in EU legal context.*

The question whether there is a legal basis will be answered with a:
simple but clear YES or NO



Assessment will be based on current EU Law:

- ◀ while it is always possible to amend the Treaty and thus create a competence which had not been there before, the assessment of legal feasibility would not make sense if one were to take this into account;
- ◀ then there would simply be no limits ...
- ◀ *THUS: The results of the legal analysis always come with the caveat that if the Member States all – unanimously – decide that they want to take this approach, then they can always decide to amend the Treaty and still pursue it.*



Once a legal basis is found, it has to be assessed whether or not, and to what degree, this approach is consistent with existing EU law:

- ◀ Here the *differences between the policy pathways* may come into play:
 - ◀ e.g. which of them complies/fits better with the free movement of goods or the competition and State aid provisions under the TFEU.
- ◀ BUT: also and generally the *principles of subsidiarity and proportionality* need to be examined.



Subsidiarity and Proportionality:

1. These principles are, at the same time, both :
 - important EU constitutional considerations; and
 - significant practical issues, linking legal principles with the political (law-making) process, at both national *and* EU level.
 2. These principles raise questions of the appropriate:
 - *level* of law-making ((sub-)national or EU (others?)); and
 - *intensity* of any legislation (extent of harmonisation, availability of derogations, exclusions, opt-outs, etc).
- ... and are closely related to, and indeed, often difficult to disentangle from, each other.

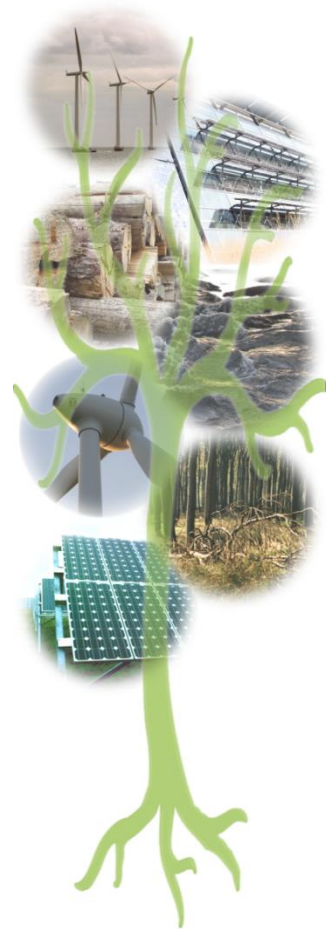


Subsidiarity: Article 5(3) TEU

“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.”

- Justifying EU-level action: goals, (lack of) alternative ways of achieving them, extent and quality of evidence required (and by whom?);
- Convincing Member States *politically* (both governments and national parliaments: post-Treaty of Lisbon mechanism, etc).



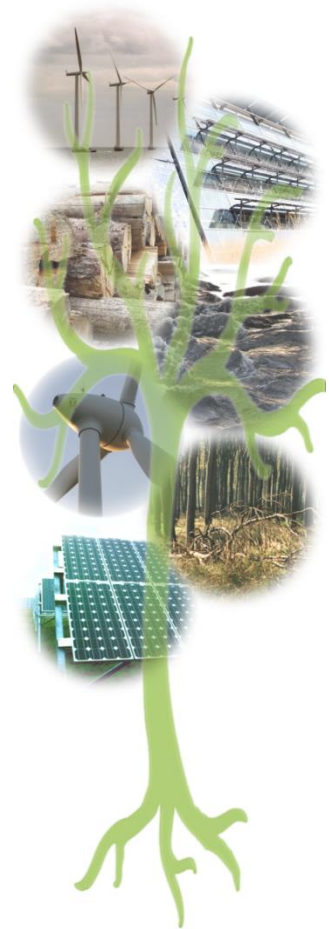
Proportionality:

Article 5(4) TEU:

“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.”

- Justifying the nature and extent of EU-level action: goals, possible conflict with other rules/rights (balancing, default positions, etc);
- A potential legal ground of challenge to EU acts (and Member State actions where *prima facie* contrary to EU law).



Link these ideas to the interpretation of Article 194 TFEU:

- Level of evidence which can be put together to justify stronger harmonisation proposals as a matter of subsidiarity (particularly politically, after the new provisions on the role of national Parliaments in the TFEU) and of proportionality.
- While the standard of potential judicial review of EU legislation on such bases has never been terribly intense, there still have to be good reasons for EU action.
- One open question: might the presence of Article 194(2) TFEU - and the 'opt-out' interpretation thereof - be relied upon by the Commission to justify a more relaxed standard of review in any legal challenge?
 - E.g. Is it easier to satisfy the subsidiarity and proportionality criteria, where Member States might have a Treaty-based derogation upon which they can rely, even in the face of a strong/deep harmonization directive in this area ... ?



Some key legal parameters:

- Competence / legal basis considerations;
- *In particular*, appropriate interpretation of Article 194 TFEU and its place under the Treaties;
- Law- / decision-making consequences of legal basis conclusions;
- Consistency with requirements of EU law, both constitutional (subsidiarity and proportionality) and substantive (free movement, competition, State aid, etc).

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Thank you.

