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

beyond 2020

Report D7.3

Legal drafting guidelines on two key policy pathways: minimum harmonisation and soft harmonisation with feed-in premium

Authors:

Angus Johnston (University of Oxford)

Dörte Fouquet & Jana Nysten (*BBH*)

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Web:	www.res-policy-beyond2020.eu
General contact:	beyond2020@eeg.tuwien.ac.at

Project consortium:

	Vienna University of Technology, Institute of Energy Systems and Electrical Drives, Energy Economics Group (EEG), Austria *(Project coordinator)*
	Fraunhofer Institute for Systems and Innovation Research (ISI), Germany
	Consejo Superior de Investigagiones Cientificas (CSIC), Spain
	University of Oxford, United Kingdom
	Becker Büttner Held (BBH), Belgium
	Czech Technical University in Prague (CVUT in Prague), Czech Republic
	AXPO Austria GmbH (AXPO), Austria
	Ecofys b.v. (Ecofys), The Netherlands
	Comillas Universidad Pontificia Madrid (Comillas), Spain
	Institute for Resource Efficiency and Energy Strategies (IREES), Germany
	Energie Baden-Württemberg AG (EnBW), Germany

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 finely-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.

Contact details:

<< Project coordinator >>

Gustav Resch
Vienna University of Technology, Institute of Energy Systems and Electrical Drives,
Energy Economics Group (EEG)
Gusshausstrasse 25/370-3
A-1040 Vienna
Austria
Phone: +43(0)1/58801-370354
Fax: +43(0)1/58801-370397
Email: resch@eeg.tuwien.ac.at

<< Lead author of this report >>

Angus Johnston
University of Oxford (UOxf)

University College
High Street
Oxford
United Kingdom
Phone: +44 1865 276650
Fax: +44 1865 276790
Email: angus.johnston@law.ox.ac.uk

This document

contains the 'Legal Draft on two key policy pathways: minimum harmonisation and soft harmonisation with feed-in premium'

Authors:
Angus Johnston (*University of Oxford*)
Dörte Fouquet & Jana Nysten (*BBH*)

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1 Introduction

This report builds upon the work developed in the course of this project across the range of work packages. There, the two key pathways - which best met the various criteria for assessment - have been identified as:

- minimum harmonisation; and
- soft harmonisation where feed-in premiums are the specified type of support instrument.

This result emerged from our legal analysis, but was also reflected in the conclusions from other work packages.

The Report entitled "D3.2: Report on legal requirements and policy recommendations for the adoption and implementation of a potential harmonised RES support scheme"[1] provides the key basis for the recommendations developed in the present report. There, issues of the appropriate legal basis and form of instrument for an EU measure were analysed, as were numerous issues of the compatibility of such a measure with pre-existing EU Treaty rules and secondary legislation.

Here and at this stage, it is not possible to offer a full and detailed draft of possible legal instruments which might be used to implement either of the two pathways: too many other elements would need to be discussed and agreed upon before that could be written (as made clear in the 'Roadmap' report (D7.2)[2]). Rather, key elements identified in report D3.2 will be highlighted here, where their inclusion would facilitate the goals pursued or clarify how other EU law rules might apply to the same subject matter, thus easing the task of Member States and the Commission in the implementation, application and scrutiny of EU and national rules on renewables support.

[1] D. Fouquet, et al., Report on legal requirements and policy recommendations for the adoption and implementation of a potential harmonised RES support scheme, 2014.
[2] P. Del Rio, et al., Report on Roadmaps for practical implementation of a harmonisation of RES(-E) support in Europe, 2014.

2 Outline of key characteristics of the two policy pathways addressed in this report

§2.1 General points

- Only new RES installations (2021 to 2030) are affected: the assumption is made that in the case of any sort of harmonisation, RES installations that have entered the market prior to 2020 remain under their old (national) RES policy scheme. Thus, any new RES plants that have been installed in the period 2021 to 2030 are affected.

- The focus here for harmonisation is on RES in the electricity sector: this means that RES in heating and cooling or in the transport sector are not the focus of our assessment and have not been assessed in the modelling or other analyses. Thus, possible drafting implications for these sectors are not addressed here.

In the modelling work on this project, other sectors were taken into consideration (since they are of relevance to measuring overall RES target-fulfilment), but for simplicity it was assumed that support costs (as well as deployment as relevant for target fulfilment) are in the case of RES-Heating & Cooling borne by the country of origin. In the case of biofuels in transport, meanwhile, we assumed that a "harmonised physical trade" would be in place (i.e. a blending obligation with equal quotas across all MSs) and, consequently, support costs related to biofuels would be borne by the consumer (i.e. representing a "full burden-sharing" according to the (harmonised) demand for biofuels).

§2.2 Soft harmonisation with a feed-in premium system

The basic characterisation of **soft harmonisation** is as follows:

- EU & National RES targets for 2030;

- one support instrument;

- Member States (MSs) can decide on various design elements, including support levels.

In other words, there would be an EU-wide target, but also national targets consistent with the EU target. Countries would have to implement domestically the support scheme that has been decided at EU level. However, countries may use whatever design elements they deem best and support levels may differ across countries. However, there might be some design elements imposed at the EU level.

We have also specified further characterisation details more specifically with regard to the case of a (harmonised) feed-in premium system:

- in modelling and other analysis, we assume that the type of instrument (i.e. in our case a feed-in premium system (with fixed premiums)), the duration of support and the technology coverage are predefined at EU level;

- moreover, in the case of feed-in premium systems, the assumption is made that support levels are technology-specific;

- for a specific RES technology (like small-scale or central PV, or small- or large-scale biomass CHP), support levels may, however, differ by country, representing (in modelling) the degree of freedom that MSs have to affect their national 2030 RES target-fulfilment. Differences across MSs are assumed to be smaller than in the case of minimum harmonisation, where minimum design criteria define the corridor of feasible support levels;[3]

- with respect to the national accounting of support expenditures for RES-E, there is no burden-sharing agreement between MSs adopted *a priori* in the case of soft harmonisation. Co-operation mechanisms (may) come into play to achieve a proper match between national 2030 RES targets and domestic RES deployment. In modelling we assume that, in a first step, support costs are borne by the country of origin (where deployment takes place). In a second step, cooperation then comes into play: host countries make use of cooperation to sell their surpluses (not required for own target-fulfilment) to off-taker countries (which face a shortfall).

§2.3 Minimum harmonisation (i.e. national RES support with cooperation, with minimum design standards at EU level)

The brief characterisation of **minimum harmonisation** is *as* follows:

- EU & National RES targets for 2030;

- MSs can decide on the type of support instruments as well as various design elements incl. support levels

In other words, under minimum harmonisation, EU-wide targets as well as national targets are set by the EU. MSs decide upon both the type of support scheme that they apply and its design elements. In general, MSs may set whatever support level they deem most appropriate for achieving their national target. The preferred variant (according to the

[3] Such design criteria, however, also consider resource characteristics (i.e. the site-specific full load hours) in the case of wind onshore and PV, similarly to the German or French reference system as used to define support levels for onshore wind (which differ by site or their efficiency, respectively).

overall assessment) is then, however, to apply however minimum certain design standards set by the EU (e.g. authorisation procedures and an obligation to support a range of different technologies).

We have also specified further characterisation details for this approach to minimum harmonisation:

- in modelling, it has been assumed that all MSs use a similar duration of support (i.e. just for simplicity, in order better to compare differences in support levels), and the technology coverage is predefined at EU level;

- the assumption is made that MSs will make use of their support instrument(s) as planned to be applied in forthcoming years. More precisely, countries using quota schemes (and which have not planned to change that) stick to this type of support but, if not they have not already done so, also introduce a banding approach to set technology-specific incentives therein. The remainder (i.e. countries using feed-in tariffs or premiums (or no support, like Spain) will apply feed-in premiums to support RES-E beyond 2020;

- for a specific RES technology (like small-scale or central PV or small- or large-scale biomass CHP) support levels differ by country, representing (in modelling) the degree of freedom that MSs have to affect their national 2030 RES target-fulfilment. Differences across MSs are assumed to be limited to a certain extent due to the introduction of EU-wide minimum design criteria, thus narrowing the corridor of feasible support levels;[4]

- with respect to the national accounting of support expenditures for RES-E, there is (as under soft harmonisation) no burden-sharing agreement adopted. Co-operation mechanisms come into play to achieve a proper match between national 2030 RES targets and domestic RES deployment. Again, as under soft harmonisation, support costs are first borne by the country of origin (where deployment takes place). In a second step, then co-operation comes into play: host countries make use of cooperation to sell their surpluses (not required for own target fulfilment) to off-taker countries (which face a shortfall).

In the following text, we provide an outline of important drafting elements and considerations: first, those common to both pathways (§3); then, those drafting questions specific to minimum harmonisation (§4); and finally, drafting questions of particular relevance to soft harmonisation where a feed-in premium system is specified.

[4] Such design criteria, however, also consider resource characteristics (i.e. the site-specific full load hours) in the case of wind onshore and PV, similar to the German or French reference system as used to define support levels for onshore wind (that differ by site or their efficiency, respectively).

3 Drafting elements common to both pathways

§3.1 Legal basis

As examined in detail in Report D3.2 (§1.2), it seems clear that Article 194 TFEU would be an appropriate legal basis for both a soft harmonisation (in general, and if specifying a feed-in premium system in particular) and a minimum harmonisation measure. This conclusion raises important questions about the law-making procedure to be followed in adopting the measure and the extent to which Member States might seek to secure opt-outs or rely upon derogations from such a measure: this is due to the uncertainty surrounding the proper interpretation of Article 194(2) TFEU, and a definitive conclusion on this issue cannot be stated at this stage.

Insofar as it could be argued that the primary goals of any such harmonisation measure were primarily environmental, Article 192 TFEU could provide a legal basis, but then it seems likely that such a measure might be subject to the requirement of unanimous voting in Council (allied only with the consultation of the European Parliament), as a result of Article 192(2)(c).

However, while the current renewables Directive 2009/28/EC was adopted as primarily an environmental measure, the advent of the new *lex specialis* for energy in Article 194 TFEU (as emphasised by the Court of Justice in its first judgment on the provision)[5] would seem now to cover measures in the field of renewable energy as well (given the explicit wording of Article 194(1) TFEU). Thus, Article 194 TFEU should be used as the legal basis for an EU measure on renewables, whether of a soft or minimum harmonisation character.

§3.2 Legal instrument

An EU measure of soft or minimum harmonisation in the renewable energy field would be specifically designed to offer various topics on which Member States (MSs) would be afforded often quite significant choice and discretion in how to implement the goals of that measure. As such, a directive would clearly be the most appropriate single instrument for either minimum or soft harmonisation of renewables under EU law (see Report D3.2, §4, esp. §§4.1.2 and 4.2.2). Article 194 TFEU clearly empowers the EU legislature to adopt directives as one type of "measure", and indeed respect for the principles of subsidiarity and proportionality encourages the EU to exercise its competences in the form of directives rather than regulations where possible (see the discussion in Report D3.2, esp. §§3.1.1 and 3.1.2).

At the same time, it should be acknowledged that directives are capable:

- *both* of incorporating relatively detailed rules on specific issues, which in practice will leave little or no discretion to Member States as to the wording and content of national implementing provisions;

[5] Case C-490/10 *European Parliament* v. *Council* (judgment of 6 September 2012), para. 67.

- *and* of utilising so-called "soft law"-style elements, encouraging co-ordination, consultation, co-operation, information-sharing and the like, with a view to improving the knowledge base and context within which the implementation and application of EU law takes place.

This flexibility of the directive as an instrument is particularly well suited to the soft and minimum harmonisation pathways analysed here: e.g. the specification of a feed-in premium as the type of support measure to be used by MSs under soft harmonisation could sit comfortably alongside other provisions which afford discretion to MSs. Thus, a requirement that such premiums be technology-specific would be a clear obligation imposed upon MSs, but the levels of support offered in that differentiation between technologies would be left to each MS to set for itself, taking into account the national situation (renewables resource base, costs, locational and infrastructure issues, etc). At the same time, the incorporation of national renewables targets in the soft harmonisation pathway adopted here would require MSs to conduct analysis so as to show that those implementation choices were appropriate and well designed to achieve those binding targets set by the EU-level measure (the directive) (as, indeed, under the current Directive 2009/28/EC).

§3.3 Interaction with other substantive EU Treaty requirements

As explained in Reports D3.1 and D3.2, EU legislation is required to be compatible with the primary rules of the EU's Treaties: this applies not only to finding a legal basis and following the proper law-making procedures, but also to compliance with substantive rules of EU law. As a hierarchically inferior instrument, EU legislation must respect the Treaty rules, rather like national legislation must respect the strictures of the national Constitution.

At the same time, even when an EU measure has passed these tests, Member State implementation and application of EU legislation is also required to respect these overarching rules of EU law laid down in (or arising from) the Treaties. Thus, this section concerning 'interaction' with these Treaty rules addresses both the terms of the EU harmonisation measure itself *and* ways in which the content and structure of that EU measure might affect and/or assist MSs in their implementation and enforcement tasks thereunder.

§3.3.1 Subsidiarity and Proportionality

The field of energy (Article 194 TFEU; and, indeed, that of the environment, Article 192 TFEU) is one of shared competence between the EU and its Member States. By virtue of Article 5(3) and (4) TEU, the EU's exercise of such competence is governed by the principles of subsidiarity and proportionality. In brief, subsidiarity concerns justifying the need for action to be taken on a given issue *at EU level* (rather than leaving it to the MSs to pursue such goals within their own competence), while proportionality focuses upon justifying the *extent* or *intensity* of such EU-level measures. It quickly becomes apparent that the two are difficult to disentangle, since whether EU-level action is needed at all is

closely related to the nature and extent of such proposed action. Detailed discussion of these principles has been provided elsewhere in this project (see, in particular, §§3.1.1 and 3.1.2 in Report D3.2) and will not be repeated here. However, these principles are of relevance to how any EU harmonisation measure on renewable energy might be formulated, and this has implications both for explaining and justifying the substance of such a measure *and* for the process by which it would need to be adopted. This latter point is of particular importance under Article 194 TFEU: the need, politically and diplomatically, to carry MS agreement in Council will be especially crucial in the energy field, given the uncertainty surrounding the implications of Article 194(2) TFEU for the position and rights of the MSs.

§3.3.1(a) In general

To date, the degree of judicial scrutiny conducted in *ex post facto* review of EU measures on subsidiarity and proportionality grounds has generally been limited: thus, the risk of successful judicial review of an EU harmonisation measure using these grounds of review seems very low. This has been discussed in Report D3.1 and need not be repeated here.

Instead, the important impact of subsidiarity and proportionality will be its role within the decision-making process, and in particular how national governments and Parliaments react to harmonisation proposals. These governments each have a seat in Council and a strong role in the negotiations on such Commission proposals for EU harmonisation; and under the new provisions introduced by the Treaty of Lisbon, national Parliaments may adopt reasoned Opinions on proposed EU legislation, which could trigger a review of such proposals. While these Opinions are not 'binding' or 'blocking' in any legal sense, the practicalities of national systems – under which the government is accountable to its Parliament – may mean that such Opinions have a significant influence upon the negotiating positions adopted by national governments in Council on the relevant EU proposal.

A crucial point in justifying a measure under the principles of subsidiarity and proportionality will therefore be the *objective(s)* which the measure aims to pursue. Certain objectives will more easily justify far-reaching EU action, whereas others could equally well be achieved at Member State level, or through less far-reaching EU action that leaves greater scope for Member State discretion. It will thus be of great importance to justify from the earliest drafting stages: (1) why the proposed EU measure is necessary; and (2) why it is proportionate to adopt particular rules and/or mechanisms at EU level. Naturally, the extent of supporting evidence required will need to be stronger and clearer, as the detail and intensity of rules in an EU measure increases: thus, discharging these obligations will be more difficult for a soft than a minimum harmonisation measure, and the more so for soft harmonisation specifying just one type of support scheme. However, the wider the range, and the more detailed the nature, of the EU-level 'minimum design criteria' envisaged under minimum harmonisation (see §2.3, above), the heavier the burden to show that the impact and reach of such harmonisation meets the requirements of subsidiarity and proportionality. Qualitative and if possible also quantitative indicators should be employed by the Commission to substantiate the need for EU-level action, and for the proposed *extent* of that action.

Thus, while as a technical legal matter it is not typically a difficult task for EU legislation to be drafted so as to satisfy subsidiarity and proportionality,[6] as a practical matter of the law-making process (and particularly in a climate of concern about energy prices and subsidies), convincing national and EU politicians of the need for and benefits of harmonisation seems likely to be the more pressing task. In that regard, wide consultation, careful marshalling of evidence and clear drafting of legislative proposals can be a staunch ally in navigating a harmonising proposal through the legislative process.

§3.3.1(b) Linked to consumer protection under Article 12 TFEU (and other) goals

The principle of proportionality only starts to bite when it is attached to a protected interest, upon which another rule or measure intrudes in some way. Proportionality then offers a structured approach for trying to balance these competing rights or interests: or, in other words, if the protected right or interest is *prima facie* entitled to be held free from interference, then any measure seeking so to interfere will be required objectively to justify its impact. And it must do so by reference to an acceptable public interest goal or reason, and must not interfere further than is justifiable for achieving that goal. This is relevant to other provisions of EU law (and will recur below in the discussion of Article 34 TFEU), but is likely to prove important in establishing that an EU harmonisation measure on renewable energy does not fail properly to take into account consumer protection requirements, especially given the EU's objective to secure a "high level" of consumer protection (Article 12 TFEU).

While neither a soft nor a minimum harmonisation measure would *of itself* impose burdens upon consumers – since Member States would have discretion to decide how and by whom the costs of renewables support should be borne – the MS's implementation decisions should take into account the impact upon consumers. In practice, the legal analysis of justifying such consumer impacts would be likely to involve only limited scrutiny under EU law, and would probably easily be satisfied by pointing to the environmental benefits of a shift to a larger proportion of renewables in electricity generation. However, the national political sensitivity of such energy pricing questions should not be underestimated: here, again, convincing national governments and Parliaments of the proportionality of an EU harmonisation measure requiring MSs to go further in ensuring renewables development and deployment may prove a difficult and important element in securing agreement on an EU harmonisation proposal. Clearly, the need to justify such consumer impacts would be stronger under a 'soft harmonisation with feed-in premium' pathway, but this would also be a more focused discussion, and thus could be easier to manage and assess than the broader range of design and impact questions which might arise under the minimum harmonisation pathway.

[6] Forms of words can usually be found, reflecting evidence collected, which show relevant elements such as: transboundary effects; the danger of national action conflicting with the Treaties; and clear benefits gained from EU-level action.

§3.3.2 Article 34 TFEU: free movement of goods and imports

The intricacies and uncertainties of the impact of Article 34 TFEU upon EU and national renewable energy promotion laws and policies have been analysed at some length in Report D3.2 (see §§3.1.8 and 3.2.8 on soft and minimum harmonisation, respectively), and this will not be repeated in detail here.

First, we should note that Article 34 TFEU will be of relevance both to the drafting and goals of the EU harmonising directive on renewables and, importantly, also to the implementing measures adopted by the Member States thereunder. However, the relevance of Article 34 TFEU to the EU measure is more significant with regard to a soft harmonisation measure specifying a feed-in premium, because such a measure would itself be imposing a provision which might be trade-restrictive; under minimum harmonisation, any such restrictions would be created by national implementation measures.

Second, a current uncertainty must be noted with regard to the relationship between EU harmonising legislation and Article 34 TFEU: this concerns the recent Opinion of Advocate General Bot in the *Ålands Vindkraft* case, where he suggested that those provisions of Directive 2009/28/EC which were designed to allow a Member State to limit the benefit of national renewables support schemes solely to renewable electricity generated within that MS should be held invalid, as an unjustifiable restriction upon the free movement of goods.[7] The judgment of the Court of Justice remains pending, but if AG Bot's approach were to be accepted, this would impose constraints upon what EU harmonisation legislation on renewables would be able to allow MSs to do. At the very least, it would require more detailed and far-reaching evidence to justify why a Member State should be allowed to keep closed its renewables support schemes: this would, it is suggested, need to be explained in some detail in the recitals to any harmonisation directive (whether soft or minimum). Further, the wording of the operative provisions of the directive which sought to authorise such MS measures would need to be drafted carefully and clearly: both as a legal matter, to ensure clarity for national courts and regulators, and as a practical matter, so as to provide sufficient certainty for investors, financiers and operators in retaining and expanding their involvement in renewables deployment. Precise drafting details cannot be proposed at this stage until the Court's judgment is handed down, and it is possible that the Court will take a less stringent approach to the potential clash between EU and national environmental goals, on the one hand, and free movement of goods, on the other.[8]

Third, if it is accepted (as our analysis in Report D3.2 suggests that it should: see §§3.1.8 and 3.2.8) that such renewables support schemes, where limited to the support of domestically-generated electricity only, amount to a *prima facie* import restriction, then such schemes will require justification if they are to be compatible with Article 34 TFEU. Common to both soft and minimum harmonisation are the grounds upon which such justification might be established. These are: "public security" (via increased renewables development and deployment, reducing reliance upon (imported) fossil fuels and thus

[7] Case C-573/12 *Ålands Vindkraft* v. *Energimyndigheten* (Opinion of 28 January 2014).
[8] The earlier Case C-379/98 *PreussenElektra* [2001] ECR I-2099 shows just such a difference in approach between AG Jacobs and the Court on what is now Article 34 TFEU.

contributing, in one way, to improved security of supply) and "environmental protection"[9] (e.g. in the form of contributions to emissions reductions, increased sustainability of energy supply). Similarly, any such intrusion upon free trade must be proportionate, in the sense that its impact must be no more trade-restrictive than necessary to achieve the goals of that intruding measure. As a drafting matter, therefore, an EU harmonising directive will need clearly to specify in its provisions (and explain in its recitals) the objectives being pursued by such support schemes. Further, where the EU rules themselves might amount to the trade barrier, information should be marshalled as to why less trade-distortive measures would not achieve the relevant goals; indeed, the inclusion of such elements in the recitals would also facilitate the defence of national implementing rules against arguments based upon Article 34 TFEU and thus would be a useful addition to the EU harmonising measure, whether of the soft or the minimum type.

§3.3.3 Article 107 TFEU: State aids

While minimum or soft harmonisation measures could lead to distortions in competition and inter-Member State trade (due to the adoption of different support levels in each MS, e.g.), neither would result in EU aid, precisely because MSs retain discretion as to the *amount* of aid which could be granted. Thus, EU State aid law would be of relevance to the MS in its design and implementation of national support schemes when implementing the directive. Therefore, there is good sense in the inclusion of a clause in terms that: "This Directive is without prejudice to Article 107 and 108 TFEU". This would clarify the position for MSs, operators and investors, but would not involve more details concerning specific requirements to be satisfied by national schemes (except under soft harmonisation, the need to use a feed-in premium) beyond those already applicable under EU State aid rules.

However, there would be benefit in greater clarity on the application of those EU State aid rules with regard to renewables support schemes, including simplified procedures for clearance and even (if enough experience had been accumulated) inclusion in the Block Exemption Regulation's regime. Under the Regulation, notification would not be necessary at all, provided the Regulation's terms were followed by the MS's scheme. This would be an important contribution to the smooth functioning of the regime established by a minimum or a soft harmonisation directive, but would have to be adopted under the EU's competence to address State aid, rather than under Article 194 and a renewables harmonisation directive itself. Obviously, the precise content of such guidelines or legislation would differ depending upon the choice of a minimum or soft harmonisation measure (given that under the latter only one type of support scheme could be operated by a MS), but the improved clarity, certainty and speed that such an addition would bring could be important in helping the EU harmonising directive and the national rules thereunder to function effectively and efficiently. In this regard, the current efforts of the European Commission to draft guidelines on State aid on energy and environmental

[9] Although it should be noted that controversy remains concerning whether directly discriminatory national measures (or, here, EU measures expressly allowing such direct discrimination by national law) *can* be justified under the environmental heading: see the discussion in Report D3.2, §3.1.8 and the references cited therein.

matters is a welcome approach, although care will need to be taken to ensure that the guidelines eventually adopted interact well with, and do not undermine the adoption of, the next harmonising measure on renewables.

§3.4 Interaction with other EU secondary legislation

In general, any potential inconsistencies between two pieces of EU secondary legislation should be manageable through the introduction of provisions in one instrument (or both), which address possible problems. In the course of our analysis in Report D3.2, a number of issues were highlighted which would benefit from such express clarification were a new EU harmonising directive on renewables to be adopted.

Thus, priority dispatch for renewables is *prima facie* a problem of discrimination under Directive 2009/72/EC on the internal electricity market, but is addressed by Article 15(3) thereof, which incorporates the requirement for such priority dispatch; similarly, the current Article 8(2) of the same Directive requires Member States to provide for the possibility of tendering for new capacity (beyond the normal authorisation procedures) in the interest of environmental protection or to promote infant and new technologies. Such provisions could be used as a model for resolving potential conflicts in future.

Certain elements of the Energy Efficiency Directive 2012/27/EU ('EE Directive') - particularly Article 15(5) concerning priority or guaranteed grid access and priority dispatch for high efficiency cogeneration plants - raise specific legal issues where a new renewables directive would need careful drafting. In particular, the current wording in Article 15(5) EE Directive provides that it is "without prejudice" to similar priority grid access and dispatch for renewables: at present, this leaves room for debate as to which would have priority over the other in the event of a choice having to be made (since both sets of priorities are themselves subject to being overturned where secure system operation so requires). Greater clarity on these two sets of provisions and their interactions would be a welcome element to include in the drafting of a new renewables directive (whether under soft or minimum harmonisation).

Further, a new renewables directive could prove an important opportunity to clarify other points under other directives currently in force, where present uncertainty might be damaging to the development and deployment of renewables which would be pursued by the new directive. For example, the status of a connection between an offshore wind farm and the onshore grid might be thought uncertain under the current internal electricity market Directive 2009/72/EC: is such a connection a direct line, part of the transmission network or something else? And, if it counts as a transmission line, then what of the requirements of unbundling and third party access which would *prima facie* apply to it? Such uncertainties can push up financing costs and delay the realisation of projects, and should be addressed in the drafting of a new measure if possible.

Finally, the scheme of a new renewables directive would need to be carefully co-ordinated with those of other related legislation, so as to avoid the introduction and operation of the new directive undermining pre-existing regimes. Of particular relevance here are the European Emissions Trading System Directive 2003/87/EC (as amended)('ETS Directive') and the EE Directive mentioned above. Thus, the interaction between support

schemes to incentivise renewables and demand for emissions allowances under the ETS is a crucial issue which needs careful co-ordination *ex ante* to avoid each having deleterious impacts upon the other.[10] In light of achieving a consistent and harmonious set of laws at EU level, a proposal for a soft harmonisation-type measure on RES should take into account whether and how the EU ETS incentivises the further development of particular RE technologies, and whether and how this might have an impact upon the chosen RE support scheme. The greenhouse gas emissions cap should influence the setting of an EU-wide renewable energy target (and national targets consistent with the EU target), and thought should be given to the trajectory planned for both the EU emissions cap and the EU renewables target. This is necessary to avoid future inconsistencies. Similar questions of interaction could be raised with regard to the impact of a new renewables directive upon the EE Directive and its demand-management goals (see Report D3.2, §3.1.20).

A final note on interactions also concerns the EU ETS Directive, and in particular how the revenue generated from the auctioning of emissions allowances can, and should, be used by Member States. At present, under Article 10(3)(a), 50% of the revenues generated "should" be used for one of the following purposes: further reduce greenhouse gas emissions; develop renewable energies; forestry sequestration; or carbon capture and storage. This provision will need to have its application extended to cover the period after 2020, and in combination with discussions on a new renewables measure, thought might be given to requiring the use of auction revenues as a means of bolstering renewables support in the future.

§3.4 Co-operation mechanisms

In general, such mechanisms to facilitate co-operation between Member States so as to allow one EU MS to benefit from another MS's greater progress in fulfilling its renewables targets could easily continue under the so-called "flexibility mechanisms" established by the current renewables Directive 2009/28/EC, in particular, the notion of statistical transfers under Article 6.[11] The current rules on statistical transfer are rather flexible and involve minimal formalities (e.g. there is no common format for notifying such transfers, beyond a requirement to record the quantity and price of the energy subject to that transfer), which might be thought to be a positive encouragement to MSs to utilise this mechanism. On the other hand, it might be suggested that being able to resort too easily to such alternative routes might disincentivise a MS from taking seriously its own obligations to meet its national renewables targets through deployment in its own territory.

[10] See, e.g., Klessmann's presentation at the beyond2020 Final Conference (Brussels, 21 October 2013): http://www.res-policy-beyond2020.eu/finalconference/7_Policy%20interactions%20between%20GHG%20and%20RE%20policies%20(Klessmann,%20Ecofys).pdf.

[11] But also including joint projects with other MSs (Articles 7 and 8) or even third countries (Articles 9 and 10), and joint support schemes (Article 11).

For some, imposing qualifying conditions (in the form, perhaps, of requiring a purchaser MS to be within a certain range of an indicative trajectory for achieving its own national target) to be eligible to be a purchasing MS in a statistical transfer might be a way of adding teeth to the 'binding' nature of national targets under any new EU renewables directive. For others, such limitations would be counter-productive and might prove inefficient: e.g. the MS wishing to purchase may face high generation costs at home and could thus achieve progress towards its target more cost-effectively by purchasing the surplus from a MS with a lower-cost renewable resource. These drafting questions are important, and should be preceded by careful thought as to the costs and benefits of adding sharper edges to the trajectories towards, and the final achievement of, national targets under soft or minimum harmonisation as defined here.

4 Minimum harmonisation drafting questions

§4.1 The nature, extent and detail of 'minimum design criteria' under minimum harmonisation

A basic minimum harmonisation model would leave significant discretionary choices to Member States as to the design of national renewables support schemes and the levels of support offered. However, as highlighted above (§§2.3 and 3.3.1), the greater the range and detail of design criteria relating to such schemes that are specified at EU level in a harmonising directive, the heavier the onus on the EU legislator to justify the need for such provisions. This has the potential to affect both the question of 'subsidiarity and proportionality' and also the applicability of Article 34 TFEU. As discussed in §3.3.2, a loose minimum harmonisation measure would mean that the only rules which might create import restrictions would be those of the MS when implementing the directive. Equally (as we will address in §5.1, below), enough detail in the EU directive could mean that the type of support scheme chosen, utilising those EU-specified "design elements", would inevitably affect imports: thus, the import restriction could be attributable to the directive, rather than the national implementing measure. If this were the case, then the uncertainties surrounding the *Ålands Vindkraft* case (§3.3.2, above) would resurface again here, especially if most MSs continue, as at present, to keep their national systems closed to renewables from outside their own territory.[12] And even were those uncertainties ultimately to be dispelled by the Court of Justice, it would remain necessary to provide clear justification within the new EU renewables directive itself for why its *prima facie* import-restrictive design elements were in fact justifiable on environmental, supply security or other grounds.

If, however, the design elements in question were limited to some harmonisation of authorisation procedures and the obligation to support a range of technologies via the banding of support levels, then these concerns would be much reduced, even to the point of being relatively easy to justify.

§4.2 Setting the binding national renewables targets and related issues

This will obviously be a crucial drafting question under any minimum harmonisation measure; at the same time, it is dependent upon assessment of resource potentials, progress made since the 2009 renewables Directive, national GDP and a range of other economic, technical and no doubt political criteria. Thus, it is not possible at this stage to offer guidance on how such targets might be defined and drafted.

[12] Although, then, difficult questions of attribution and impact would arise: e.g. would the design elements attached to a tradable green certificates regime under a minimum harmonisation directive cause import restrictions of themselves? Or would such restrictions only occur *because* a given MS chose to ally those elements with a national territorial eligibility restriction for renewables to participate in their national support scheme?

An issue which arose in the discussions surrounding the 2009 Directive concerned whether some form of enforcement ought to be available during the currency of these targets (whether in the form of a penalty, a decision by the Commission, etc), but this issue never really gained any traction in the debate between Council, Commission and European Parliament. It is worth noting that such penalties are not unknown to EU law (e.g. they exist in the agricultural field): again, for some they would be a useful tool to keep MSs focused upon target-fulfilment, while for others they would be an unnecessary and antagonistic distraction from designing and developing national schemes and systems to achieve renewables targets in an effective and efficient manner.

§4.3 Details concerning justification for import-restrictive effects of national renewables support schemes?

As canvassed above (§3.3.2; and see also Report D3.2, §3.1.8), under an EU minimum harmonisation measure, the pressure point for Article 34 TFEU will be the nature and details of a Member State's national scheme, adopted to achieve the goals and targets set out in the new renewables directive. One further drafting issue might thus concern whether the new directive could provide clearer grounds upon which MSs could rely when seeking to justify their national scheme(s) in the face of arguments based on the free movement of goods. In so doing, the new directive would not be undertaking a particularly novel exercise: one of the earlier internal market measures (Directive 64/221/EEC) embodied a legislative attempt to clarify the substance and procedure relating to derogations from the rules on the free movement of workers, the freedom of establishment and the freedom to provide and receive services, on the grounds specified expressly in the Treaty itself (i.e. public policy, public security and public health). These rules can be found – further elaborated – today in Directive 2004/38/EC (on the rights of EU citizens and their families to move and reside freely within the EU): see its Chapter VI.

The current difficulty in providing such legislative support for national measures in this regard is due to the uncertainty regarding whether environmental protection (as a justification for trade restrictions) should be allowed to shelter even directly discriminatory national rules (see Report D3.2, §3.1.8 and the references cited therein). This might be achieved by an attempt to expand our understanding of the ground in Article 36 TFEU concerning "the protection of the health and life of humans, animals and plants" also to encompass environmental protection: this would assist because Article 36 TFEU has always been capable of justifying such directly discriminatory national rules,[13] and would chime nicely with the obligation to integrate environmental considerations (and in particular the principle of rectifying environmental damage at source wherever possible: Article 11 TFEU: see Report D3.2, §§3.1.4 and 3.2.4). But the reason to emphasise the point here as a drafting issue is that, if it could be achieved, it would have the highly beneficial effect of removing some of the uncertainty that currently surrounds the design and implementation process at the national level (in similar vein to the discussion of State aid guidelines above, §3.3.3). For as long as reliance must be placed upon some degree of private investment to bring about the large-scale development and

[13] Case 249/81 *Commission* v. *Ireland* (*"Buy Irish"*) [1982] ECR 4005.

deployment of renewables within MSs, such improved certainty in the EU-level legal framework should be beneficial to improving the investment and project climate in the renewables field in the future. It is for that reason worthy of serious consideration in any new EU renewables directive, but particularly so under a minimum harmonisation directive, due to the range of options left open to MSs with regard to types of support (etc) for renewables.

5 Soft harmonisation with a feed-in premium system: drafting questions

§5.1 Feed-in premiums and Article 34 TFEU: justifying import restrictions

An EU directive involving soft harmonisation (as defined above, §2.2) and specifying that Member States must use the instrument of a feed-in premium - with technology-specific banding, and including details as to how that instrument should be designed (duration of support, technologies covered), but leaving choices to MSs as to some other details and the levels of support granted – would seem, *prima facie*, to create a restriction upon imports. This is due to that scheme's combination of a purchase obligation and a guaranteed additional return above the market price for electricity, which mean that it is made more difficult for electricity suppliers to purchase imports of renewable electricity and producers from other countries find it much harder to sell into the MS with that support scheme. (For detailed analysis of these issues, see Report D3.2, §3.1.8.)

As a result, the import-restrictive effect of the EU renewables directive itself would need to be justified; any extra elements of the MS's national scheme which implemented that directive and exacerbated the position would be likely to require justification as well. The additional element to the discussion in §4.3, above, is that the recitals to the directive itself (and probably also the text of some of the relevant provisions establishing the detailed elements of the feed-in premium) would need to establish that the directive's regime was necessary to achieve public interest goals and proportionate to doing so. Thus, an elaboration of the environmental (and/or "health and life of humans, animals and plants") and public security (in the sense of security of supply) goals of the new renewables directive would be required.

Finally, under any ground of justification, the measure would need to be necessary and proportionate in relation to the objectives pursued: i.e. "environmental protection" and/or "public security". This so-called "proportionality test" comprises a number of stages. First, is the measure is necessary to achieve the aims pursued? This requires there to be at least a "reasonable connection" between the measure and its objectives. Second, the Court engages in a weighing or balancing exercise: it looks to whether the measure in question has the least distortive effects on free movement, or whether the same objectives could be achieved through less restrictive means. In *PreussenElektra* (§3.3.2, above), the Court 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 harmonisation of support schemes. 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, in cases involving judicial review of conditions similar to those in the case of RES support, the CJEU has held that the EU legislature must be allowed a "broad discretion".

For example, in *Nutri-Link*,[14] the Court considered provisions of an EU Directive which constituted a restriction of what is now Article 34 TFEU and which the EU legislature justified on the grounds of the "protection of human health" (Article 36 TFEU). The Court considered that this policy area entailed "political, economic and social choices" in which the EU was called to "undertake complex assessments". It held that "consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue ... ." The barrier of "manifestly inappropriate" is significantly higher than that of "proportionality" *stricto sensu*.

Member States could argue that setting binding national minimum targets is a sufficiently far-reaching means to achieve the objective of developing national RE support. In principle, it should be irrelevant which type of renewables support mechanism is deployed, as long as Member State reaches its target. However, lessons learnt from Directive 2009/28/EC show that this is not the case in practice. Member States face various significant problems in promoting RE support at national level. If a *particular* type of support scheme – here, a feed-in premium, based upon the results of the modelling and other analysis in this project - proves *significantly* more efficient and effective than any of the other existing schemes, or if having *one single* support scheme would prove significantly more efficient for RE support in Europe than various different schemes, it is arguably proportionate to impose a harmonised scheme upon all Member States. There currently exist significant differences between the various national RE support schemes. These differences, in themselves obstacles to the free movement of "goods" (electricity), would be eliminated by imposing one harmonised support scheme. The environmental benefits which such a soft harmonisation would bring would include: increased renewables deployment, potentially enhanced reductions in greenhouse gas emissions, while reducing trade distortions currently created by the co-existence of various different national schemes.

Thus, it can be concluded that imposing one single RE support scheme in the form of a harmonised feed-in premium is: (1) necessary to achieve the objective pursued ("environmental protection" and/or "public security" in the form of increased development of RES); and (2) the least restrictive means to achieve this, given that less trade-distortive measures such as binding minimum targets do not sufficiently achieve the objective. These details provide important guidance to those drafting any future EU soft harmonisation directive.

§5.2 Feed-in premium and the Energy Taxation Directive 2003/96/EC

A final drafting point to note concerns the current position under the Energy Taxation Directive 2003/96/EC, where preferential treatment of renewable energy is allowed by means of tax exemptions adopted by the Member States (Article 15 of the Energy Taxation Directive). It should be clarified what relationship, if any, is envisaged between a new EU

[14] 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-06451, para. 52.

renewables directive of the soft harmonisation type and this tax exemption. A soft harmonisation measure could be envisaged which might render this opportunity to exempt renewables an obligation on the MSs: to do so, the caveat in Article 194(3) TFEU would have to be satisfied: fiscal measures concerning energy require unanimity in a vote in Council, and involve only consultation of the European Parliament, and so would be difficult to incorporate within a single harmonising instrument. Thus, it is suggested that any reference to fiscal matters and their interaction with a soft harmonisation directive for renewables should be carefully designed and minimalist in nature, clarifying that the new directive does not intend to alter or affect the position under the Energy Taxation Directive.

6 Conclusions

Given the relative similarity between the minimum and soft harmonisation pathways assessed in the course of this project, it is clear that many of the key drafting elements, guidelines and issues in these two pathways will in practice address similar questions (§3, above). This is reflected in the analysis provided in report D3.2 and developed in this report. Thus, the issues of the appropriate legal basis (Article 194 TFEU) and type of legal instrument (directive) are resolved in similar fashion under both pathways, and identifying precisely the goals pursued by such EU harmonisation (with strong supporting evidence) under either pathway will prove crucial for establishing compliance with the legal principles of subsidiarity, proportionality, the free movement of goods and the EU State aid rules. Further, both pathways will require care in drafting to ensure compatibility and coherence between any new EU renewables harmonisation directive and pre-existing EU secondary legislation on related energy topics.

The specific details involved under the two pathways, however, mean that more far-reaching EU "soft" harmonisation (§5, above) may itself require justification in the face of Article 34 TFEU, as well as involving more specific discussion concerning its interaction with EU legislation on energy taxation. Meanwhile, minimum harmonisation (§4, above) will focus attention more squarely upon the compatibility of Member State implementation measures with EU law principles on free movement of goods and State aid: thus, one strong indication from the analysis in this project is that the certainty and predictability of national renewables support regimes (adopted to implement an EU minimum harmonisation directive) would be strongly enhanced by clear EU rules and guidelines concerning the applicability and implications of such EU law requirements. This, while not strictly a drafting guideline for an EU renewables harmonisation directive *per se*, is nevertheless a crucial accompaniment to such a measure, if the impact of such a directive is to realise its full potential in practice.