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

D3.2 Report

Report on legal requirements and policy recommendations for the adoption and implementation of a potential harmonised RES support scheme

Authors:

Dörte Fouquet & Jana Nysten (*BBH*)

Angus Johnston & Eva van der Marel
(University of Oxford)

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

Project consortium:

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

Dörte Fouquet & Jana Nysten
Becker Büttner Held (BBH)

Avenue Marnix 288
B-1000 Brussels
Belgium

Phone: +322 204 44 00
Fax: +322 204 44 99
Email: jana.v.nysten@bbh-online.be

This document

Contains the 'Report on legal requirements and policy recommendations for the adoption and implementation of a potential harmonised RES support scheme'

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

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Introduction

This report draws on two previous works, developed in the course of this project.

The Report entitled "D3.1: Report on potential areas of conflict of a harmonised RES support scheme with European Union Law"[1] presented a first inventory of all the legal provisions in European Union ("EU") primary and secondary law relevant for the development and introduction of a harmonised support scheme beyond 2020. The inventory explains the general meaning and interpretation of the respective provisions, based upon the case law of the European Court of Justice ("CJEU") and legal literature.

The Report entitled "D2.1: Key policy approaches for harmonisation"[2] identified different degrees of harmonisation as well as matching policy pathways. The policy pathways identified in Report 2.1 now need to be analysed according to their respective legal feasibility and their compatibility with existing EU law. This report therefore carries out a detailed analysis and assessment of the legal feasibility of those policy pathways and specifies which provisions of EU law are applicable to each of them. Our findings will be taken into account in the "multi-factor criteria analysis" for the overall assessment and ranking of the different policy pathways, and the outcome of this exercise will help to direct further research. They will also be used to develop policy recommendations as overall conclusions from the project.

The legal feasibility of the different harmonisation approaches and policy pathways will be assessed based upon the current legal framework. A measure is thus considered legally feasible if an appropriate legal basis and required procedural framework exist under the relevant existing EU law (i.e. the Treaty on the Functioning of the European Union ("TFEU" or "Treaty")). We will not consider the possibility for Treaty amendment, the procedures for which are provided in Article 48 of the Treaty on European Union ("TEU"), since this would open up unlimited possibilities. Logically, this report will limit its compatibility assessment with general EU law to measures which are deemed legally feasible under the current provisions of the Treaty.

A policy pathway is considered 'compatible' when it does not conflict with the provisions of the Treaty, as well as relevant secondary legislation, or when it can be designed in such a way so as to be compatible.[3] See our previous report "D.3.1

[1] D. Fouquet, *et al.*, *Report on potential areas of conflict of a harmonised RES support scheme with European Union Law*, 2012.
[2] P. Del Rio *et al.*, *Key policy approaches for harmonisation of RES(-E) support in Europe – Main options and design elements*, 2012.
[3] E.g. by amending pre-existing secondary legislation to ensure compatibility.

Report on potential areas of conflict of a harmonised RES support scheme with European Union Law" for an overview of the relevant provisions. A measure is considered incompatible when it inherently conflicts with those provisions. In cases where the degrees of harmonisation and policy pathways leave room for different design options, it will be indicated, where possible, which should be chosen to make the measure compatible.

Contents

1. Meaning of harmonisation in the EU and choice of legal basis

This section briefly introduces the relevant legal definitions, e.g. 'full', 'medium' and 'minimum' harmonisation, in order to provide clarity (§1.1), before considering the appropriate legal basis for an EU measure approximating Member States' national legislation in the area of renewable energy (§1.2).

§1.1 Defining harmonisation

Harmonisation, whilst at times hard to define,[4] is a 'top-down' form of regulation since harmonisation measures are adopted by the EU institutions and entail legally binding obligations on the Member States. It has been referred to as the "Community method"[5] and is among the most far-reaching and intrusive of all legally binding measures which the EU may take, in contrast to the choice of instruments available to the EU in those areas in which EU action is limited to supporting, coordinating and supplementing national actions without amounting to harmonisation (pursuant to Article 2(5) TFEU and Article 6 TFEU). Such 'supporting' measures may take the form of, for example, guidelines on best practice, monitoring and legal incentive measures. Whilst they are legally binding acts and normally passed in accordance with the ordinary legislative procedure, their impact is limited. 'Support' measures are designed to achieve the specific purpose of the objectives listed in the Treaty provisions on the basis of which they are taken, which are usually of a very general nature. In stark contrast to harmonisation, 'support' measures may be considered as a form of 'persuasive soft law'.[6] These various instruments are not mutually exclusive, and harmonisation can co-exist with, and be complemented by, 'softer' forms of governance. Recent years have seen a plethora of (more or less decentralised) methods of governance being used in areas in which the EU lacks competence to harmonise, often referred to as 'new' or 'experimentalist' methods of governance, and which essentially aim at mutual learning through the exchange of information and best practices

[4] It is clear, however, that it needs to be distinguished from coordination – which would mean that the different rules or procedures remain in place, but that (e.g.) the different agencies take into account each other's decisions.

[5] P. de Schoutheete, *The Evolution of Intergovernmental Cooperation in the European process* (Challenge Europe, 2, 2006), stemming from its evolution under the European (Economic) Community Treaty, as distinguished from intergovernmental approaches used under the old TEU and retained today for CFSP.

[6] P. Craig, & G. (hereafter: 'Craig & de Búrca, *EU Law*'), *EU Law: Text, Cases, and Materials* (Oxford OUP, 5th edn., 2011), at 86, 87; see, further, L. Senden, *Soft Law in European Community Law* (Oxford, Hart Publishing, 2004).

between the Member States.[7] In the face of disagreement on the substantive content and distribution of institutional competences, it is not unusual that a set of more or less institutionalised procedures is decided upon which allows coordinated action between the Member States whilst allowing for (various degrees of) flexibility.[8] An example of this is the Open Method of Coordination ("OMC"), developed in the 1990s and now enshrined in Article 148 TFEU.

However, whilst 'top-down' regulation by way of harmonisation contrasts with these more or less decentralised modes of governance,[9] harmonisation itself can also be achieved in different degrees. The political sensitivity of certain policy areas has prevented Member States from conferring upon the EU institutions the powers needed exhaustively to harmonise each policy area. In addition to the different degrees of harmonisation possible, harmonisation can be achieved in different ways. Legal documents can be aligned whilst remaining in existence, or they can all be replaced by one single new document, in which case one speaks of "codification".[10]

Historically, harmonisation in EU law has been developed with a view to removing obstacles to the establishment and functioning of the internal market.[11] The focus has long been on removing all national barriers to the cross-border supply of goods and services which could not be justified under Articles 34 and 36 TFEU.[12] This form of exhaustive harmonisation (from here on "full harmonisation") leaves little scope for divergent national laws and has often been necessary in very technical areas, for example the development of the CE mark for goods.[13] The Court of Justice of the EU ("CJEU") has defined full harmonisation as exhaustive regulation on EU level that does not leave room for the Member States to adopt further measures in national legislation.[14] Full harmonisation has been proposed in some

[7] There exists a vast amount of legal literature on methods of governance in the EU, e.g.: C.F. Sabel & J. Zeitlin, 'Learning from difference: the new architecture of experimentalist governance in the EU' (2008) 14 *European Law Journal* 271-327; G. de Búrca, 'New Governance and Experimentalism: An Introduction' [2010] *Wisc. L. Rev.* 227; J. Scott, *Environmental Protection: European Law and Governance* (Oxford, OUP, 2009).
[8] E.g. in D. Trubek, and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 343.
[9] Keeping in mind the nonetheless considerable impact upon Member State action of some 'soft' governance techniques (e.g. the OMC) and the lack of a clear-cut distinction between what can be considered 'hard' and 'soft' law, both in the EU and in general.
[10] M. Fauré, 'The Harmonisation, Codification and Integration of Environmental Law: A Search for Definitions' [2000] *European Environmental Law Review* 174.
[11] Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* (C.H. Beck, München, 2011) (hereafter, 'Grabitz/Hilf/Nettesheim'): Article 114 AEUV, para. 26.
[12] European Commission, 'Guide to the implementation of directives based upon the New Approach and the Global Approach', available at: http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf, at 8.
[13] See Directive 97/7/EC [1997] OJ L144/19.
[14] Case 275/85 *Commission* v. *Denmark* [1987] ECR 4069, para. 12; Case 148/78 *Ratti* [1979] ECR 629, para. 26f.

areas relating to consumer protection, for example:[15] the relevant legislation specifically sets out that the Member States are no longer competent to adopt or maintain differing rules in this area.[16] However, it should be noted that, even in the event of a full harmonisation measure based upon the internal market clause (Article 114 TFEU), Member States may continue to maintain or establish new national legislation contrary to a full harmonisation measure where the (strict) conditions of Article 114(4) and (5) TFEU are fulfilled. Moreover, the harmonisation measure may include a safeguard clause (pursuant to Article 114(10) TFEU), allowing Member States temporarily to derogate from the measure under certain conditions. We will consider these Treaty-based derogation options and the CJEU's interpretation of them in §1.2, below.

Whilst full harmonisation has played an important role in EU market law, it is not always the most desirable tool to achieve integration. The benefits of maintaining legal diversity within the EU have, at times, been highlighted, and as such the CJEU has held that every market actor has the right to choose the legal order that offers him the greatest freedom.[17] In addition to economic considerations and market design questions, the level of harmonisation which can be achieved is therefore also a question of whether harmonisation is politically desirable.[18] The Member States must have conferred the competence to harmonise upon the EU institutions (Article 5 TEU), thus having chosen to limit their own national legislative competence in that particular area. This explains why not all areas of EU law are open to the same 'intrusive' level of harmonisation. Minimum harmonisation, as opposed to full harmonisation, allows for minimum provisions to be laid down uniformly across the Member States but leaves scope for more stringent national measures, within the usual limits of the Treaties.[19] The minimum harmonisation approach demonstrates sensitivity to national initiatives based upon national perceptions and agendas and allows Member States to adopt differing legislation tailored to their individual needs.[20] Minimum harmonisation has been recognised as the *modus operandi* of environmental regulation (see

[15] E.g. Directive 1985/374 on products liability [1985] OJ L210/39, or Directive 2005/29 on Unfair Commercial Practices [2005] OJ L149/22, or the new Directive on Consumer Rights that will replace, as of 13 June 2014, the current Directive 97/7/EC. See, generally: European Commission, 'Guide to the implementation of directives based upon the New Approach and the Global Approach', available at: http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf.
[16] Compare Article 4 of the new Directive on Consumer Rights: "Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of protection". Also: J. Smits 'Full harmonisation of consumer law? A critique of the Draft Directive on Consumer Rights' (2010) 18 *European Review of Private Law* 5, at p. 6ff.
[17] Case C-212/97 *Centros* [1999] ECR I-2835, para. 27.
[18] Grabitz/Hilf/Nettesheim, Article 114 AEUV, para. 31.
[19] B. de Witte, D. Hanf & E. Voss (eds.), *The many faces of differentiation in EU law* (Intersentia, 2001), p. 148.
[20] *Ibid.*, p. 153.

Article 192 TFEU).[21] Certain EU measures based upon the internal market clause, Article 114 TFEU, equally include a so-called minimum harmonisation clause allowing Member States to adopt more stringent national legislation. However, there remains a great deal of controversy concerning whether minimum harmonisation based upon Article 114 TFEU is both possible and encouraged by the European Commission.[22]

In other areas, the Member States have chosen in the Treaty to confer only supporting and complementary competence upon the EU institutions, rather than the power to adopt harmonising measures: these areas include the provisions on social policy (Article 153 TFEU), public health (Article 168 TFEU) and culture (Article 169 TFEU). Article 2(5) of the TEU explains that EU actions to coordinate Member State action do not supersede their competence and cannot entail any harmonisation. Coordination thus means that the EU can undertake some efforts – and to some degree bind the Member States – to put them all on the same track and lead the direction, but cannot take all competence away from them.[23]

This report will consider the possibility of pursuing (any of) these degrees of harmonisation (e.g. full harmonisation, minimum harmonisation and also the possibility of a half-way house) as and where appropriate, subject to limits of the legal basis on which the EU measure is to be taken. We will now turn to an analysis of the appropriate legal base(s) for approximating Member States' national laws and actions in the area of energy.

§1.2 Choice of legal basis

The EU's main harmonisation competences can be found in Articles 114 and 115 TFEU.

Since its insertion into the Treaties by the Single European Act in 1987, Article 114 TFEU has become the main legal basis for harmonisation. It allows for an EU measure to approximate provisions laid down in the laws, regulations or administrative actions of the Member States which have as their object the establishment and functioning of the internal market. Any EU measure can be used

[21] N. de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' (2012) 9 Journal for European Environmental & Planning Law 63-70, at 69.
[22] S. Weatherill in P. Oliver (gen. ed.), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing, 2010), Ch. 13, 427-486.
[23] However, this does not necessarily mean that legally binding acts adopted in the context of the EU's coordination tasks will be less far-reaching than harmonisation. In this regard, the limit in Article 2(5) TFEU can be subject to debate and it is likely that a clear determination will have to wait until there is a decision by the European Court of Justice.

(e.g. Regulation or Directive), and voting in the Council is done by qualified majority, while the European Parliament is co-legislator.

Article 115 TFEU has become of less "significance" since the insertion of Article 114 TFEU, but provides the competence to harmonise Member States' laws, regulations and administrative actions where they directly affect the establishment and functioning of the internal market. Its procedural requirements are strict. Harmonisation on the basis of Article 115 TFEU is only allowed by means of a Directive and requires unanimity voting in the Council.

Article 116 TFEU allows the European Commission to consult with the Member States whose national laws, regulations or administrative acts distort competition, and, where such consultation does not result in (voluntary) removal of the distortion, to adopt legislation.

Moreover, as mentioned in the previous section, the EU has the competence to introduce minimum standards with regard to environmental protection (Article 192 TFEU); Legislative competence in the field of energy was introduced by the Lisbon Treaty and is found in Article 194 TFEU, with the following objectives: ensuring the functioning of the energy market; ensuring the security of energy supply in the EU; promoting energy efficiency, energy savings and new and renewable forms of energy; and promoting the interconnection of energy networks. Article 194(2) TFEU is said to apply "without prejudice to Article 192(2)(c)", and an EU measure regulating the energy market may therefore still be based upon Article 192 TFEU, provided that the main objective is the protection of the environment and not the harmonisation of the internal (energy) market.[24] This may remain useful for certain measures which aim to promote renewable energy. It should be noted that Article 192 TFEU only allows for minimum harmonisation, since Article 193 TFEU provides that Member States can adopt more stringent measures in order to establish or maintain a higher level of environmental protection.

Whilst there is no explicit hierarchy between Article 194 TFEU and the other Treaty provisions, Article 114(1) TFEU applies "[s]ave where otherwise provided in the Treaties", which expresses its subsidiary nature with regard to more specific provisions. In establishing whether Article 194 TFEU is more specific or not, it should be noted that Article 194(2) TFEU also stipulates that it applies "without prejudice to the application of the other provisions of the Treaties". This is a familiar phrase which appears in various other places in the Treaty, e.g. Article 19 TFEU concerning discrimination. With regard to the predecessor of Article 19 TFEU (Article 13 EC), Bell has explained that "(t)o the extent that there is an overlapping legal base between (two provisions), the reference … to 'without prejudice to the other provisions' tends to support the view that where a more

[24] Compare: Grabitz/Hilf/Nettesheim, Article 192, para. 69 (stressing the distinction between the environmental competence and the internal market competence).

specific legal base exists, … then (the specific legal base) should be used".[25] Considering both the aim and the wording of Article 194(2) TFEU, in comparison with more general Treaty provisions such as Article 114 TFEU, it is clear that Article 194 TFEU is the most specific provision (i.e. a *lex specialis*) and therefore constitutes the appropriate legal basis for an EU measure regulating the internal energy market. The *lex specialis* nature of Article 194 TFEU has been confirmed by the CJEU in *European Parliament* v. *Council*,[26] where it stated that Article 194 TFEU "constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives". This resolves at least one open question about the patchwork of competence in the energy field which existed before the Lisbon Treaty entered into force. Note that the phrase "without prejudice to the application of other provisions of the Treaties" will also ensure that energy legislation fits into the broader framework of existing EU law.

Only where the proposed EU measure aims at an objective different from those listed in Article 194 TFEU, could (and indeed should) the respective other legal basis (e.g. Article 114 TFEU) still be used.

The energy market, which is an integral part of the internal market in general,[27] is an explicit objective of Article 194(1) TFEU. The competence to ensure the functioning of the energy market would seem to allow for comprehensive regulation and control. The EU is not only given the responsibility of adopting a legislative framework within which market powers can interact, but the term 'functioning' leaves room for certain political choices as well. Thus, a measure based upon Article 194 TFEU could equally aim to regulate energy supply and demand or address consumer concerns.[28] However, the central objective should be the removal of the existing barriers and the completion of the internal energy market.[29] Given that Article 194 TFEU now has to be considered as the *lex specialis* – the only appropriate legal basis – for measures aiming at the functioning of the energy market, this means that there is no room left for Article 114 TFEU to apply.[30] The same applies in principle for measures aiming at security of supply, support to energy efficiency, and interconnection of networks.[31]

For renewable energy, however, Article 194 only mentions "the development of new and renewable energy": on this basis, it has been argued that its coverage

[25] Mark Bell, 'The New Article 13 EC Treaty: A Sound basis for European Anti-Discrimination Law' (1999) 6 *Maastricht J. Eur. & Comp. L.* 9.
[26] Case C-490/10, nyr, judgment of 6 September 2012, para. 67.
[27] The energy market referred to is thus the internal market for energy, which the Commission aims to complete by 2014: compare Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L211/55 (14.8.2009).
[28] Grabitz/Hilf/Nettesheim, Article 194, para. 15.
[29] Compare: Grabitz/Hilf/Nettesheim, Article 194, para. 15.
[30] W. Kahl, 'Die Kompetenzen der Energiepolitik nach Lissabon' (2009) EuR 601, p. 618.
[31] *Ibid.*, p. 618.

may not be exhaustive, as the term "development" can be interpreted narrowly and may refer only to the technical development. It would include measures such as in the European Commission's SET-Plan,[32] but it would not cover operational economic support, as in a classical support scheme.[33] Following this line of argument, it seems as though measures to promote renewables could still be taken under the environmental competence,[34] provided that they specifically and primarily have environmental objectives.[35] However, generally and by the majority, Article 194 TFEU is considered to cover all renewable energy legislation, which is why we chose to focus on that provision. Further, as will be seen in the following, most harmonisation approaches would seem to aim primarily at the functioning of the energy market, so that the different interpretations of the renewable energy competence are less relevant.

Having established that Article 194 TFEU is the appropriate legal basis for a measure aiming to approximate Member States' national legislation with regard to the energy market, we must now examine to what degree (if any) a measure based upon Article 194 TFEU may harmonise. Article 194(2)'s second paragraph contains an important caveat, namely that measures based upon this provision:

> "… 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)."

We will refer to these as "Member States' energy rights". The insertion of the caveat was insisted upon by certain Member States[36] and was subject to considerable negotiation after the rejection of the Draft Constitutional Treaty.[37] The caveat triggers more questions than answers as to the EU's competence to regulate the energy market, and various interpretations will be suggested in the following paragraphs. Depending upon the interpretation given to the caveat, the degree of harmonisation which Article 194 will allow may differ; and it should be emphasised that, as yet, there is no authoritative judgment of the CJEU on the meaning and implications of this caveat.

[32] 'European Strategy Plan for Energy Technology', COM (2007) 723 final.
[33] Callies/Ruffert, *EUV AEUV* (2011): Article 194, para. 15.
[34] W. Kahl, 'Die Kompetenzen der Energiepolitik nach Lissabon' (2009) EuR 601, at 618. However, in recent discussions with the Commission, they seemed not to follow this interpretation, but rather referred to Article 194 TFEU as the only – or at least the obvious – legal basis.
[35] See: Callies/Ruffert, *EUV AEUV* (2011): Article 192, para. 27. Further: Client Earth, 'The impact of the Lisbon Treaty on climate and energy policy – an environmental perspective' (January 2010), available at: http://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-impact-on-climate-and-energy-policy.pdf: see 14ff.
[36] Compare H. Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy' (2011) 1 *European Energy Journal*, 33, at 35 and 36.
[37] W. Kahl, 'Die Kompetenzen der Energiepolitik nach Lissabon' (2009) *EuR* 601, at 622.

§1.2.1 Absolute and relative energy rights

From the outset, it can be observed that Member States' 'energy rights', as listed in the caveat, can either be relative or absolute. Both possibilities will be considered. In the light of a consistent interpretation of EU law,[38] it can be suggested that the meaning of the caveat bears some similarity to Article 192(2)(c) TFEU. Article 192 TFEU is the appropriate legal basis for EU measures aimed at environmental protection, and Article 192(2)(c) TFEU states that, by way of derogation, 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' should be adopted using a different legislative procedure[39] from other EU measures based upon that provision. It has therefore been suggested that Article 194 TFEU, similarly to Article 192 TFEU, includes a threshold of 'significant effect'. In other words, an EU measure based upon Article 194 TFEU shall not 'significantly' affect Member States' 'energy rights',[40] but any effect on Member States' 'energy rights' below this threshold does not infringe upon the Treaties. This theory will be referred to as the 'significance-threshold' and is the premise for several of the hypotheses suggested below.

However, it should be remembered that there is no explicit mention in Article 194(2) TFEU of a threshold of any kind. A level of uncertainty therefore remains as to the validity of an interpretation which considers a threshold to be implicit in the article's wording. Still, there are various reasons to believe that the CJEU could, and possibly would, interpret Article 194(2) TFEU in this way.[41]

Taking a step back, we can observe that the CJEU has at times adopted some form of appreciability test without there being an explicit basis in the Treaty. It is well known that for an agreement to fall within the scope of Article 101(1) TFEU – which prohibits particular agreements or concerted practices which "may affect trade between Member States" and have as their object or effect the "prevention, restriction or distortion" of competition – the CJEU has held that an agreement must affect competition and inter-Member State trade to an "appreciable extent".[42] Equally relevant are the CJEU's more recent

[38] Case C-225/91 *Matra SA* v. *Commission* [1993] ECR I-3203, para. 42.
[39] *Viz*.: requiring unanimous voting in the Council, rather than qualified majority voting (as under the EU's 'ordinary legislative procedure', for which see Article 289 TFEU).
[40] E.g. C. Callies & M. Ruffert, *EUV/EGV: das Verfassungsrecht der EU mit Europaischer Grundrechtecharta: Kommentar* (München: C.H. Beck, 4th edn., 2011); M. Ludwigs, 'Band 5: Energierecht', in M. Ruffert (ed.), *Europäisches sektorales Wirtschaftsrecht* (Hatje/Muller-Graf, 2012).
[41] Beyond the obvious similarities of Article 194(2) TFEU with Article 192(2)(c) TFEU, pointed out earlier in this section.
[42] Case 22/71 *Béguelin Import Co* v. *GL Import-Export S.A.* [1971] ECR 949, para. 16. The Commission has set out guidelines as to when it deems an agreement to be of minor importance,

interpretations of Article 34 TFEU (free movement of goods), a provision which can be seen as "a crucial element in determining the constitutional relationship between the Union and its Member States".[43] In its judgments in *Trailers*[44] and *Jetskis*,[45] the CJEU seems to have adopted an effects-based approach including a *de minimis* threshold to find a national measure in breach of Article 34 TFEU,[46] by specifically examining the measure's hindrance of market access.[47] The *weight* given to the magnitude of a measure's impact on market access is especially evident from the ruling in *Jetskis*, where the CJEU observed that "where the national regulations … have the effect of *preventing* users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of *greatly restricting* their use, … such regulations have the effect of hindering the access to the domestic market".[48] As Dougan has observed, this "suggests the need to demonstrate a considerable impact on consumer demand for the relevant goods, perhaps even of practical equivalence",[49] and thus implies a considerable threshold beyond which access to the market is deemed to be hindered and, unless justified, there is a breach of Article 34 TFEU. Whilst the 'market access test' has not necessarily completely superseded the CJEU's

using market share thresholds to quantify whether or not there is an appreciable restriction of competition (Commission Notice on Agreements of Minor Importance which do not appreciably restrict Competition under Article 81(1), [2001] OJ C 368/13), but it should be noted that such Commission documents create legitimate expectations which bind the Commission in its decisional practice, but do not bind the Court: see Joined Cases T-374, 375, 384 and 388 *European Night Services* v. *Commission* [1998] ECR II-3141. For general discussion of appreciability in this area, see J. Alison, 'Journey Toward an Effects-Based Approach under Article 101 TFEU – the Case of Hardcore Restraints' (2010) 55 *Antitrust Bulletin* 783.

[43] M. Dougan, 'Legal Developments' (2010) 48 *JCMS* 163, at 165.

[44] Case C-110/05 *Commission* v. *Italian Republic ('Trailers')* [2009] ECR I-519.

[45] Case C-142/05 *Åklagaren* v. *Percy Mickelsson and Joakim Roos ('Jetskis')* [2009] ECR I-4273.

[46] The CJEU has examined a national measure's effect on market access since its *Keck* judgment (Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097), but until recently did so by laying the emphasis on the discriminatory nature of the measure and without applying a *de minimis* test (although such a test was suggested by AG Jacobs in his Opinion of 24 November 1994 on Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* v. *TF1 Publicité SA and M6 Publicité SA*, at para. 42). With regard to freedom of movement of services and workers, ensuring market access is equally an important consideration in examining compliance with the free movement provisions, but the CJEU's focus remains on the 'directness' of the hindrance to market access (Case C-384/93 *Alpine Investments BV* v. *Ministerie van Financiën* [1995] ECR I-1141; Case C-415/93 *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman* [1995] ECR I-4921). For general discussion, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: OUP, 3rd edn., 2010), esp. Chs. 5 (goods) and 9–11 (workers, establishment and services, respectively).

[47] Considering that the national measures in question laid down restrictions on use, the CJEU would normally have considered them using its *Dassonville* formula to see whether the measures were 'capable of hindering, directly or indirectly, actually or potentially, intra-community trade' (Case 8/74 *Procureur du Roi* v. *Benoit and Gustave Dassonville* [1974] ECR 837, para. 5) or, if the measures constituted selling arrangements, whether or not they affected in the same manner, in law and in fact, marketing of domestic products and of those from other Member States (*Keck and Mithouard*, n. 46, above, at para. 12). This emphasis on hindering market access can also be found in Case C-265/06 *Commission* v. *Portugal* [2008] ECR I-2245, paras. 33-35.

[48] Case C-142/05, n. 13, above, para. 28 (emphasis added).

[49] Dougan, n. 43, above, at 170.

traditional approach to examining the scope of Article 34 TFEU,[50] the use of a *de minimis* threshold in establishing a hindrance to market access reflects a move towards a more practical take on the interpretation of Article 34 TFEU,[51] and the possibility that the CJEU may take a similar approach to interpreting Article 194(2) TFEU.[52]

At any rate, as will be discussed below, if no threshold of any kind were applied to Article 194(2) TFEU, then the introduction of a new, explicit energy competence to the Treaties would in fact result in significantly restricting the EU's competence in the field of energy. It would be surprising if the CJEU were to adopt such a narrow and contradictory reading of Article 194 TFEU. Therefore, whilst acknowledging the objections to imposing a 'significance-threshold' on Article 194(2) TFEU, we consider it likely that the CJEU would adopt an appreciability test of some kind in determining the extent to which an EU measure may affect a Member State's 'energy rights'. As can be observed from the hypotheses set out below, in the absence of any threshold, it seems that Article 194 TFEU would leave little scope for EU regulation in the field of energy.

§1.2.2 Derogation options

It can be argued that Member States' energy rights are not "significantly" affected if Member States may derogate from a harmonisation measure based upon Article 194 TFEU. The possibility to derogate can be imagined along similar lines to the derogation options available under Article 114 TFEU, which allows for a full harmonisation measure aimed at ensuring the functioning of the internal market, whilst at the same time providing Member States with the possibility to derogate

[50] The CJEU in *Commission* v. *Italy* (n. 44, above, para. 37) observes that Article 34 TFEU captures three categories of measures: discriminatory measures, product requirements and 'any other measure which hinders products originating in other Member States to the market of a Member State'. The latter category presumably includes selling arrangements. Therefore, non-discriminatory selling arrangements which 'hinder' market access now appear to fall within the scope of Article 34 TFEU (subject to the *de minimis* threshold), where previously only those non-discriminatory selling arrangements which 'prevented' market access did. As Dougan has observed (n. 43, above, at 169) this may also indicate that the product requirements/ selling arrangement distinction has become redundant, since discriminatory selling arrangements are necessarily caught by the first category, as are those which hinder market access.

[51] For an analysis of the inconsistencies in the CJEU's use of the 'market acces's' test more generally, across the free movement provisions, see J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev* 437.

[52] Note that this is not necessarily so. AG Jacobs, in his Opinion on *Leclerc-Siplec* (n. 46, above), warned that while a *de minimis* test could be used with regard to what is now Article 34 TFEU, such a test would be out of place with regard to charges having equivalent effect to customs duties, given that: the prohibition of such charges is more specific than the prohibition of measures having equivalent effect to a quantitative restriction, and the Treaty has as its objective to eliminate all customs barriers (para. 47). Arguably, this objection to a *de minimis* threshold does not apply with the same force to Article 194 TFEU because of the lack of specificity surrounding the prohibitions laid down in Article 194(2) TFEU and in light of the objectives listed in Article 194(1) TFEU.

from that harmonisation in certain circumstances. These circumstances are set out in Article 114(4) and (5) TFEU and, while they most likely only apply in the context of Article 114 TFEU itself, they may provide guidance on how derogation options could be used so as to ensure that a measure does not affect Member States energy rights. So:

- *if* the caveat in Article 194(2) TFEU is interpreted as only prohibiting an EU measure from "significantly" affecting Member States' energy rights,
- *and* if the existence of some sort of derogation options is considered as sufficiently allowing Member States to exercise those rights,
- *then*, following this interpretation, it will be possible to adopt an EU measure on the basis of Article 194 TFEU aimed at harmonising the energy market to a "significant" extent.

However, pursuing this hypothesis requires a detailed analysis of the conditions of Article 114(4) and (5) TFEU, which falls outside the scope of this report.[53] Moreover, considering the lack of any textual indication that the caveat in Article 194(2) TFEU indeed refers to such derogation options, this possible interpretation will, for the moment being, be disregarded as a legally feasible option.

§1.2.3 Inserting an 'opt-out' clause or a Treaty-level derogation

The caveat in Article 194(2) TFEU may imply that an EU measure based upon Article 194 TFEU should include an "opt-out" clause, so that Member States' energy rights remain unaffected. Depending upon whether or not a *de minimis* threshold is applied (e.g. one of "significance"), such a clause would have to be more or less narrowly construed. If it is presumed that an EU measure may not affect Member States' energy rights whatsoever, then the possibilities to opt out must be extensive. If it is presumed that an EU measure may not "significantly" affect Member States' energy rights, then this is less so the case. An opt-out clause can be construed along similar lines to the amendments to the Deliberate Release of Genetically Modified Organisms (GMOs) Directive[54] recently proposed by the Commission.[55] Following the example set with regard to GMOs, Member States which opt out of the EU harmonisation measure will nevertheless have to comply with the provisions of the Treaties. Member States would therefore not be exempt from complying with EU law more generally and in particular with the free

[53] For a more detailed analysis, see A. Johnston & E. van der Marel, '*Ad lucem*? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU' [2013] *European Energy and Environmental Law Review* 181.
[54] Directive 2001/18/EC [2001] O.J. L106/1.
[55] 'Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory', COM (2010) 375 final (13 July 2010).

movement provisions, e.g. Articles 34 and 36 TFEU, as well as the principle of proportionality.

A similar, but subtly different, approach might understand the caveat as amounting to a free-standing derogation provided expressly by the TFEU, which would allow Member States to derogate from the requirements of legislation adopted under the first paragraph of Article 194(2) where its 'energy rights' were ("significantly) affected.[56]

Taking into account the lack of information regarding how an "opt-out clause" would be construed and the chance that Member States would not make use of the possibility to "opt out" or derogate, we will assume that either interpretation of the caveat in Article 194 TFEU allows only for some level of minimum harmonisation. Further, it should be noted that Declaration 35 attached to the Treaty of Lisbon saw the Member States stressing that Article 194 does not affect a Member State's ability to take the necessary measures to ensure their energy supply in cases of emergency according to Article 347 TFEU. For some, the presence of such a Treaty-level derogation is an argument against construing the Article 194(2) caveat to provide another such derogation (because, if Article 194(2) offers such a derogation then there would have been no need for the Declaration);[57] on the other hand, it might be suggested that the nature of the threshold to justify reliance upon such derogations in each case may be different, so that Article 347 may justify Member State derogations on a wider range of issues, but *only* if the emergency threshold has been reached.

§1.2.4 A unanimous vote in the Council

If the caveat of Article 194(2) TFEU cannot be interpreted as implying some form of derogation or requiring an "opt out" clause, whether on the basis of the 114 TFEU derogation provisions or a similar construction, then two scenarios remain. Arguably, the reference to Article 192(2)(c) TFEU implies that harmonisation measures in the energy market require unanimity voting when the measure risks affecting Member States' rights, as referred to in Article 194(2) TFEU. Despite a

[56] This is one possible interpretation of the approach of J.-C. Pielow & B. Lewendel, 'The EU Energy Policy After the Lisbon Treaty' in A. B. Dorsman *et al* (eds.), *Financial Aspects in Energy, a European Perspective* (Heidelberg: Springer, 2011), Ch 9, at 154, when they refer to the caveat functioning as a "relative escape clause"; this idea was also mooted by A. Johnston, 'United Kingdom', national report in J. Laffranque (ed.), *The Interface between European Union Energy, Environmental and Competition Law: Reports of the XXV FIDE Congress, Tallinn 2012, Volume 2* (Tallinn: Tartu University Press, 2012), 552, and A. Johnston & G. Block, *EU Energy Law* (Oxford: OUP, 2012), at 1-05.

[57] For them, the Declaration seems to be an addition to the caveat in Article 194(2) TFEU, for cases in which the Union did adopt legislation: see Callies/Ruffert, *EUV AEUV Kommentar* (2011): Article 194, para. 21.

certain lack of logic, this interpretation has been considered in academic literature as a viable option.[58]

However, we should consider the genesis of the current wording. In the revised version of the draft Constitutional Treaty (12 June 2003),[59] Article III-152 (as it was then numbered) on energy did include a caveat whose wording mirrored that of what is now Article 192(2)(c) (covering "energy sources" and "supply structure") and which intended that the decision-making process would involve a requirement of unanimous approval in Council by making express and sole reference to the procedure provided for in what is now Article 192(2)(c). This background, allied with *both* the changes made to the wording of what is now Article 194(2), both during the Convention on the Future of Europe and the final agreement by the Member States of the Constitutional Treaty, *and* the fact that Article 194(3) specifically refers to unanimity voting concerning fiscal measures, might be thought to make it strange simply to assume that the new wording intended to retain the original approach.[60]

§1.2.5 A complete competence limit

The final and remaining option is that of a complete competence barrier, where a measure based upon Article 194 TFEU may not (whatsoever) affect Member States' energy rights. If this is interpretation is upheld, then no (or only a very limited) level of harmonisation is possible. However, it should not be forgotten that such a strict interpretation of the caveat would result in the contradictory situation that the insertion of a new and specific shared EU energy competence (i.e. Article 194 TFEU) would lead to fewer possibilities to regulate the internal energy market when compared to the situation prior to the Lisbon Treaty.

[58] L. Hancher & F. Salerno, 'Energy Policy After Lisbon' in A. Biondi *et al* (eds.)., *EU Law After Lisbon* (Oxford: OUP, 2012), Ch. 18, esp. section III; H. Vedder, 'The formalities and substance of EU external environmental competence: stuck between climate change and competitiveness' in E. Morgera (ed.), *The External Environmental Policy of the EU: EU and International Law Perspectives* (Cambridge: CUP, 2012), Ch. 1.

[59] Available at: http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00802.en03.pdf, emphasis added.

[60] An early reaction to the final text of the Constitutional Treaty (L. Hancher, 'The New EC Constitution and the EU Energy Market', in M.M. Roggenkamp and U. Hammer (eds.), *European Energy Law Report II* (Antwerp: Intersentia, 2005), ch. 1, at 7) seemed to suggest that the Article 194(2) caveat should be taken to import a unanimity requirement for the two areas which are identically worded in Article 194(2) and Article 192(2)(c). One could agree with this insofar as the EU measure might be said to involve environmental and energy policy goals (when the procedure under Article 192(2)(c) would prevail if a joint legal basis were pursued): indeed, the General Court appears to have reasoned in a manner which would confirm this point in Case T-370/11 *Poland* v. *Commission*, n.y.r., judgment of 7 March 2013), at para. 17. *But* this argument is less convincing where no environmental goal is involved, and does not apply at all to the other term in Article 194(2) (a Member State's "right to determine the conditions for exploiting its energy resources"), which is not present in Article 192(2)(c) at all.

§1.3 Dual legal bases

The CJEU allows the possibility for an EU measure to be based upon two Treaty articles simultaneously if the measure includes, as regards both the aims pursued by its authors and its content, two indissociably linked components (i.e. of both articles) neither of which can be regarded as secondary or indirect as compared with the other.[61] Moreover, a dual legal basis is only possible if the procedural requirements of both articles are compatible with each other.[62] The choice of a dual legal basis could be considered where a measure aiming at approximating Member States' national laws in the field of renewable energy pursues both the aims and objectives of Article 194 TFEU and, in equal measure, environmental protection in the spirit of Article 191 TFEU. The use of such a dual legal is thus only possible if we adopt an interpretation of Article 194(2) TFEU following which both Article 194(2) TFEU and Article 192 TFEU prescribe the same procedural requirements. Article 194 TFEU prescribes qualified majority voting in the Council, unless the measure which is being adopted ("significantly") affects a Member State's choice between different energy sources and the general structure of their energy supply. In that case, Article 192(2)(c) TFEU prescribes unanimity voting in the Council. It follows from the different interpretations of the caveat of Article 194 TFEU described above that only if the unanimity-hypothesis is adopted (following which the caveat requires a unanimous vote in the Council), both provisions would require unanimity voting and the measure could be based jointly on Article 194 and 192 TFEU. Alternatively, if the measure which is being adopted does not "significantly" affect Member States' energy rights, then both provisions prescribe qualified majority voting in the Council; their procedural requirements would equally be compatible and the measure can be adopted on the basis of both provisions.

[61] Joined cases C-164/97 and C-165/97 *Parliament* v. *Council* [1999], para. 14.
[62] Case C-300/89* *Commission* v. *Council* [1991] ECR I-2867, paras. 17 to 21.

2. Assessment Part I: Classification and legal basis

§2.1 Full harmonisation

§2.1.1 Understanding the full harmonisation approach

One of the degrees of harmonisation identified in Report D2.1 is the so-called 'full' harmonisation approach, which assumes that the EU harmonises the entire renewable energy support system. This would entail that all measures, including most of their design features, would be decided at EU level without leaving any room for the Member States to adopt their own diverging instruments or policies.

In order to assess the legal feasibility of this approach – by first finding the adequate legal basis and thereafter assessing its compliance with general EU law – it is important to be aware of the differences and similarities between the different policy pathways within this approach.

Report D2.1, entitled "Key Policy approaches for a harmonisation of RES-E support in Europe – Main options and design elements", explains that harmonisation is generally understood as the top-down implementation of common, binding provisions which have been set at EU level. Full harmonisation is defined as a scenario in which there is only one EU-wide renewable energy target, without national targets in the Member States; one EU-wide support scheme, with the same level of support set and applicable in all Member States; as well as all other design options (e.g. the eligibility criteria of the plants or the duration of the support) uniform to all Member States. As this would result in irregular development of renewables among the Member States, in the sense that some Member States would face a greater growth than others, an equalisation mechanism would be foreseen in this harmonisation scenario to equalise the costs and benefits of the renewables growth and "share the burden".[63]

Within this degree of harmonisation, the policy pathways differ only as to which support system is chosen: i.e. a feed-in tariff, a feed-in premium, a banded or an un-banded quota system. These differences need not be examined at this stage.

[63] Such an equalisation mechanism would be likely to look different for the defined policy pathways; however, for practical reasons – and considering that by definition allocation cannot go over either national targets nor differences in the level of support – it is likely that it would require setting up a fund at EU level, which collects and distributes the contributions from the Member States in accordance with their share in the overall energy consumption, and would require some amendments to the EU multiannual financial framework. Such an equalisation mechanism could be similar to the organization and structure of the Common Agricultural Policy (CAP).

§2.1.2 Classification of the full harmonisation approach and assessment of potential legal basis

As mentioned above, full harmonisation would aim primarily at the functioning of the energy market. Setting one single support scheme with a single level of support, common to all Member States, is deemed to reduce distortions regarding cross-border electricity prices and to facilitate investment decisions.[64] However, it is also argued that non-harmonised support schemes would add unnecessary complexity and uncertainty to investment decisions, leading to a higher cost of capital, less cost-effectiveness and ultimately higher prices for the consumer.[65] Greater convergence between renewables and conventional wholesale electricity costs and standardisation of the support costs across consumer bills have also been mentioned.[66] Overall, non-harmonisation is said to interfere with effective market functioning and to distort the cross-border wholesale market price of electricity.[67]

As discussed above, the full harmonisation approach would have to be based upon Article 194(1)(a) TFEU, the *lex specialis* in the field of EU energy law, irrespective of the policy pathway taken within this approach.

The environment provision (Article 192 TFEU) cannot be invoked as legal basis as in the absence of any evidence that the EU measure would primarily aim at environmental protection, e.g. by increasing deployment of renewables or otherwise reducing harmful impact on the environment. Environmental objectives are generally not mentioned as arguments in favour of full harmonisation, so in the absence of any economic or scientific evidence that full harmonisation would lead to any additional environmental benefits, Article 192 TFEU would seem unlikely to be able to serve as an appropriate legal basis. Considering that the EU legislation has to respect the principles of: proportionality (meaning that the measures may not go further than what is necessary to achieve the objectives pursued); and subsidiarity (meaning that the EU may only legislate if and insofar the objectives

[64] CEER, 'Implications of non-harmonised renewable support schemes' (June 2012), available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Electricity/Tab/C12-SDE-25-04b_SDE%20NHSS-Conclusions_18-Jun-2012.pdf.

[65] In general: European Commission, 'Communication from the Commission to the European Parliament and the Council – Renewable Energy. Progressing towards the 2020 target', SEC (2011) 129, 130, 131, COM (2011) 21, Brussels, 31.01.2011, p. 11; Also: CEER, 'Implications of non-harmonised renewable support schemes' (June 2012), available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Electricity/Tab/C12-SDE-25-04b_SDE%20NHSS-Conclusions_18-Jun-2012.pdf, at 14.

[66] CEER, 'Implications of non-harmonised renewable support schemes' (June 2012), available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Electricity/Tab/C12-SDE-25-04b_SDE%20NHSS-Conclusions_18-Jun-2012.pdf, at 14.

[67] CEER, 'Implications of non-harmonised renewable support schemes' (June 2012), available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Electricity/Tab/C12-SDE-25-04b_SDE%20NHSS-Conclusions_18-Jun-2012.pdf, at 19.

cannot be sufficiently achieved by the Member States),[68] it appears that fully harmonising renewables support cannot be done based upon the environmental competence if it can be established that the same level of environmental protection could be reached in a less intrusive manner. Objectives such as the promotion of renewable energy and environmental protection are being pursued by means of minimum harmonisation and other regulatory techniques, e.g. the imposition of binding national targets under Directive 2009/28/EC. Moreover, Article 192 TFEU does not allow for full harmonisation since, pursuant to Article 193 TFEU, Member States may adopt more stringent national measures. Further, Article 193 TFEU – which enshrines a Member State's right to adopt more stringent measures for the protection of the environment – only highlights that in those areas the concept of competition between the different legal systems is pursued and perceived as the better option than a single – even if possibly less protective/supportive due to the different levels of protection which the Member States are willing to offer – and uniform system.[69]

Unless the measure were to allow for the option to derogate (as is possible under Article 114(4) and (5) TFEU), or unless a unanimous vote were reached, a uniform support level and the uniform criteria for eligibility for support would interfere with a Member State's sovereignty over its energy mix and the exploitation of their resources. Once the level of and the criteria for support are set, not only would the decision with regard to those energy resources be taken from the Member States, but at least some of them would face such a considerable growth in renewable energy deployment that there would hardly be any room left for the exploitation of other sources.[70] The harmonisation would lead to increased trade between the Member States and Member States would have to share their own resources with others, so that ultimately it would be problematic to argue that they could still decide which other energy sources to exploit and have in their mix

[68] Compare Article 5(3) TEU.

[69] Thus, any argument that measures to support renewables may still be adopted under the environmental competence (Article 192 TFEU) will not assist with regard to the full harmonisation approach. When basing the measure on this provision, Article 193 TFEU would always allow the Member States to take additional action and provide for more stringent rules. In the context of renewables support, those could, for example, be: additional support measures for some renewables technologies, higher support rates to encourage even more deployment, or more stringent sustainability criteria for biofuels. This would undermine the principal ideas behind the full harmonisation approach, so that full harmonisation, as defined in the course of this project, would thus *per definitionem* not be possible under that provision. Thus, the further discussion of the potential application of this Article seems redundant as it would in no circumstances lead to the pre-defined result of the 'full harmonisation' pathway.

[70] Compare also: S. Tindale, 'How to expand renewable energy after 2020' (Centre of European Reform, December 2012), available at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/pb_sct_renewable_7dec12-6713.pdf, at 4.

and how to design their structure of supply.[71] In the course of the adoption of Directive 2009/28/EC, the Member States' sovereignty in this respect was discussed at length. Through adopting an EU wide target of only 20% and though careful negotiation of the national targets with each Member State (based upon their willingness and ability to contribute to this target), it was found that their rights were sufficiently respected. Further, they remained free to choose among the different renewable energy sources. However, this would not be the case under a full harmonisation approach, in which Member States would give up their influence over their national energy mix.

It could further be noted that any kind of equalisation mechanism, as briefly referred to above[72] – which would become necessary under the full harmonisation approach to balance the differences between the Member States – may have budgetary implications,[73] and form a budget line currently not provided for by the EU's multiannual financial framework. Adding this item would require unanimity in the Council and the consent of the European Parliament, in accordance with the special legislative procedure set out in Article 312 TFEU.

Thus, it would seem that the threshold for reliance upon the caveat under Article 194(2) would be satisfied under a full harmonisation approach. In practice, therefore, and considering the debate about the consequences of the caveat in Article 194(2) TFEU, it seems highly unlikely that full harmonisation can be pursued under current EU law without Treaty amendments.

§2.1.3 Conclusion on full harmonisation

We can conclude from the above that full harmonisation as described above would affect, whether or not and to whichever extent a threshold is imposed, Member States' energy rights. In doing so, the measure would fall foul of Article 194(2)

[71] Compare: Grabitz/Hilf/Nettesheim, Article 194, para. 33. The Member States' sovereignty over their energy mix and structure of supply does not per se mean that there can never be a new target beyond 2020 for renewable energy or the like. As was the case with the current renewable energy target, and thus as proven in the past, the Member States can – based upon their sovereign decision rights – commit to such a target. So it was the Member States who - in the European Council of Ministers and thus in the fold of the European Union – on the spring summit in 2007 officially committed to the so-called 20-20-20 targets, of at least 20% carbon emission reduction, at least 20% renewable energy and at least 20% improved energy efficiency to be achieved in 2020. It only means the decision on whether or not to take such a step is at the Member States' discretion and cannot be imposed by the European legislator. Compare also: Client Earth, 'The impact of the Lisbon Treaty on climate and energy policy – an environmental perspective' (January 2010), available at: http://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-impact-on-climate-and-energy-policy.pdf, p. 12ff.

[72] See §2.1.1, above.

[73] As mentioned above (*ibid*.), it is highly likely that Member States would in some way make or receive financial contributions to balance the differences in renewables deployment that would result from the harmonised support at EU level. This is the very idea of the equalisation scheme, which could look very similar to the Common Agricultural Policy.

TFEU, regardless of whether or not a *de minimis* test like the "significance threshold" theory is upheld. Alternatively, Member States could unanimously vote in favour of a full harmonisation measure affecting their energy rights, if there exists indeed the possibility to resort to unanimity voting. These possibilities notwithstanding, it is most likely that full harmonisation of the energy market (and irrespective of which policy pathways are chosen) is currently not legally feasible. Those competence limits cannot be circumvented by recourse to other Treaty provisions, such as Article 114 TFEU conferring more general harmonisation competence.[74]

[74] Accordingly, for the full harmonisation approach and any policy pathway within it to be legally feasible, it would require amendment of the Treaty. While such amendments of the Treaty – allowing for a new item in the financial framework and full legislative competence in the field of energy, unbarred by Article 194(2) TFEU – are in principle possible, such a scenario is not subject to this present study as it would change the entire setting for any such assessment. Accordingly, the potential compliance of this degree of harmonisation with other provisions of EU law will not be discussed further.

§2.2 Medium harmonisation

2.2.1 Understanding the medium harmonisation approach

The second degree of harmonisation assessed in the course of the project is the so-called 'medium' harmonisation approach. Medium harmonisation is very close to full harmonisation, but would leave some room to the Member States to deviate from the common uniform rules in the sense that they may adopt additional national measures to support renewables.

Following up on previous work, and in particular Report D2.1 entitled "Key Policy approaches for a harmonisation of RES-E support in Europe – Main options and design elements", medium harmonisation implies there would be:

- one EU-wide instrument with one EU-wide support level, similar to the abovementioned full harmonisation approach;
- one EU-wide renewable energy target, without national targets for the Member States;
- additional (albeit limited) support for specific technologies at Member State level, either within the EU-wide support scheme (i.e. additional remuneration based upon local benefits under FITs or FIPs) or as a purely national instrument in additional to the EU-wide support scheme (e.g. investment subsidies, or soft loans); and
- an equalisation mechanism for the harmonised support scheme.[75] Note that the extra costs for additional support would not be equalised but fall upon the Member State which incurs them.

Within this degree of harmonisation, again, there are four different policy pathways, which refer to the choice of support system that is to be established on EU level. This can be a feed-in tariff (FIP), a feed-in premium (FIP), a banded or an un-banded quota system. These differences may become relevant when assessing the compatibility of a potential measure with EU primary and secondary lawharmonisation, and thus are addressed only in the second step of the assessment.

[75] See the text at n. …, above. Such an equalisation mechanism would be likely to look different for the different defined policy pathways. However, by definition, allocation can exceed neither the national targets nor the differences in the levels of support. It is likely that it would require setting up a fund at EU level, which would collect and distribute the contributions from the Member States in accordance with their share in the overall energy consumption, and would require some amendments to the EU multiannual financial framework. Such an equalisation mechanism could be similar to the organization and structure of the Common Agricultural Policy (CAP).

§2.2.2 Classification of the medium harmonisation approach and assessment of potential legal bases

The medium harmonisation approach would allow the Member States to adopt national measures in addition to the fully harmonised EU-wide support for renewables. However, they would not be able 'do less' than what the harmonised EU scheme would prescribe, but only 'more' to support renewables.

Medium harmonisation should not be confused with full harmonisation, which we have considered above. There are different examples of EU harmonisation measures that leave room for the Member States to deviate individually. The degree of leeway left to the Member States determines the degree of harmonisation introduced by the relevant EU legislation. For the qualification of the medium harmonisation approach in EU terms, it is helpful to compare the competence left to the Member States thereunder with that which would remain under other EU legislative initiatives.

As previously mentioned, full harmonisation may include limited possibilities for diverging national action, without affecting the full harmonisation nature of the EU measure in question. We have mentioned the derogation possibilities on the grounds of Article 114 (4) and (5) TFEU, and the possibility to take safeguard measures if this is allowed by the EU measure. The inclusion of a so-called 'safeguard' clause does not, in and of itself, prevent an EU measure from aiming at full harmonisation.[76] EU harmonisation measures on the basis of the internal market clause, for example, may include a safeguard clause by virtue of Article 114(10) TFEU. This allows the Member States to take provisional measures in certain emergency circumstances: e.g. on the basis of one of the non-economic reasons of Article 36 TFEU, subject to an EU control procedure.[77] Member States invoking this safeguard must immediately notify this to the Commission, and the Commission will then examine the legitimacy of the Member State's decision. Where there are concerns about a particular product the Commission may decide to take it out of the EU market altogether or, where the concerns are not well-founded, the Commission can order the Member State to stop its action. Thereby, the safeguard clause allows the Commission to analyse the justification for national measures restricting the free movement of products presumed to comply with the relevant EU law requirements. At the same time, the Commission informs all national surveillance authorities about dangerous products and, accordingly, about the necessary restrictions extended to all Member States so as to ensure an equivalent level of protection throughout the EU.[78] It is therefore a means to

[76] Grabitz/Hilf/Nettesheim, Article 114 AEUV, para. 40.
[77] B. de Witte, D. Hanf & E. Voss (eds.), *The many faces of differentiation in EU law* (Intersentia, 2001), 153.
[78] European Commission, 'Guide to the implementation of directives based upon the New Approach and the Global Approach', available at: http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf, at 51.

maintain and improve the fully harmonised system, rather than to undermine it, while allowing for specific derogations in individual cases. All EU food regulations, for example, contain a safeguard clause.[79]

Safeguard measures also serve as an early-warning system for the EU internal market, since the notification of a safeguard measure to the Commission will trigger an investigation and where necessary an amendment to the existing EU framework. Considering their temporary and *ad hoc* nature, safeguard measures are therefore altogether different from the additional national measures which may be adopted in the event of medium harmonisation. On the other hand, the possibility for a Member State to adopt additional measures as foreseen in the medium harmonisation approach implies that the Member States have not given up all their legislative competence.[80] They can still take long-term legislative action, without the Commission intervening.[81]

As for the full harmonisation approach, the medium harmonisation of Member States' laws and regulations with regard to renewable energy would serve the primary objective of the establishment and functioning of the internal energy market. With one single support scheme and one level of support, for example, distortions on cross-border electricity prices may be reduced and there may be standardization on the consumer bills across Europe.[82] Therefore, Article 194 TFEU would be the appropriate legal basis for a medium harmonisation measure, considering the provision's function as *lex specialis* in the field of energy (above, §1.2).

Considering the uncertainties surrounding the meaning of the caveat of Article 194(2) TFEU, with regard to the preservation of Member States' energy rights, medium harmonisation could only be achieved if either unanimity voting in the

[79] B. de Witte, D. Hanf & E. Voss (eds.), *The many faces of differentiation in EU law* (Intersentia, 2001), 167.

[80] However, although not relevant for this qualification exercise, it should be noted that the exercise of this remaining competence is complicated by Article 2(2) TFEU which says that in case both the Member States and the EU have legislative competence, the Member States may exercise their competence only where the EU did not yet or has ceased doing so. The question of what has been regulated – and thus been exhausted – by the EU is not always an easy one in practice, and it is not always clear how far national legislators can still go. In such cases, the ultimate decision lies with the European CJEU of Justice, before which in many cases Member States' national laws are then challenged in the context of the freedoms of the market.

[81] Whether they notify the Commission or not, has not been defined in the Report D2.1. For the time being it can be left open. However, based upon existing practice to be discussed in the following, and practical considerations, such a notification obligation seems recommended.

[82] In general: European Commission, 'Communication from the Commission to the European Parliament and the Council – Renewable Energy. Progressing towards the 2020 target', SEC (2011) 129, 130, 131, COM (2011) 21, Brussels, 31.01.2011, at 11; compare also: Jansen, Gialoglou & Egenhofer, 'Market Stimulation of Renewable Energy in the EU: What degree of harmonisation of support mechanisms is required?' (CEPS Task Force Report, October 2005); CEER, 'Implications of non-harmonised renewable support schemes' (June 2012), available at: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Electricity/Tab/C12-SDE-25-04b_SDE%20NHSS-Conclusions_18-Jun-2012.pdf.

Council were allowed, or possibly if an "opt-out clause" were inserted in the measure or a Treaty-based derogation were supported. In the event of the latter, this would require constructing an "opt-out clause" in such a way that this would not undermine the EU-wide support scheme, which seems likely to prove difficult in practice. Medium harmonisation would affect Member States' choice between the different energy sources, since exploitation would only occur where it is most profitable (e.g. based upon geographical conditions). Certainly, within this calculation one needs to consider aspects such as grid and transport costs, which would raise the costs of exploitation in remote areas. However, Member States might still be able to support some renewable energy sources more than others or provide additional support to all renewable technologies, and thus influence whether and which energy sources continue to be exploited and used within their territory. An "opt-out clause" could be construed in such a way that, where this is warranted by particularly sensitive considerations, Member States could also limit their national support in respect of particular technologies: e.g. biofuels, which may trigger ethical questions. However, this would be likely to reduce the effectiveness of having a centralised support mechanism. Consequently, if no feasible "opt-out clause" could be construed, medium harmonisation might lead Member States with favourable geographical conditions to face considerable growth in (possibly unwelcome) technologies, potentially preventing them from exploiting other energy sources.[83] Therefore, unless a feasible "opt-out clause" can be constructed, or unless a unanimous decision is reached, medium harmonisation would be very likely to affect Member States' energy rights (even if, and to whichever extent, a *de minimis* test is used) and fall foul of the caveat in Article 194(2) TFEU. Alternatively, in the unlikely event that Member States could derogate from certain elements of the measure (similar to the derogation options of Article 114(4) and (5) TFEU), a medium harmonisation measure would be possible on the basis of Article 194 TFEU, but Member States would retain certain derogation possibilities. In the same vein as for a possible "opt-out clause", and subject to how such derogation options were constructed, this would equally risk undermining the overall effectiveness of the harmonisation.

Environmental protection or the promotion of renewables, as aimed for by the environmental provision (i.e. Article 192 TFEU), is unlikely to constitute an equally significant motivation for medium harmonisation, considering that current practice suggests this can be pursued without the need for a single support system. Nevertheless, unlike with regard to full harmonisation, medium harmonisation could be achieved on the basis of Article 192 TFEU since Article 193 TFEU allows Member States to adopt more stringent national measures. Additional renewables

[83] Compare also: S. Tindale, 'How to expand renewable energy after 2020' (Centre of European Reform, December 2012), available at: http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/pb_sct_renewable_7dec12-6713.pdf, at 4.

support by a Member State could be considered a more 'stringent' measure, considering it would be likely to lead to increased deployment of renewables and thus increase environmental protection at national level. The Member State offering additional support would then provide for higher environmental standards than what would result from the harmonisation. The medium harmonisation approach is therefore not, unlike full harmonisation, by definition excluded from the scope of Article 192 TFEU. However, so far there seems to be no evidence that the primary aim of supporting renewables is indeed environmental protection, and not the functioning of the internal energy market.

It is not inconceivable that a medium harmonisation measure would be motivated, in equal measure, by market and environmental protection objectives. If this is so, then the possibility of a dual legal basis (Articles 194 and 192 TFEU) should be considered (above, §1.3). A dual legal basis is only exceptionally used in cases in which it is established that the act simultaneously pursues a number of objectives which are indissociably linked, without one being secondary and indirect in relation to the other.[84] A medium harmonisation measure would, if taken (partially) on the basis of Article 192 TFEU, fall within the category of Article 192(2)(c) TFEU and trigger the procedural requirement of a unanimous vote in the Council, as well as demoting the European Parliament's role (from co-decision under the ordinary legislative procedure) to one of merely being 'consulted'. Therefore, only if:

- *either* the caveat of Article 194(2) TFEU were interpreted so as to require a unanimous vote in the Council;
- *or* there was a complete overlap between the grounds for triggering the caveats in both Articles 192(2)(c) and 194(2) (i.e. the measure did not seek "to determine the conditions for exploiting [a Member State's] energy resources")[85]

would the procedural requirements of Article 194 TFEU and Article 192(2)(c) TFEU be compatible, and could the measure be taken on the their joint legal basis. Alternatively, if the measure did not "significantly" affect Member States' energy rights as understood by Article 192(2)(c) TFEU and the hypothesis of unanimity voting were not followed, then both provisions would equally have compatible procedural requirements (namely qualified majority voting in the Council) (above,

[84] Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713, para. 23.
[85] Because, here, the reference in Article 194(2) to it applying "without prejudice to Article 192(2)(c)" could, possibly, apply. It seems unlikely, however, that a medium harmonisation measure concerning renewables support would not also, in some way, have an impact upon the conditions for the exploitation of a Member State's energy resources.

§1.2.7). If the latter were true, however, the measure would be likely to cease to be one of medium harmonisation.

Another concern in this respect is that the Union legislator has to respect the principles of subsidiarity and proportionality, and would thus have to provide convincing evidence that the same environmental benefits cannot be achieved through (e.g.) national support schemes, national levels of support and national targets. Considering that medium harmonisation would at the same time allow for additional national measures, it seems unlikely that this could be established. As Article 194 TFEU is still seen as "the obvious" Article for measures in the energy sector and there is neither an authoritative Court judgment confirming that Article 192 TFEU could still be used, nor is there any evidence of the primarily environmental objectives of a medium harmonisation approach, it seems that Article 192 TFEU is unlikely to offer an appropriate legal basis.

Further, with the equalisation mechanism needed to balance the costs among the Member States, it is possible that a change to the EU multiannual financial framework would need to be effected, which again would require a unanimous decision in the Council after consent of the European Parliament according to the procedure of Article 312 TFEU. So, assuming that evidence of a primarily environmental objective could be provided and thus Article 192 TFEU could be used as a legal basis, it would still require unanimity among the Member States as a result of Article 192(2)(c), as well as changes to the EU multiannual framework.

§2.2.3 Conclusion on medium harmonisation

A medium harmonisation measure would almost certainly have to be based upon Article 194 TFEU, since its predominant aim would be the functioning of the internal energy market. Considering our discussion on the different interpretations of the caveat of Article 194(2) TFEU, medium harmonisation would be possible: either in the event of unanimity voting; or if an "opt out" clause were inserted (subject to how the "opt-out clause" would be construed); or if the harmonisation were to remain subject to Member State derogation options (if it were accepted that such options could apply). Article 192 TFEU could be an appropriate legal basis for a medium harmonisation measure concerning renewable energy sources if there were enough evidence that the measure would pursue, as its main objective, the environmental aims of Article 191 TFEU: at present, this does not seem to be the case. It should be added that, in any event, a measure based upon Article 192 TFEU which "significantly affects Member States' choice between different energy sources and the general structure of their energy supply" remains subject to unanimity voting in the Council (Article 192(2)(c) TFEU).

Considering all of the above, medium harmonisation would thus not be possible without a change to the Treaty. There is therefore no need to continue with an assessment of the compliance of such a medium harmonisation measure, or any of the policy pathways identified therein, with EU primary and secondary law.

§2.2.4 Tendering for large-scale renewables

§2.2.4.1 Understanding the tendering for large-scale renewables policy pathway

The Report "D2.1 - Key policy approaches for a harmonisation" identifies one policy pathway which is similar, but not identical, to medium harmonisation. Under policy pathway 6, an EU-wide tendering scheme for large scale RES (i.e., above a given size threshold) would coexist with national support schemes for all other, and notably smaller, projects. Tendering would be technology-specific and a centralised EU bidding procedure would be organized, whereby bidders bid for locations all over Europe (in €/MWh). Sites might be pre-approved by national authorities. The amount of capacity tendered for would be in line with the EU target, but it may not cover all the target, but leave part of it to the Member States and thus rely upon their national support schemes. The extent to which the attainment of the EU target is covered by the tendering scheme would have to be decided.

There would be no national targets for the Member States imposed by the European Union. However, the Member States may set their own targets and keep their own support schemes. Whether or not such support schemes would have to be limited to small-scale renewables projects, and thus whether the EU legislation introducing such a scheme would explicitly prohibit support for larger projects, has not been defined in the Report. Based upon the discussion below, however, it seems largely irrelevant to the outcome.

The tendering scheme itself would be one single, fully harmonised system in which all Member States would have to participate. Design elements would be decided on by the European legislator. There would have to be some kind of agreement on the financial contribution of each Member State to the tendering scheme. While the Report leaves open how the tendering would be organized and how the financial means would be administered, it seems most likely that some EU institution would be in charge of this task.

§2.2.4.2 Classification of the tendering for large-scale renewables pathway & potential legal basis

The pathway of tendering for large-scale renewables – in addition to national support schemes for decentralized, small-scale generation – would be quite similar to medium harmonisation as defined in Report D2.1 and as discussed above:[86] this is why we have covered this pathway at this juncture in the present Report. Such a measure would be intended to facilitate the functioning of the energy market as well, as it would create, at least for large-scale projects, a harmonised support system. Those submitting tenders would have to compete for the support, and the competition may lead to cost-efficiencies and projects being developed under the best conditions. For investors and consumers, the harmonisation may further lead to increased transparencies.[87] Absent any evidence that such a policy pathway would lead to increased renewables development compared to scenarios without such harmonised, EU-wide tendering for large-scale renewables, the measure would thus have to be considered primarily as aimed at the functioning of the internal energy market.

Thus, legislation to introduce such a system would have to be based upon Article 194 TFEU, not on Article 192 TFEU. The question arises whether the caveat under Article 194(2) TFEU would bar such legislation: i.e. whether tendering for large-scale renewables would interfere with "a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy resources and the general structure of its energy supply."[88]

In this regard, it has been suggested above that harmonised support schemes are likely to lead to renewable energy deployment only in the locations with the best conditions, as the level of support would be adjusted to the costs of deployment only under such conditions. A tendering scheme for large-scale projects would even exactly aim at that: projects would compete against each other and the support would be awarded to the tender with the best proposal, whereby the cost factor would normally play an important role. While some Member States would face significant increases in renewables deployment due to such a scheme, others would not. The former may complain that the tendering scheme would interfere with their sovereignty over the exploitation of their energy resources, as it would no longer allow them to exploit other than the supported renewable energy resources. The latter may raise the argument that, even if they can adopt additional support measures, doing so would be more costly than without the tendering scheme in place. With a prohibition of additional support for large-scale renewable energy projects, the effect may be even stronger, as some Member States would then be restricted to renewable energy supply from decentralized,

[86] See §2.2, above.
[87] Compare the arguments mentioned above in the context of full and medium harmonisation: see §§2.2 and 2.3.
[88] Art. 194(2) TFEU.

small power plants (which may have, e.g., implications for infrastructure design and management, and grid costs). Accordingly, one or more Member States' energy rights may be affected by legislation introducing additional tendering for large-scale renewables.

This, again, means that Article 194(2) TFEU would apply, with the result that the European legislator could not adopt legislation which it could ensure would be binding on all Member States. Even if the caveat is interpreted to allow only for an inherent opt-out based upon primary law, the system of a harmonised tendering scheme as it is defined in Report D2.1, with all Member States participating and contributing, could not be guaranteed.

Furthermore, it should be mentioned that such a system which would finance renewable energy support with contributions made by the Member States would, again, be likely to pose problems with regard to the financial provisions in the Treaty.[89] According to Article 311 TFEU, the Union has to finance the budget from own resources and in compliance with the multiannual financial framework. At least in the most obvious design, a system of EU-wide tendering would constitute an item in the EU budget. The Union would thus have to come up with resources to cover this item. The relevant procedures to add additional resources to attain the Union's policy objectives involve unanimous decision-making in the Council, after consultation of the European Parliament, and approval by the Member States in accordance with their respective constitutional requirements. These are the same procedural requirements which would be required to make an amendment to the Treaty apply, making it this approach politically very difficult.

§2.2.4.3 Conclusion on tendering for large-scale renewables

A system of EU-wide tendering for large-scale renewables would have to be based upon Article 194 TFEU and the energy competence, as it would primarily aim at the functioning of the energy market. However, as it may affect the Member States' energy rights, the introduction of such legislation seems unlikely to be legally feasible due to Article 194(2) TFEU, as the law currently stands.

[89] Art. 310ff TFEU.

§2.3 Soft harmonisation

§2.3.1 Understanding the soft harmonisation approach

As a third degree of harmonisation, Report D.2.1 suggests 'soft' harmonisation. Soft harmonisation involves:

- an EU-wide target;
- additional national targets for each Member State, which add up to the EU target;
- a common support scheme, decided at EU level (e.g. a feed-in tariff or a quota), which Member States must implement into their domestic legislation;
- limited harmonisation only of the design of the common support scheme, generally allowing Member States to use different design elements and customize the support scheme to national preferences; and
- different support levels across the Member States.

Within this degree of harmonisation, again, distinctions are made between different policy pathways depending upon the type of support scheme chosen: a feed-in tariff, a feed-in premium, a banded or an un-banded quota system. These differences will become relevant when assessing the compatibility of a potential measure with EU primary and secondary law. This will be discussed after having assessed the legal feasibility of a soft harmonisation measure.

§2.3.2 Classification of the soft harmonisation approach and assessment of potential legal bases

The soft harmonisation approach would not only allow the Member States to offer support in addition to what is being fixed at EU level, but also leaves the design and level of support to the Member States. Rather than imposing strict rules on how to support renewable energy, the Member States are given national targets which they have to reach. While one specific type of support scheme (e.g. a feed-in tariff or a quota) will be used all over the EU, differences between the Member States will remain.

In this scenario, the Member States clearly do not fully give up their national legislative competences. Soft harmonisation is therefore different from full harmonisation. Its harmonising effects are more similar to what is understood as

minimum harmonisation. However, it even goes a step further than the minimum harmonisation practised, for example, with respect to the environment, where the legal basis for any EU measure also provides that the Member States can always adopt more stringent and more protective measures. Unlike the medium harmonisation approach presented in this project (Report D2.1) which may fall under the notion of minimum harmonisation according to EU usage, under soft harmonisation Member States may not only offer additional support but can largely also decide upon *how* they do it, as long as they reach their renewables target. This obligation to reach the target is thus largely an obligation binding only as to its result.

The question arises which objective(s) soft harmonisation would pursue. First of all, soft harmonisation would aim at the removal of cross-border distortions, and erase certain differences between the Member States: e.g. by setting a common support scheme and harmonising, to a certain extent, the design elements of this support scheme. Through the imposition of one and the same support scheme in all Member States, soft harmonisation could lead to an improved degree of standardization of the costs for renewable energy across all (or at least wider groups of) European consumers, and it could also improve clarity on prices. However, certain differences between the Member States would remain, e.g. with regard to levels of support and certain design elements of the common support scheme. Arguably, therefore, soft harmonisation in this context is not primarily aimed at establishing and ensuring the functioning of the energy market, but solely at the promotion of renewables. Nevertheless, whether soft harmonisation would primarily serve the functioning of the internal energy market as an integrated whole or the promotion of renewable energy, which is one of the main objectives listed in Article 194(1) TFEU, the appropriate legal basis would presumably be Article 194 TFEU anyway, as the *lex specialis* in the field of energy (above, §2.1).

Any measure must respect the principles of subsidiarity and proportionality; this means that the support system imposed on the EU level should result in overall improvements in the system for renewables deployment across the EU,[90] by comparison to a situation in which all Member States continued to choose their own support schemes.

As the Member States would remain free to set their own levels of support in order to reach their target and decide upon which energy sources to rely, it can be argued that Member States' energy rights would not "significantly" be affected and that soft harmonisation would not fall foul of Article 194(2) TFEU *tout court*. This requires a somewhat flexible understanding of the "significance" threshold, or

[90] Which could include increased expected deployment, lower costs, earlier co-ordination between national systems and/or markets, etc.

any other *de minimis* test which may be established by the CJEU in a future interpretation of Article 194.

If the flexible nature of soft harmonisation is insufficient in and of itself to be considered as falling below the threshold beyond which Member States' energy rights may not be affected, then the insertion of an "opt out" clause could be envisaged (see § , above). This would allow Member States to "opt out" (e.g. of specific design elements of the common support scheme) where this is warranted by the conditions set out in the clause, within the limits of general EU law, and therefore ensure that the EU measure would fall below the threshold beyond which it may not affect Member States' energy rights.

Further, it is possible that the insertion of an "opt out" clause into a *medium* harmonisation measure – drafted in such a way that Member States could "opt out" of the harmonised design elements of the common support scheme and cater these to national standards, as well as "opt out" of the harmonised support levels but decide them individually –would then *result* in some form of soft harmonisation. The drafting of such an "opt out" clause would not be straightforward, especially considering that, in a soft harmonisation scenario, national targets would feed into the EU target, while no national targets exist in a medium harmonisation scenario. If successfully designed, the advantage of such a scenario would be the following: if no Member States were to choose to "opt out", a relatively high level of (medium) harmonisation would be achieved; if Member States were to choose to "opt out", a still appreciable level of (soft) harmonisation would be achieved; and, in either scenario, the harmonisation measure would not "significantly" affect Member States' energy rights and could therefore be based upon Article 194 TFEU. Similar reasoning can be applied to the possibility of allowing for derogation options.

Alternatively, in the event that the caveat implies a procedural requirement of unanimity voting, an EU measure aiming for soft harmonisation could be based upon Article 194 TFEU without the need for derogation options or the insertion of an "opt out" clause; but this would require a unanimous vote in the Council.

On the other hand, if no *de minimis* threshold were imposed and the caveat were interpreted as indicating an absolute competence limit, Member States might argue that the mere imposition of a target interferes with their sovereignty, and that this affects their energy rights. This is not absolutely unlikely, considering the uncertainty regarding the validity of a *de minimis* threshold. Even if, for example, the "significance threshold" theory were upheld, Member States could argue that a target of "at least x% renewable energy" would "significantly" affect their choice between different energy resources. Under the current Directive 2009/28/EC, those complaints have been carefully circumvented through direct negotiations with the Member States on what they are willing and able to contribute. As this

issue is likely to return with future and more far-reaching targets, such negotiations may again become necessary; and, on this occasion, such Member State resistance would be (at least politically, and possibly legally) bolstered by the uncertainty on the meaning of the Article 194(2) caveat. As another example of potential opposition from the side of the Member States, the mandatory introduction of a quota system could necessitate several changes to the way in which Member States organize their energy supply, so that they could raise concerns in this regard as well. These difficulties may rule out the possibility that soft harmonisation, in and of itself, would fall below whichever *de minimis* threshold is imposed. Soft harmonisation could more readily be achieved if the caveat were interpreted as requiring the use of derogation options, an "opt-out" clause or Treaty-level derogation, or unanimity voting. However, we should also highlight that the CJEU has not indicated that any of these interpretations is correct.

Article 192 TFEU could be an appropriate legal basis for a soft harmonisation measure concerning renewable energy sources if there were enough evidence that the measure would pursue, as its main objective, the aims of Article 191 TFEU. Considering that soft harmonisation does not seem to aim at regulating the internal energy market as a whole, and does have important environmental effects, this remains a possibility. Like medium harmonisation (above at §2.2), soft harmonisation leaves sufficient space for more "stringent" national measures pursuant to Article 193 TFEU, and Article 192 TFEU does not therefore seem *per se* to exclude soft harmonisation.

It is also not inconceivable that a soft harmonisation measure would be motivated, in equal measure, by market and environmental protection objectives, as examined with regard to a medium harmonisation measure (above at §2.2). If this is so, then the possibility of a dual legal basis (Articles 194 and 192 TFEU) should be considered (above, §1.3). A dual legal basis is only exceptionally used in cases in which it is established that the act simultaneously pursues a number of objectives which are indissociably linked, without one being secondary and indirect in relation to the other.[91] A soft harmonisation measure would, if taken (partially) on the basis of Article 192 TFEU, possibly fall within the category of Article 192(2)(c) TFEU and trigger the procedural requirement of a unanimous vote in the Council. Therefore, only if the caveat of Article 194(2) TFEU were interpreted following the hypothesis which requires a unanimous vote in the Council would the procedural requirements of Article 194 TFEU and Article 192(2)(c) TFEU be compatible, and could the measure be taken on the their joint legal basis. Alternatively, if the measure did not "significantly" affect Member States' choice between different energy sources and the structure of their energy supply, pursuant to Article 192(2)(c) TFEU, and the unanimity voting hypothesis

[91] Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713, para. 23.

were not followed, then both provisions would equally have compatible procedural requirements (namely qualified majority voting in the Council) (above, §1.2.7). Therefore, the possibility of a dual legal basis would again require a proper examination of the "significance" of the effect which soft harmonisation would have on Member States energy rights, both with regard to Article 192(2)(c) TFEU and Article 194(2) TFEU

However, considering that the promotion of renewable energy sources is one of the objectives of Article 194 TFEU and considering the lack of any evidence that environmental protection would be the primary objective, it seems that Article 192 TFEU is not a likely legal basis, whether jointly or by itself.

§2.3.3 Conclusion on soft harmonisation

The soft harmonisation approach would have to be based upon Article 194 TFEU, unless evidence exists that its primary aim is environmental protection as set out in Article 191 TFEU. As it would allow the Member States to keep certain rights as regards the sources and structure of their energy supply, it may be possible that the caveat of Article 194(2) TFEU would not pose any serious obstacles and the measure could be adopted following the ordinary legislative procedure. This is, however, subject to a lenient interpretation of when a measure is deemed to "affect" Member States' energy rights. Alternatively, an "opt-out" clause could possibly be inserted in the measure allowing Member States to "opt out" in such a way that the measure would not "significantly" affect Member States' energy rights. Similarly, there remains the possibility that the caveat should be interpreted as allowing for some sort of derogation options within an Article 194-based measure or, and as yet lacking definite parameters, allowing Member States to deviate from an Article 194-based measure on grounds of the caveat itself. Depending upon how these derogation options or "opt-outs" would be construed, soft harmonisation would be possible on the basis of Article 194 TFEU. Finally, some authors would argue that Member States could decide to vote in favour of soft harmonisation subject to unanimity (see §1.2.4, above). Soft harmonisation on the basis of Article 194 TFEU is therefore considered to be legally feasible.

However, it is likely that Member States would want a say on their national targets, as was the case during the negotiations which led to Directive 2009/28/EC. This may result in lengthy discussions between the Member States and the Commission on how much each is willing and able to contribute. This would necessitate at least the consent of each Member State to its national target.

Article 192 TFEU could equally constitute a legal basis for soft harmonisation renewable energy legislation, provided that the measure's purpose is principally

environmental protection. The measure would be likely to be subject to unanimity voting (pursuant to Article 192(2)(c) TFEU).

Thus, under a soft harmonisation approach the EU-level target and the national targets may seem rather unproblematic, as they directly serve the increased deployment of renewables. However, in particular the obligation on the Member States to adopt one specific support scheme with some design options being pre-defined at the EU level may raise concerns with regard to subsidiarity and proportionality. The EU institutions will have to show that similar results cannot be achieved if those decisions are left to the Member States, although the intensity of judicial review of EU legislation on subsidiarity and proportionality grounds has traditionally been limited: thus, these requirements are likely to be of greater significance during the EU's law-making process, including the potential for objections to be raised by national Parliaments under the post-Treaty of Lisbon procedure concerning subsidiarity.[92]

[92] See the discussion in our Report D3.1, sections 5.1 and 5.2, and the references cited therein.

§2.4 Minimum harmonisation

§2.4.1 Understanding the minimum harmonisation approach

The fourth degree of harmonisation considered in this project (see Report D2.1) see has been called 'minimum' harmonisation. It would provide for an EU-wide renewable energy target, as well as for national targets. However, the Member States can decide upon both the type of support scheme that they apply and its design elements. In particular, they may set whatever support level they deem appropriate to ensure that they reach their target. This harmonisation approach would only introduce some additional common minimum design elements: for example, authorisation procedures and the obligation to diversify and support different technologies.

Within this degree of harmonisation, no different policy pathways have been defined. The compliance assessment with EU primary and secondary law will thus not differentiate between the different options. At the same time, we should remind the reader that the options which the Member States choose in their national schemes must remain compatible with the binding framework of primary EU law (e.g. free movement, competition and State aids provisions under the TFEU) and the currently applicable rules of EU secondary legislation (except insofar as such rules would be amended by any new piece of EU renewables legislation).

§2.4.2 Classification of the minimum harmonisation approach and assessment of potential legal bases

As under the soft harmonisation approach discussed above, the minimum harmonisation approach would mainly set a target which the Member States then have to reach, but allow them to choose their own methods. However, unlike the soft harmonisation approach, the Member States would even have a free choice with regard to the kind of support scheme that they implement. With those features, the minimum harmonisation approach differs from the other degrees of harmonisation discussed above. It does not seem significantly to serve internal market purposes,[93] since its effects are minimal in that regard. Rather, the adoption of renewable energy targets seems primarily motivated by the objective to promote renewable energy, and thus mainly serves environmental objectives.

This approach suggests that the only certain design elements would be harmonised by the EU measure. Design elements would only address issues that have been

[93] Or at least little more than the current regime.

found to hinder renewable energy deployment in the past, such as lengthy authorisation procedures for renewables plants. An existing example of design elements would be guarantees of origin for renewable energy (Directive 2009/28/EC [94]). Moreover, Member States would retain a certain level of freedom on how to implement the provisions in ways they deem appropriate.[95]

Accordingly, the minimum harmonisation approach only partly aims at harmonisation as traditionally understood in the context of EU law. It primarily serves to promote renewable energy, and not the functioning of the internal energy market as a whole.

Article 194 TFEU would again be the obvious legal basis for such a measure, as the development of new and renewable energies is explicitly mentioned. However, Article 192 TFEU could also be of relevance, since the protection of the environment appears to be a (and perhaps the) main objective of a minimum harmonisation measure (when defined as envisaged here).

The caveat in Article 194(2) TFEU could still prove to be an insurmountable obstacle, even in the context of minimum harmonisation, depending upon the interpretation followed. It could be argued that national targets impose a certain energy mix and therefore (to whichever *de minimis* threshold is imposed) affect Member States' energy rights. However, Directive 2009/28/EC and the binding national targets to which the Member States have committed in the past indicate that there is a willingness to accept national energy targets and that they be enshrined in EU level legislation. In the absence of Member State opposition, a successor to the current RES Directive could be adopted on the basis of Article 194 TFEU, simply by accepting the "significance" threshold and finding that this threshold has not been met. This would, however, not shed any light on how to interpret the caveat in a case where an EU measure *is* deemed "significantly" to affect Member States' energy rights.

Alternatively, it may be suggested that Article 192 TFEU (which is the legal basis for the current RES Directive) may continue to be used as a legal base for a minimum harmonisation measure. This may, however, require the special legislative procedure and a unanimous vote in the Council, if the measure is

[94] Compare, e.g., Article 15 of Directive 2009/28/EC, which sets out in greater detail (in particular when compared with its predecessor, Directive 2001/77/EC) how the Member States are required to design their system of guarantees of origin. The establishment and maintenance of this system is deemed to facilitate the promotion of renewables by bringing clarity into the energy mix and thus to the consumers and shall make (cross-border) trade of renewables more transparent.

[95] Compare, e.g., Article 13 Directive 2009/28/EC regarding administrative procedures, which refers to the Member States' judgment as regards appropriateness. Similarly, according to Article 15 of Directive 2009/28/EC, and despite the fact that there are some quite detailed requirements for the system of guarantees of origins, it is left to the Member States to "ensure" that there is an appropriate system to meet those requirements in place and the respective implementation vary in practice.

deemed "significantly" to affect the Member States' choice between different energy sources and the general structure of their energy supply (Article 192(2)(c) TFEU).

It is also not inconceivable that minimum harmonisation would be motivated, in equal measure, by market and environmental protection objectives, as examined with regard to a medium harmonisation measure (above at §2.2.2) and soft harmonisation (above at §2.3.2). If this is so, then the possibility of a dual legal basis (Articles 194 and 192 TFEU) should be considered (above, §1.3). A dual legal basis is only exceptionally used in cases in which it is established that the act simultaneously pursues a number of objectives which are indissociably linked, without one being secondary and indirect in relation to the other.[96] A minimum harmonisation measure would, if taken (partially) on the basis of Article 192 TFEU, possibly fall within the category of Article 192(2)(c) TFEU and trigger the procedural requirement of a unanimous vote in the Council. Therefore, only if the caveat of Article 194(2) TFEU were interpreted following the unanimity-hypothesis (following which the caveat requires a unanimous vote in the Council) would the procedural requirements of Article 194 TFEU and Article 192(2)(c) TFEU be compatible, and could the measure be taken on the their joint legal basis. Alternatively, if: the measure did not "significantly" affect Member States' choice between different energy sources and the structure of their energy supply, pursuant to Article 192(2)(c) TFEU; the caveat in Article 194 TFEU were understood to be parallel to Article 192(2)(c) TFEU; and the unanimity hypothesis were not to be followed (following which the caveat requires a unanimous vote in the Council), *then* both provisions would equally have compatible procedural requirements (namely qualified majority voting in the Council) (above, §1.2.7). Therefore, the possibility of a dual legal basis would again require a proper examination of the "significance" of the effect which minimum harmonisation would have on Member States' energy rights, both with regard to Article 192(2)(c) TFEU and Article 194(2) TFEU.

However, considering that the promotion of renewable energy sources is one of the objectives of Article 194 TFEU and considering the lack of any evidence that environmental protection would be the primary objective, it would seem that Article 192 TFEU is not a likely legal basis whether jointly, or by itself

With regard to the harmonisation measures contained in this approach, and in the absence of any clear information concerning what they will relate to, it will be difficult to assess whether they may lead to opposition from the Member States.

[96] Opinion 2/00 [2001] ECR I-9713, para. 23.

§2.4.3 Conclusion on minimum harmonisation

Minimum harmonisation appears to be legally feasible based upon Article 194 TFEU, and especially so if a *de minimis* threshold is adopted; and it is likely that this would work without the need to resort to either an "opt-out" clause or derogation options. Unless the unanimity hypothesis is followed (following which the caveat would require a unanimous vote in the Council), the measure would require the ordinary legislative procedure with qualified majority voting in the Council. Nevertheless, if the caveat were interpreted as laying down an absolute competence limit, Member States may still argue that their sovereignty over their energy mix is affected so that such a measure would fall foul of the caveat in Article 194 TFEU.

Article 192 TFEU might be used instead, subject to the minimum harmonisation approach primarily serving environmental objectives, as well as jointly with Article 194 TFEU if the objectives of both provisions are pursued in an equal manner. If Article 192 TFEU is used as a legal basis, and if it is decided that the measure would have a "significant" effect on Member States' choice between different energy sources and/or the general structure of their energy supply, then the measure would require a unanimous vote in the Council pursuant to Article 192(2)(c) TFEU. If no "significant" effect were found, then the measure could be adopted using the ordinary legislative procedure with qualified majority voting in the Council.

However, as the experience with Directive 2009/28/EC has shown, the Member States may be willing to negotiate their individual targets with the European Commission, and thus this would allow for the minimum harmonisation approach to be adopted under Article 194 TFEU, *even* in the face of potential limits as a result of the caveat of Article 194(2). Implicitly, however, this would mean that consensus would have to be found on the targets, and thus ultimately that all Member States would have to agree to their own national target as set in such EU legislation.[97]

[97] I.e. a *de facto*, if not *de jure*, version of a unanimity Council voting requirement.

§2.4.4 Only ETS

§2.4.4.1 Understanding the "Only ETS" approach

According to Report D2.1, the "Only ETS" approach would lead to a scenario without any renewable energy targets and without any dedicated support to renewable energy. Neither would there be a separate system for energy efficiency. All financial incentives to invest in renewable energies would come from the European Emission Trading System (ETS), within which the market for emission allowances sets the price for carbon emissions and thus determines the level of support emission saving measures may get.

The "Only ETS" scenario has to be distinguished from the minimum harmonisation or reference scenario in the sense that the Member States may no longer have national targets and national support schemes. The ETS would be the only instrument in place, contrary to the minimum harmonisation approach (§2.4) where the Member States may pursue their national policies.

§2.4.4.2 Classification of the "Only ETS" approach and legal basis

As mentioned above, Article 192 TFEU provides the European legislator with the competence to legislate in the area of the environment, pursuing the objectives mentioned in Article 191 TFEU. Those include: "*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*".

The "Only ETS" approach would, it seems, primarily aim at combating climate change. It would set a target for emissions reductions, and it would install a mechanism to reach this target. As such, it would not directly be concerned with the functioning of the internal energy market or any other of the objectives mentioned in Article 194 TFEU in the context of the European Union's energy competence. Thus, according to the European Court it should rather take the environmental competence of Article 192 TFEU as a legal basis, not Article 194 TFEU.[98] This view is confirmed by the existing legislation relating to the ETS: Directive 2009/29/EC[99] and Commission Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission

[98] On the Court's case-law on the choice of the correct legal basis, see §1.3, above.
[99] Directive (EC) 29/2009 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 [2009] OJ L140/63.

allowances,[100] are both based upon what is now Article 192 TFEU (former Article 175 EC).

Measures to combat climate change would normally, according to Article 192(1) TFEU, be adopted according to the ordinary legislative procedure. However, for measures significantly affecting *inter alia* a Member State's choice between different energy sources and the general structure of its energy supply, Article 192(2) provides for a special legislative procedure with unanimity in the Council. Article 192 TFEU does therefore not entirely bar such legislation, but subjects it to more stringent procedural requirements with an individual veto for each Member State.[101]

The "Only ETS" approach would effectively prohibit national renewable energy targets or national support schemes for renewable energy, as it would prohibit energy efficiency support schemes and other measures to control which resources are used and how. Rather, the Member States would be exposed to the functioning of the EU ETS system. Similarly to what has been said with regard to full harmonisation, a Member State with very good conditions for, e.g., the exploitation of wind energy, may have to accept that its entire electricity generation would come from wind power, irrespective of its own preferences. Member States with less optimal conditions, on the other hand, may face a situation in which no investments in renewable energy generation at all are made within their territory. The same logic may apply for energy efficiency investments, CCS or other low-carbon solutions. This development would be independent of the actual percentage for greenhouse gas emissions savings at which the EU-wide target would be set, although the more ambitious the target, the faster and more significant the development may be. In the end, though, and as with full harmonisation, the Member States would no longer be able effectively to decide which energy resources to exploit and where, or how to organize their energy supply. The threshold "*significantly*" explicitly mentioned in Article 192(2)(c) would thus sooner or later be met so that, for the adoption of EU legislation introducing a system only based upon the ETS, the special legislative procedure of Article 192(2) would need to be used.

As briefly mentioned above (§1.2), the legislative competence based upon Article 192 TFEU comes with a reservation: according to Article 193 TFEU, the European legislator cannot prevent Member States from maintaining or introducing more

[100] Commission Decision (EU) 278/2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council [2011] OJ L130/1.
[101] Compare the recent decision of the EU's General Court, stating that while such measures may be barred under the energy competence due to Article 194(2), they are possible when pursuing objectives of environmental policy, with the special legislative procedure under Article 192(2) TFEU to be followed. Case T370/11 *Poland* v. *Commission*, nyr, judgment of 7 March 2013, para. 17.

stringent protective measures.[102] The Member States may thus take permanent or provisional national measures in the area of environmental protection, despite the existence of EU legislation in this area. The question arises whether this would inherently undermine the "Only ETS" approach, and thus make it *per definitionem* impossible for it to achieve its objectives where it had to be based upon Article 192 TFEU. The answer seems to depend upon the definition of "more stringent protective measures".

A Member State could decide that it would want to do more than what had been agreed on EU level. Considering that, in the course of a special legislative procedure with a veto for each Member State, the ultimate EU-wide emissions savings target may end up being quite unambitious, this scenario does not seem unlikely. Member States could thus consider setting national targets for renewable energy, and maintain or introduce national renewable energy support schemes, in addition to the emissions savings target and the ETS. Yet the rationale of the "Only ETS" scenario would appear to be to *prevent* this combination of different mechanisms in this area.

Article 193 TFEU gives the Member States the right to take such more stringent protective measures, at least within the scope of the EU legislation. For a Member State to rely upon Article 193 TFEU and the competence to adopt more stringent protective measures, it is thus required that the envisaged national measure falls within the scope of the existing EU legislation and conflicts with it.[103] Without conflicting secondary legislation, the Member States are in any case free to adopt whatever national legislation they wish,[104] subject (of course) to the need to comply with the general requirements of the TFEU (free movement, competition, State aids, etc). If such conflicting EU legislation did exist, national legislation may only be adopted or maintained if and insofar as it provides for a higher level of protection than the EU legislation. This may include more stringent material requirements or shorter deadlines for compliance,[105] and would allow the Member States to maintain or set up decentralized approaches, provided that they comply with the other provisions of the Treaties and notify their measures to the Commission.[106] However, it is debated whether the more stringent protective

[102] In addition, Article 191(2) TFEU further requires that "harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing the Member States to take provisional measures for non-economic reasons, subject to a procedure of inspection by the Union." National renewable energy targets and support schemes will hardly constitute temporary measures in the sense of Article 191(2) TFEU, however, and the question whether a safeguard clause would make sense within "Only ETS" legislation is likely to depend upon the exact content of the legislation.
[103] Case C-203/96 *Dusseldorp* [1998] ECR I-4075, para. 35ff.
[104] Article 5 TEU and the principle of conferral: see §1.2, above, and Report D3.1, section 2.
[105] Case C-6/03 *Deponiezweckverband Eiterköpfe* v. *Land Rheinland-Pfalz* [2005] ECR I-2753, para. 44f.
[106] C. Callies & M. Ruffert (eds), *EUV AEUV Kommentar* (C.H. Beck, 2012, München): Article 193, para. 1ff.

measures need to be immanent in the system of the EU legislation or provide for stricter requirements under the same instrument. It seems that whether national legislation based upon Article 193 TFEU would be permissible will depend upon the exact content of the respective EU and national legislation.[107] It is suggested that legislation aiming in the same direction, systematically building upon it and developing it in order to reach the objectives of Article 191 TFEU may be considered to come within the meaning of "more stringent restrictive measures".[108]

With regard to national renewable energy targets and support schemes, the situation seems rather complicated. On the one hand, one can argue that renewable energy has environmental protection benefits which would be additional to other low-carbon solutions which would be supported by the ETS. Thus, when deciding upon specific ways of reaching the overall emissions savings targets and in particular the promotion of renewable energy, a Member State may pursue those additional benefits, such as noise reduction, protection of habitats, and the like. Depending upon the interpretation of Article 193 TFEU, it may be irrelevant that those objectives are pursued through a different instrument. Rather, as they would aim at a more sustainable energy supply and thus would run in the same direction as the "Only ETS" legislation, such national rules may then be seen as more stringent protective measures within the scope of Article 193 TFEU.

On the other hand, national renewable energy targets may be considered to fall outside the scope of the EU ETS altogether, as a national renewable energy support scheme would constitute an entirely different instrument rather than a more stringent protective measure. It could be said that Member States could thus not rely upon Article 193 TFEU to defend national measures in the field of renewable energy, so that Article 193 TFEU would not stand in the way of such EU legislation introducing the "Only ETS" approach which included a prohibition on national renewable energy support schemes and target.[109]

[107] H. Jarass, 'Verstärkter Umweltschutz der Mitgliedsstaaten nach Art. 176 EG' (2000) NVwZ 529.
[108] C. Callies & M. Ruffert (eds), *EUV AEUV Kommentar* (C.H. Beck, 2012, München): Article 193, para. 9.
[109] Again, one may argue that the prohibition of renewable energy targets and support schemes cannot be based upon Article 192 TFEU as it does not pursue an environmental objective but is a harmonisation measure, aiming at the functioning of the energy market and thus having to be based upon Article 194 TFEU. Then, it seems, similar arguments to those raised above in the discussion on full harmonisation (§2.1) may be employed, concluding that such a prohibition is not possible under that provision. However, such an argument would have to stand against the reasoning that the functioning of the "Only ETS" legislation would be undermined by national renewable energy targets and support schemes, so that their prohibition is inherent in the system itself.

§2.4.4.3 Conclusion on "Only ETS"

Legislation introducing only a single EU-wide emissions reductions target and prescribing the ETS as the *only* system to be employed to reach this target, thereby effectively prohibiting national renewable energy targets and support schemes, would have to be based upon Article 192 TFEU and the European legislator's competence in the field of the protection of the environment. As it would significantly affect the Member States' sovereignty over their energy mix, however, it appears that the special legislative procedure would need to be followed to adopt it. Due to the unanimity requirement in the Council, each Member State would thus have a veto.

Further, as a result of Article 193 TFEU, the Member States may adopt more stringent protective measures: this competence is protected by the express wording of the Treaty. This could relate to national renewable energy targets and support schemes, depending upon the interpretation of that provision and the formulation of the EU legislation. Thus, certain differences and potential distortions would still have to be accepted if and whenever the Member States decided to maintain or introduce them. "Only ETS" legislation, even if adopted in accordance with the special legislative procedure, could in practice not be guaranteed to lead to full harmonisation of the Member States national laws. Thus, the "Only ETS" approach as defined in Report D2.1 is not legally feasible. A "weaker version", according due respect to Article 193 TFEU, is feasible under Article 192(2) TFEU, but would require unanimity in the Council.

3. Intermediate conclusion and next steps

Based on the analyses above, we conclude that the TFEU provides a legal basis for the EU to adopt a "soft"- or "minimum" harmonisation type measure, the scope of which measures has been defined in our previous works and throughout this report.[110] It is very unlikely that the TFEU also grants the EU the power to adopt more far-reaching measures in the area of energy, such as "medium" or "full" harmonisation, or a strong "ETS-only" approach. This conclusion takes into account Member States' tepid enthusiasm for more extensive harmonising EU legislation, and remains subject to any future Treaty amendments.

Given that secondary EU law (here, the EU measure) cannot amend the Treaties or other secondary law, an EU measure cannot be adopted if it contradicts the Treaties or other secondary law. The following section will therefore analyse the compatibility with EU law of those types of measures which we consider the EU has the power to adopt; i.e. "soft" and "minimum" harmonisation. The compatibility analysis is based on the "inventory" of Report D3.3, which highlights the most relevant Treaty provisions and secondary law measures for the purpose of this project. At the end of each analysis, a "compatibility score" out of 10 will be provided (where "10" indicates that the degree of harmonisation is expected to be *entirely compatible* with existing EU law, and "0" indicates that the degree of harmonisation is *extremely unlikely* to be compatible with existing EU law).[111] It should be remembered that the two degrees of harmonisation discussed here are not rigidly defined categories. Careful drafting may prevent incompatibilities from arising where it is known that particular aspects of a chosen policy pathway are potentially problematic.

The assessment will be structured as follows: *first*, we will assess the compatibility with EU law of *soft harmonisation*. As explained in further detail above and in our previous reports, soft harmonisation may impose any one of various possible RE support schemes on the Member States. Therefore, and only where this is relevant, the assessment will be further broken down per type of support scheme (harmonised FITs; harmonised FIPs; harmonised Quotas; etc.). *Second*, we will assess the compatibility with EU law of *minimum harmonisation*, in a similarly structured fashion. *Third*, as a result of the evolution of discussions within the project, we have also considered the compatibility of a modified version of the "Only ETS" pathway, since it has been an element of the assumptions made in the

[110] See Part I of this Report as well as Report 2.1 for further detail on the scope of soft- and minimum harmonisation.
[111] The scores thus generated will then be fed into the Multi-Criteria Factor Analysis conducted elsewhere in this project.

modelling analysis[112] and the ongoing political debate during the course of the project. It thus seemed sensible to consider this issue in more detail, even though we have concluded that the originally defined "Only ETS" pathway would, effectively, not be legally feasible.

[112] See Work Package 4, in particular.

§3.1 Soft harmonisation

§3.1.1 Article 5(3) TEU - Principle of Subsidiarity and

§3.1.2 Article 5 (4) TEU Principle of Proportionality

These two principles will be treated together in the following analysis. In the area of "energy", in which competence is shared between the EU and the Member States, the Member States may exercise their competence to the extent that the EU has not exercised its competence. The Member States may again exercise their competence to the extent that the EU has decided to cease exercising its competence (Article 2 TFEU). Sharing responsibilities in this way between the EU and the Member States does not, however, grant the EU the freedom to adopt legislation to whichever extent it wants wherever there is a legal basis in the Treaties for it to do so. The use of the EU's competence is governed by the principles of subsidiarity and proportionality. These guiding principles are defined in Article 5 TEU as follows:

> *3. 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.*
>
> *4. 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 first extensive guidance on the application of these principles took the form of a set of Guidelines in 1992. These were subsequently incorporated in a Protocol which was added by the Amsterdam Treaty to the then EC Treaty, thus becoming

part of primary law. This Protocol has now been replaced after the entry into force of the Lisbon Treaty by the Protocol referred to in Article 5 TEU ("Protocol No. 2"). Protocol No. 2 is somewhat shorter than the Amsterdam Treaty Protocol and does not include its predecessor's substantive guidance. However, the guidance from the Amsterdam Treaty Protocol and the 1992 Guidelines are still taken into account by the Commission when assessing the subsidiarity and proportionality of EU action.[113] We therefore continue to use these documents better to understand how those principles should be interpreted.

The principle of *subsidiarity* is a "guiding principle" which is an important part of defining the boundary between the powers and responsibilities of the EU and the Member States.[114] It helps to determine whether action should be taken at EU level, or at Member State level. When proposing an EU measure, this claim has to be substantiated by qualitative and, wherever possible, quantitative indicators.

The principle of *proportionality* is a "guiding principle" which defines *how* the EU should take action: i.e. what the extent and content of that action should be.[115] The Amsterdam Treaty Protocol emphasised the need to adopt the "simplest" form of action; all things being equal, EU measures should take the form of a Directive rather than that of a Regulation.

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. This point ties in with the choice of legal basis. For example, the sole aim to "reduce CO_2 emissions" would define the measure as an environmental measure, to be adopted on the basis of Article 192 TFEU and not Article 194 TFEU. It would also be an insufficient objective in and of itself to justify that a far-reaching EU measure on RES would be necessary and appropriate. Member States could argue that the market mechanism of the existing, or in any event a reformed, EU ETS would suffice to "reduce CO_2 emissions" without having to adopt an EU measure on renewables support specifically. However, the pursuit of the objectives of Article 194(1) TFEU would define the measure as an energy measure, to be adopted on the basis of Article 194 TFEU, and could justify an EU measure on RE support specifically. Logically, the greater the cross-border effect of the chosen objective, the more likely it is that the objective will justify far-reaching EU action. It is via the wide consultation process in which the Commission must engage as part of the decision-making process (see below) that the Commission will have the opportunity

[113] Report from the Commission on subsidiarity and proportionality, 17th report on better law-making covering the year 2009, COM(2010) 547 final, 8 October 2010.
[114] *Ibid.*
[115] *Ibid.*

to highlight: which objectives the measure aims to pursue; why these justify EU action in the first place; and why these objectives require *that particular extent* of EU action.

First of all, it should be noted that, whilst subsidiarity and proportionality are distinct concepts, the 1992 Guidelines and the Amsterdam Treaty Protocol blur them "in a useful way".[116] It is interesting to see that in practice there is also no clear-cut distinction between the two. The Lisbon Treaty has introduced important changes concerning how to control the principles in practice. National Parliaments may now issue a reasoned Opinion on whether draft proposals for an EU measure comply with the principle of subsidiarity. If a sufficient number of Member States' Parliaments oppose the measure, this may trigger a review of the proposed measure. Given that a proposal for a measure on energy would be based on the ordinary legislative procedure, more than half of the Member State Parliaments would have to oppose a proposal on grounds of subsidiarity in order to trigger a review (this is also referred to as the "orange card" mechanism). The Commission may then decide to amend or withdraw the proposal, or maintain it as it is – in which case it must provide a justification for doing so. On the basis of this justification, and taking into account the Member State Parliaments' reasoned Opinions, the legislators (the European Parliament and the Council) then assess whether or not the principle of subsidiarity is respected. The proposal will be rejected if 55% of the members of the Council or a majority of the votes cast in the European Parliament believe this is not the case. Moreover, the Committee of the Regions has been granted the competence to challenge a measure before the CJEU on grounds of a breach of the subsidiarity principle for all those cases where the TFEU provides for the Committee to be consulted. The Member States have a similar power to bring an EU measure before the CJEU.

During the previous year, discussions have intensified concerning the need better to define the scope of such subsidiarity control. A recent report by COSAC[117] shows that some Member State Parliaments, in their application of the subsidiarity test, believe that both the principle of subsidiarity and the principle of proportionality are equally important; others believe that the proportionality principle is in fact a *component* of subsidiarity.[118] Moreover, the report shows that most national Parliaments are of the opinion that subsidiarity checks are not effective unless a proportionality check is also included: this emphasises the intertwined nature of both principles. If, for example, full harmonisation of RES is deemed disproportionate because its policy options (one support scheme; framework and

[116] Craig & de Búrca, *EU Law*, p. 168.
[117] Conference of the committees of the national Parliaments of the European Union Member States (COSAC) 18th Bi-annual Report: 'Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny', 27 September 2012.
[118] See also Commission, 'Annual Report 2012 on Subsidiarity and Proportionality' COM(2013) 566 final (30.7.2013, available at: http://ec.europa.eu/smart-regulation/better_regulation/documents/2012_subsidiarity_report_en.pdf).

design elements set at EU level; etc.) go beyond what is necessary to achieve the objective(s) set (namely the objectives listed in Article 194(1) TFEU, and in particular the development of renewable forms of energy), then it will also infringe the principle of subsidiarity (there is no added value to *that extent* of EU action).

The diversity between the Member State Parliaments notwithstanding, a large majority of Member State Parliaments have adopted a broader interpretation of the principles than the exact wording of the Protocol. As the UK House of Lords has reasoned, "although the principle (of subsidiarity) is a legal concept, in practice its application depends on political judgement".[119] While this vague and broad application is somewhat unhelpful, it neatly highlights the problem that justifying a proposal for an EU measure (e.g. soft harmonisation of RES) on the ground of subsidiarity and proportionality is no simple objective assessment. This partly explains why the Commission must consult widely before proposing legislation,[120] thus gauging stakeholders' and Member States' enthusiasm to support EU action in a particular area. For all major initiatives for EU action, the Commission prepares publically available roadmaps. Roadmaps provide a preliminary description of the action under consideration and outline the Commission's plans for policy and consultation work. They always include an initial justification for action in terms of subsidiarity and proportionality. The results of stakeholder consultations will then be taken into account at a later stage in the development of any given policy, when an Impact Assessment (IA) is carried out.

To this end, the Commission's IA Guidelines include a set of structured questions which need to be answered in order more fully to analyse the subsidiarity and proportionality of the proposed action.[121] The Commission has explained that, in its view, subsidiarity has two aspects: first, the question must be asked why the objectives of the proposed action cannot be achieved sufficiently by the Member States; and second, whether those objectives can be better achieved action by the EU. As previously mentioned, these questions seek to establish that EU action is both necessary and that there added value to taking action at EU, rather than at Member State, level. The Commission then sets out a list of more detailed questions, which should be used to "identify arguments" which are relevant. These include, for example, whether: the issue has transboundary effects; national action alone would conflict with the Treaties; and EU action would produce clear benefits; etc. Proportionality, according to these Guidelines, is more specifically assessed when examining policy options.

IAs are scrutinised by the IA Board, which may request a revised IA report where it is not evident that EU action is necessary – something which it has indeed done in

[119] COSAC 18th Bi-annual report, n. 117, above.
[120] Article 2 of the Protocol on the application of the principles of subsidiarity and proportionality.
[121] European Commission, 'Impact Assessment Guidelines', SEC(2009) 92 (15 January 2009).

the past. Moreover, at the request of a European Parliament committee, specific "added-value" assessments can be provided of proposals made in legislative reports of the European Parliament. The results of these exercises feed into the decision-making process and, if feedback is positive, serve as political leverage to back up EU action.

It should now be clear that both the subsidiarity and the proportionality assessment(s) are by definition a balancing exercise. Especially where topics are politically sensitive, each Member State will have its own reasons concerning why action should, or should not, be taken at EU level rather than at national level, and to what extent EU action can be justified. This is especially the case with more intrusive, or harmonising, EU measures. In areas in which the EU has *exclusive* competence, the principle of subsidiarity, logically, does not apply. As noted above, the area of energy is a *shared* competence between the EU and the Member States. It will be in some Member States' interest to have a particular RE support mechanism set at EU level, possibly because they believe that this may stimulate their own economic growth, and to have particular framework or design elements harmonised. However, other Member States may argue the opposite.

Given that the EU has already adopted two Directives on RES (the current Directive 2009/28/EC being the predecessor of the former Directive 2001/77/EC), and given that the many reviews of the current Directive all emphasise the continuing need and added value of "some form" of EU action, it is unlikely that a proposal for an EU measure on RES would fall foul of the principle of subsidiarity *per se*. *Generally speaking*, soft harmonisation of RES will be easier to justify than a more extensive form of harmonisation, since Member States retain their national targets, and may decide on their own design elements and support levels. This reduces the chances that certain Member State Parliaments, when assessing the proposed measure on grounds of subsidiarity, will argue that the line between EU and Member State responsibilities is drawn too much in favour of the EU. However, soft harmonisation as discussed in this report would anticipate one single RE support mechanism, set at EU level. The query remains whether this *extent* of EU action is proportionate – which, as we discussed above, feeds into the debate at national level on whether or not the proposed measure infringes the principle of subsidiarity. It will be of great importance to justify from the earliest drafting stages: (1) why the proposed measure is necessary; and (2) why it is proportionate to adopt, e.g., one single support mechanism at EU level. In practice, Member States are likely to agree to setting various specific framework or design elements at EU level. Grid access for energy from renewable sources, for example, has repeatedly been highlighted as a priority matter, both by the lobbying industry and by government officials. Past and current practice has shown that lack of grid access is a major hurdle to investment from the industry. There seems to be the necessary momentum to justify harmonising these particular framework and design

elements across the Member States, despite the possibility that some Member States *may* argue that one single renewables support mechanism set at EU level infringes the principle of subsidiarity.

We have focused here upon the impact of subsidiarity and proportionality in the EU's law- and decision-making process, rather than providing a detailed analysis of the possibility of *ex post facto* legal / judicial control via the enforcement of these principles. This is because, to date, the case law of the CJEU has been relatively lenient with regard to the intensity with which EU legislation has been reviewed for compliance with subsidiarity and proportionality: this was discussed in the inventory (Report D3.1) and it serves no purpose to repeat that analysis here. Thus, the crucial factor under this heading will be the reactions of national governments and national parliaments (and the European Parliament) to any EU proposals on renewables, and in particular whether they are satisfied that the objectives of any such EU measures are clear and justifiable, both in terms of the level at which they will be pursued and the extent to which they will have an impact upon other competing interests and rights.

Subject to the uncertainties mentioned above, we conclude that: (1) a soft harmonisation measure on RES is necessary, and there is added value to adopting such a measure at EU level rather than leaving such matters to the Member States; and (2) setting a single support mechanism and harmonising various design elements, such as grid access, would not go beyond what is necessary to attain the objectives achieved. This argument is supported by the fact that Member States retain a significant level of discretion to: set national RES targets; decide on design and framework elements; and decide on differing levels of support. These claims will have to be substantiated by qualitative and, where possible, quantitative evidence; and the Commission must take extreme care to fulfil the extensive consultation duties mentioned above.

Score: 10

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

According to Article 7 TFEU, the EU 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 EU is bound by its law and policies to the extent that it shall pursue its objectives in the most consistent way possible.

The CJEU can review the legality of acts by the EU institutions, bodies, offices or organisations on the following grounds: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; and/or misuse of powers (Article 263 TFEU). It is

beyond the scope of the present analysis to discuss further who can challenge EU law before the CJEU and to what end. In brief, it should be noted that there exist several categories of applicant-challenger, only some of which have standing *without* having to demonstrate any interest in taking action. Individuals can only bring a direct action before the CJEU under very strict conditions.

With regard to adopting an EU measure on RES, the main implication of Article 7 CJEU is that the measure will have to be consistent with existing EU law and policies. The following paragraphs aim to assess whether this is likely to be the case for a soft harmonisation-type EU measure on RES.

§3.1.4 Article 11 TFEU – Integration of Environmental Protection

Article 11 TFEU requires the EU legislator to integrate environmental protection objectives into the definition and implementation of EU policies and activities: such as, e.g., drawing up a new framework for renewable energy.

We have previously established that the main objectives of soft harmonisation of RE support will have to be those listed in Article 194(1) TFEU, which are primarily of an economic nature. Article 194(1) TFEU explicitly stipulates that EU policy on energy shall aim at those objectives "with regard to the need to preserve and improve the environment". The development of renewable forms of energy, which is explicitly listed as one of those objectives, seems likely ultimately to result in making a contribution to the sustainable development of the economy, mitigation of climate change and the protection of the environment overall. A soft harmonisation - type measure on RE support is therefore in line with Article 11 TFEU.

Score: 10

§3.1.5 Article 12 TFEU – Consumer Protection

Article 12 TFEU requires that consumer protection requirements are taken into account in defining and implementing EU actions and policies: e.g. in devising and implementing a new framework for renewable energy. This means, in particular, that the health, safety and economic interests of the EU consumers need to be respected. However, it should be noted that, while consumer protection requirements should be "taken into account", Article 12 TFEU does not impose a legal *obligation* to prioritise consumer concerns where these conflict with other needs or interests. At the same time, it must not be forgotten that the EU's Article 12 objective on consumer protection is to secure a 'high level' of protection.

A soft harmonisation - type measure is likely to affect consumers, but this does not by itself create a conflict. Soft harmonisation would not directly impose a financial burden on the consumer, since the Member States are given the discretion to decide how and by whom the cost for renewable energy support is borne. However, in light of the pressure resulting from binding targets, it is not unlikely that the cost for renewables support will eventually be passed on to the consumer. In *implementing* the EU measure at Member State level, attention will therefore have to be paid to how these costs are distributed without unduly burdening consumers. Moreover, given that the economic impact of renewables support on consumers may differ between the Member States, a forum could be established where Member States can exchange best practices. This would prevent too great a degree of fragmentation between the Member States with regard to cost distribution.

The (potential) negative impact upon consumers of higher costs arguably does not outweigh the overall gain from developing RES. A soft harmonisation - type measure would aim at the better functioning of the energy market and, through prescribing one single RE support mechanism, would allow for greater transparency of, and better comparison between, the systems of different Member States. Moreover, RE sources are often safer, in terms of their impact on human health, than certain non-renewable sources, such as nuclear and gas. These and the environmental benefits discussed above are likely to outweigh any (potential) negative effects on consumers.

Score: 9

§3.1.6 Article 18 TFEU - Principle of Non-Discrimination

Article 18 TFEU stipulates that all discrimination on grounds of nationality is prohibited. However, Article 18 TFEU is subsidiary to more *specific* provisions found elsewhere in the Treaties, including among other things the provisions on the free movement of workers and the freedom of establishment. Thus, where those freedoms are at stake, Article 18 TFEU does not apply.

Article 18 TFEU only applies where the discriminatory treatment is based on the nationality of the persons concerned and thus requires that the factors on which the differentiation in treatment depends relate to personal traits. Discrimination concerning goods rather than persons, even though based on the origin of the goods, does not fall within the scope of Article 18 TFEU. Furthermore, different national laws in different Member States are not *per se* seen as discriminatory, so that Article 18 TFEU cannot be used to reduce distortions in competition which may exist due to differences between national legislation among the Member

States. Instead, this is a question of possible harmonising legislation – typically under Article 114 TFEU where the internal market is concerned, but in the energy sector Article 194 TFEU would now be the relevant legal basis.

A soft harmonisation - type EU measure on RES does not seem to lead to discrimination based on nationality. While such legislation may well result in differential treatment as regards the origin of the electricity produced - in particular because Member States may only want to support renewable energy generated within their territory - this would not lead to discrimination between *persons* on the grounds of their nationality. Neither EU nor national legislation is likely to impose different rules depending upon the nationality of the persons working in the energy sector. Certain (other) conditions or criteria may be laid down, and we will discuss these in the context of Articles 45, 49 and 56f TFEU, considered below.

Soft harmonisation of RES is therefore consistent with Article 18 TFEU. Nevertheless, Member States will have to respect Article 18 TFEU when implementing EU legislation. The fact that EU-level soft harmonisation legislation in and of itself would not fall within the scope of Article 18 TFEU does not exclude the application of Article 18 to Member States: in implementing EU law, they cannot lay down conditions or criteria at national level that *do* amount to such discrimination.

§3.1.7 Titles II to IV TFEU - Freedoms of movement in the internal market

It has been observed by the CJEU on several occasions that the prohibition of quantitative restrictions and of all measures having equivalent effect, laid down in Article 34 TFEU, applies not only to measures by the Member States but also to measures adopted by the EU institutions.[122]

The establishment and functioning of the internal market is founded upon the free movement of goods, services, persons and capital. We will consider these four freedoms in turn.

The free of movement of goods is laid down in Article 34 TFEU and prohibits the adoption of quantitative restrictions ("QRs") to the free movement of goods, as well as measures having an equivalent effect to a quantitative restriction ("MEEQRs"). It is clear from the CJEU's long-standing case law that Article 34 TFEU prohibits "any national measure which is capable of hindering, directly or

[122] See Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15, Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para. 27.

indirectly, actually or potentially, [intra-Union] trade".[123] It should be borne in mind that electricity is, indeed, a 'good'[124] and that the soft harmonisation of the energy market must be in line with existing internal market provisions. Whilst soft harmonisation would not include any obvious QRs on the import or export of electricity, or indeed entirely prohibit imports or exports, support schemes for renewable energy may have the effect of *limiting* the amount of electricity that can be imported or exported.[125]

The free movement of persons, services and capital is laid down in the provisions of Title IV of the TFEU. None of these fundamental freedoms seems *prima facie* to be affected by soft harmonisation, since it would not prevent either workers, the self-employed, companies or branches of companies from providing services in another Member State, neither would it prevent them from establishing themselves there, nor would it in any way restrict payments between Member States. However, we will consider the free movement of capital in more detail below, since soft harmonisation of the energy market risks affecting, e.g., foreign investment.

The following sections will discuss the provisions related to the free movement of goods and capital in more detail.

Score: N/A

§3.1.8 Article 34 TFEU (Quantitative Restrictions and MEEQRs on Imports)

Article 34 TFEU prohibits the adoption of quantitative restrictions ("QRs") and measures having an equivalent effect to a quantitative restriction ("MEEQRs") on imports. This, according to the CJEU, includes:

> *"all trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."*[126]

MEEQRs include direct import restrictions but also other barriers to trade; it should be acknowledged, however, that the CJEU has been particularly harsh on measures such as import licences or requirements on imports to which domestic products are not subjected. Article 34 TFEU also prohibits those actions by a Member State

[123] Case 8/74 *Dassonville* [1974] ECR 837, para. 5.
[124] Case 6/64 *Costa* v. *ENEL* [1964] ECR 585 and Case C-393/92 *Almelo* [1994] ECR I-1447.
[125] See, e.g., the reasoning of AG Jacobs in his Opinion in Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099, para. 199ff.
[126] Case 8/74 *Dasssonville* [1974] ECR 837, para. 5.

which promote or favour domestic products to the detriment of competing imported products. The CJEU famously found that a State campaign to promote the purchase of goods "made in Ireland" constituted a measure having equivalent effect.[127] Other examples include rules on origin-marking,[128] public procurement favouring domestic goods over imported goods,[129] prohibiting importers from setting a price below a certain fixed or recommended minimum price on domestic products,[130] and measures making imports more expensive.[131] The prohibition in Article 34 TFEU even extends to some impediments to trade created by private parties, in the sense that it obliges Member State national governments to take all necessary and appropriate measures to ensure that the free movement of goods is respected in their territory:[132] this includes ensuring that private parties in their territory do not take actions (e.g. blockades and destroying imported products) which persistently prevent imports, particularly in a way which would breach national law (e.g. by wilfully destroying the property of others).

It is clear from the *Dassonville* criteria, cited above, that a measure may fall foul of Article 34 TFEU without being of a discriminatory nature: i.e. despite treating domestic and imported products alike. In a nutshell, all products that can be marketed lawfully in one Member State should be admitted into another without restrictions, based upon a principle of what some describe as (conditional) "mutual recognition".[133] The only significant exception to this rule was established by the CJEU in *Keck and Mithouard*.[134] There, the CJEU held that certain selling arrangements fall outside the scope of Article 34 TFEU, as so long as they "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".[135] Selling arrangements have, so far, included measures such as a prohibition of resale at a loss[136] and certain advertising arrangements.[137] The merit of the *Keck* formula remains a topic of academic debate and the need to resort to the *Keck* formula should be

[127] Case 249/81 *Commission* v. *Ireland ("Buy Irish")* [1982] ECR 4005, para. 21 ff.
[128] Case 207/83 *Commission* v. *United Kingdom* [1985] ECR 1201, para. 17 ff.
[129] Case 45/87 *Commission* v. *Ireland* [1988] ECR 4929, para. 19 ff.
[130] Case 82/77 *Van Tiggele* [1978] ECR 25, para. 13f; Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* v. *LIBRO Handelsgesellschaft mbH* [2009] ECR I-3717, para. 21 ff.
[131] E.g. Case 50/85 *Schloh* v. *Auto Controle Technique* [1986] ECR 1855, para. 12 ff.
[132] Case C-265/97 *Commission* v. *France* [1997] ECR I-6959; and see Case 112/00 *Eugen Schmidberger, International Transporte und Planzüge* v. *Austria* [2003] ECR I-5659.
[133] See: Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 Also, e.g., Craig & de Búrca, *EU Law*, p. 647ff. On export restrictions, however, the Court seems to interpret Article 35 TFEU to address only directly discriminatory measures: see Case 15/79 *Groenveld* [1979] ECR 3409; see, also, Craig and de Búrca, *EU Law*, p. 650.
[134] Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.
[135] *Ibid.*, para. 16 Also: Craig & de Búrca, *EU Law*, p. 655ff.
[136] *Ibid.*
[137] But not where the measure, in reality, bears on the actual content of a product, as was the case in Case 368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* v. *Heinrich Bauer Verlag* [1997] ECR I-3689.

reconsidered in light of the recent judgments in *Commission* v. *Italy (Trailers)*[138] and *Mickelsson and Roos (Jetskis)*,[139] where the CJEU favoured an approach primarily focused on the national measure's effect on market access (and, in particular, its considerable impact in influencing consumer behaviour). The CJEU has thus highlighted that three types of measures are prohibited by Article 34 TFEU: measures of a discriminatory nature; measures laying down product requirements; and 'other' measures which hinder market access, thus arguably doing away with the need to identify whether or not a measure constitutes a selling arrangement.

However, at least in the absence of EU legislation, a Member State may adopt certain measures which are *prima facie* in breach of Article 34 TFEU, provided that such measures are reasonable (i.e. necessary and proportionate) and do not constitute a means of arbitrary discrimination or a disguised restriction on trade.[140] Such measures may be justified on the basis of Article 36 TFEU, which lists concerns such as "the protection of life of humans, animals or plants" and "public security".[141] The CJEU seems to be gradually moving away from those distinctive categories, potentially allowing for more grounds for justification of a *prima facie* breach of Article 34 TFEU.[142] If a measure is "indistinctly applicable" (i.e. does not discriminate in law between domestic and foreign goods), it may in fact be justified on the basis of one of the so-called "mandatory requirements", a non-exhaustive category of justifications established by the CJEU in *Cassis de Dijon*[143] and developed in subsequent judgments. It now seems largely accepted that environmental protection provides a possible justification for measures having equivalent effect to a quantitative restriction on imports.[144] The CJEU will also apply the proportionality test to such attempts by Member States to justify national measures. The list of "mandatory requirements" has evolved over time

[138] Case C-110/05 *Commission* v. *Italian Republic* ('*Trailers*') [2009] ECR I-519.
[139] Case C-142/05 *Åklagaren* v. *Percy Mickelsson and Joakim Roos* ('*Jetskis*') [2009] ECR I-4273.
[140] Case 8/74 *Dasssonville* [1974] ECR 837, para. 6ff.
[141] This could, it seems, also include measures guaranteeing security of energy supply. Compare: 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.
[142] It should also be noted that, until *very* recently, the current Directive 2009/28/EC has never been questioned in light of Article 34 TFEU. Whilst the Directive does not explicitly impose any *specific* type of RE support scheme, "some" form of national support for renewables *is* required given the mandatory national targets for energy from renewable sources. For the recent suggestion that elements of Directive 2009/28/EC might conflict with Article 34 TFEU, see the Opinion of AG Bot in Case C-573/12 *Ålands Vindkraft* v. *Energimyndigheten* (Opinion of 28 January 2014).
[143] Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') [1979] ECR 649
[144] See, for a detailed discussion and arguments leading to this conclusion: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 325ff. Further, see more generally: C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP, Oxford, 2010), p. 101ff.

and includes, *inter alia*: consumer protection, the fairness of commercial transactions and the protection of the environment.[145] The Article 36 TFEU - type justifications have to be interpreted restrictively.[146] With regard to the mandatory requirements, and in particular the protection of the environment, the CJEU seems recently to have adopted a more lenient approach, alluding to the fact that they may equally apply to measures which discriminate between domestic and foreign goods.[147] It has been argued that the CJEU's analysis of whether or not a measure was discriminatory has, at times, been unconvincing.[148] Case-law exists specifically in relation to the support of renewable energy.[149]

A third possibility to justify measures in breach of the free movement provisions and competition law is provided by Article 106(2) TFEU, according to which "undertakings entrusted with the operation of services of general economic interest" are only subject to those provisions insofar as their application does not obstruct the performance, in law or in fact, of the tasks assigned to them. However, this exemption is to be interpreted restrictively and the CJEU has held that the category of entrusted undertakings has to be strictly defined.[150]

Given that the CJEU has defined electricity as a 'good' for the purposes of the provisions on free movement,[151] those rules also need to be respected in the context of renewable energy legislation. It follows from Article 7 TFEU that the prohibition on restrictions of free movement does not apply only to national measures: the EU legislator is equally bound not to create such unjustifiable

[145] However, it seems that in some more recent cases the protection of the environment can also serve as a justification for discriminatory measures: Case C-397/98 *PreussenElektra* [2001] ECR I-2099. Further see e.g. A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Nomos, Bonn, 2011) p. 325ff; C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (OUP 2010), p. 101ff.
[146] E.g. Case 29/72 *Marinex* [1972] ECR 1309, para. 4; Case C-205/89 *Commission v. Greece* [1991] ECR I-1361, para. 9. Arguing that only measures directly aiming at those objectives can fall within the scope and thus renewable energies legislation cannot, see: A. Pomana, n. 144, above, p. 317.
[147] Case C-203/96 *Chemische Afvalstoffen* [1998] ECR I-4075 para. 50; Case C-389/98 *Aher Waggon* [1998] ECR I-4473.
[148] For an overview on the development, the problems emerging from the case-law and suggestions for simplification, see: Craig & de Búrca, *EU Law*, p. 677ff.
[149] Case C-379/98 *PreussenElektra* [2001] ECR I-2099 (including the Opinion by Advocate General Jacobs, para. 225 ff). However, with this case, the Court again caused uncertainty as to the right interpretation of Article 36 TFEU, as it mentioned both the protection of the life of humans, animals and plants, *and* the importance that the European Union gives to environmental protection. Yet it failed to make clear what *role* these potential grounds of justification played in reaching its conclusion that the German measures did not amount to a trade restriction under Article 34. *See* e.g.: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 315ff; and A. Johnston *et al*, 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' (2008) 17(3) *European Energy and Environmental Law Review* 126, esp. pp. 131-137.
[150] E.g. Case 127/73 *BRT* v. *SABAM* [1974] ECR 313. Also: Craig & de Búrca, *EU Law*, p. 1081.
[151] Case C-393/92 *Almelo* [1994] ECR I-1447, para. 28; Case C-397/98 *PreussenElektra* [2001] ECR I-2099, para. 68ff.

differences in treatment.[152] The question to be answered is thus whether an *EU* measure introducing soft harmonisation - which would entail national renewables targets and prescribe one single support scheme to be implemented in all Member States, albeit allowing for some national divergences - would constitute an MEEQR, and if so whether this can be justified. In doing so, it will be necessary to distinguish between the different policy pathways within the soft harmonisation approach: i.e. between Feed-In Tariffs, Feed-In Premiums and Quota obligations with TGCs (with or without banding). With regard to tendering, provided that this is open to providers established abroad, this should pose no difficulties under Article 34 TFEU; if it is limited solely to domestically established providers, then it may raise issues requiring justification in a similar manner to those discussed below for the other specific types of support scheme, since such a national regime would, again, discriminate directly against imports.

Feed-In Tariffs and Feed-In Premiums

When it comes to the assessment of both Feed-In Tariffs and Feed-In Premiums, it appears that they share two main features which could interfere with the free movement of goods: the purchase obligation, and the more or less guaranteed additional return above the market price. Whether or not this income guarantee is calculated based upon the market prices is irrelevant for the evaluation under Article 34 TFEU, as will be explained below. Both policy pathways will therefore be considered together.

Purchase obligations - i.e. the obligation for electricity supply undertakings to purchase electricity at a fixed price or premium, where the type of electricity falls within the scope of the relevant (EU and/or national) legislation and subject to the electricity having been produced in the undertaking's supply area - would be capable of hindering trade between Member States.[153] This was considered in the abovementioned case of *PreussenElektra*. While the Court did not dwell on the question of discrimination, the purchase obligation at stake in that case seems to have been discriminatory in nature, as it only supported electricity generated within the scope of the law, and thus within the territory of the Member State in question.[154] This phenomenon of Member States supporting only national generation seems very likely to rather common, given the national targets set for

[152] A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 295ff. See also: Case C-397/98 *PreussenElektra* [2001] ECR I-2099, para. 71.
[153] Case C-397/98 *PreussenElektra* [2001] ECR I-2099, para. 71.
[154] However, the structure of the electricity markets, and in particular the distribution systems to which most renewable energy plants have been and still are connected, is so far still largely national, meaning that it would be technically impossible, or at least harder (except in particular geographic situations at national borders, e.g.) for power plants based in other countries to feed into the national grid. See also AG Jacobs, Opinion of 26.10.200 in Case C-397/98 *PreussenElektra* [2001] ECR I-2099, para. 195.

each Member State by Directive 2009/28/EC and the binding obligation to meet them.[155]

The guaranteed return is equally likely to find itself at odds with the free movement provisions, given that price-fixing regulations fall within the scope of EU law if the imported products are put at a disadvantage. This could be the case if imports can no longer be sold at a profit, or where their competitive advantage (e.g. due to their lower production costs) is neutralized by the importing Member State's fixed and supported prices.[156] By their very nature, both fixed Feed-In Tariffs and Feed-In Premiums are intended to offer the producers of renewable energy a higher return than they could achieve on the market for electricity. While some careful calculations are made to estimate the right level of support, no individual, concrete analysis has been carried out. It is furthermore not impossible that renewable energy producers from other Member States would be able to generate and sell for less, but would not be able to offer that energy on the market of the relevant 'home' Member State due to the price support levels, where that support is restricted to RES-E generated in that 'home' Member State only.[157] This conclusion is not dependent upon whether the system in question allows for a fixed tariff or a fixed premium additional to the market price to be paid.

This discriminatory treatment results in the situation that electricity suppliers cannot buy electricity from other Member States, at least not to the extent that they have to buy renewable electricity under their own national Feed-In law. Furthermore, those national markets are less accessible for renewable electricity producers from other countries, which producers cannot sell into, or at least can only sell less in, the markets of those Member States with such a support scheme. Thus, the obligation is "capable of hindering, actually or potentially, directly or indirectly, trade" between the Member States.[158] Following this *Dassonville* formula, the obligation should be seen as an MEEQR on imports.[159] Alternatively,

[155] And is again at issue in the *Ålands Vindkraft* case (n. 142, above), as well as in Joined Cases C-204 to 208/12 *Essent Belgium*, judgment in both of which is now pending before the Court.
[156] Case 82/77 *Van Tiggele* [1978] ECR 25, para. 13ff.
[157] Compare: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 302.
[158] Compare: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 300f.
[159] Because, or for as long as, the purchase obligation is discriminatory and thus applies only to electricity generated within the Member State in question, no recourse can be had to the Court's case law on certain selling arrangements, which if successfully relied upon would mean that the national measure would fall outside the scope of Article 34 TFEU. However, with national targets to reach, it is very unlikely that Member States would support any electricity generation elsewhere which they could not count towards their target. The technical feasibility of the import of renewable electricity would also have to be considered: once the electricity is somewhere in the grid, its "green" character cannot be guaranteed anymore. Thus, it is to be presumed that, also in the future, if we were to follow a soft harmonisation scenario then the national implementation of the support schemes would favour only national generation.

applying the CJEU's reasoning in *Commission* v. *Italy* and subsequent cases (above), it is clear that the purchasing obligation falls within the category of "discriminatory measures"; it might then be suggested[160] that the guaranteed return above the market price fits neither into the category of "discriminatory measures" nor that of "product requirements", and yet still constitutes a measure hindering market access. Since it is very likely that it hinders market access to such an extent that it breaches the *de minimis* threshold laid down in *Mickelsson and Roos*, both the purchase obligation and the guaranteed return rate would fall short of the requirements on the free movement of goods and thus, *prima facie*, amount to an MEEQR. They would, therefore, require justification, to which we return below.

Quota Obligations

In order to evaluate their compliance with Article 34 TFEU, it does not matter whether or not the quota obligations are banded with regard to specific technologies, so that those two policy pathways can be evaluated together. As mentioned above, any kind of support scheme to reach a national target is likely to favour national generation over imported renewable electricity, and would thus be inherently directly discriminatory.[161]

Just as with regard to Feed-In support, a quota would lead to a situation in which the electricity suppliers are forced to buy a specific amount of renewable electricity generated in the Member State in question. This would reduce their ability to buy electricity from other Member States. It would have an impact upon the market access of electricity producers based in other Member States, because demand for their products would be reduced.[162]

Similarly, the value of the certificates which would be issued for renewable energy generation and used to prove compliance with the quota obligation would be added to the market price for electricity. In order to force the obligated parties effectively to meet their quota through buying and submitting the right amount of certificates, a penalty mechanism could be introduced.[163] Additionally, a "buy-out" payment may be offered to undertakings who want to comply, but who would prefer to pay a certain sum of money rather than buying certificates. This gives

[160] Although, equally, it can be argued that the extra return beyond the market price here is also a discriminatory measure, because it is available only to 'home'-generated RES-E.
[161] Unless it allowed imports to participatae in such support schemes as well: see, by analogy, cases under Article 110 TFEU like Case 193/85 *Co-Frutta* [1987] 2105 ECR and Case 77/72 *Capolongo* [1973] ECR 611.
[162] Compare: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 303f.
[163] How the money gathered through such penalties is used will affect whether other EU law provisions might apply: e.g. if the money generated were to be paid to those installations which *do* meet their renewables obligations under the relevant national scheme, then EU State aid clearance would be required.

the system an aspect of price regulation, as the penalty or the "buy-out" payment influences the price of the renewables certificates, and thus the level of support. This is supported by the experience from Member States with such systems, where the value of the certificates - and thus the price for renewable energy - in the end depends upon the fines applied as a sanction for non-compliance with the obligations.

We conclude that whether a soft harmonisation-type measure on RES imposes a Feed-In Tariff or a quota mechanism, either RE support scheme would constitute an obstacle to the free movement of goods and, unless justified, fall foul of Article 34 TFEU.

Justification for both Feed-In and Quota systems

Having established that a harmonised Feed-In Tariff or quota mechanism, either of which would be a constituent element of the soft harmonisation approach, could cause a *prima facie* breach of Article 34 TFEU, the question arises whether this could be justified.

First of all, a *prima facie* breach of Article 34 TFEU can be justified on the grounds explicitly listed in Article 36 TFEU. These include "the protection of the health and life of humans, animals or plants". Moreover, the abovementioned mandatory requirements, a non-exhaustive list established by the CJEU in *Cassis*, can exempt a measure from falling foul of Article 34 TFEU, provided that the measure applies "indistinctly" between national and foreign goods. It is most likely that restricting the free movement of goods by imposing a harmonised FIT or quota mechanism could be justified on grounds of "environmental protection". The CJEU itself has recognised the contribution of renewable energy to the protection of the 'life and health of humans, animals and plants' (Article 36 TFEU) and the environment.[164] "Environmental protection" is not an explicit ground listed in Article 36 TFEU but has, at times, figured as a "mandatory requirement".[165] Given the Court's move towards a "market access - based" test in assessing a breach of Article 34 TFEU in the first place, the query remains whether discriminatory measures can even today only be justified on the basis of Article 36 TFEU. Furthermore, at the time that the Treaties were first adopted (including Article 36, the wording of which has remained unchanged ever since) environmental protection was not yet a fundamental element of EU law (whether as a policy objective or an EU legislative competence). In the light of the growing importance of this area within EU law and

[164] See both A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 315f and Craig & de Búrca, *EU Law*, p. 675, who argue that the Court created quite some confusion with its judgment in *PreussenElektra*. See, further, A. Johnston *et al* (above, n. 149).
[165] Case C-2/90 *Commission* v. *Belgium* ('*Walloon Waste*') [1992] ECR I-4431. This case is also interesting because many an author argues that the measure in question was, in fact, discriminatory.

policy, environmental protection has arguably become so fundamental an objective of the EU that today it should be treated as implicitly covered by Article 36 TFEU.[166] AG Jacobs questioned the exhaustive nature of Article 36 TFEU in *PreussenElektra*, pleading that even in discriminatory situations a measure should be justifiable on grounds of environmental protection. In practice, it appears from recent case-law that the Court has indeed been willing to allow environmental protection to be called upon to justify measures without assessing in too much detail whether this falls within the scope of Article 36 TFEU or whether it was invoked as a mandatory requirement.[167]

Second, renewable energy is increasingly recognized in some quarters as stabilizing security of supply.[168] Legislation mandating national support schemes and national targets could, therefore, potentially be justified on grounds of "public security", which is expressly listed in Article 36 TFEU. It follows from the Court's case-law that this includes security of energy supply, although it should be noted that the Court's assessment of whether such public security is really under threat has been relatively strict on national measures relying upon this justification.[169]

A third possibility to justify measures is provided by Article 106(2) TFEU. This provision carves out a limited exception from the rules of the Treaties for certain types of undertakings, namely those *"entrusted with the operation of services of general economic interest"* or *"having the character of a revenue-producing monopoly".* Undertakings which fall into either category are only subject to the rules of the Treaties insofar as their application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. However, this exemption is to be interpreted restrictively and the CJEU has held that the category of entrusted undertakings has to be strictly defined.[170] The following questions should therefore be asked: first, whether suppliers which are subject to

[166] A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 332.
[167] Craig & de Búrca, *EU Law*, p. 676. See Case C-524/07 *Commission v. Austria* [2008] ECR I-187 para. 57; Case C-142/05 *Jetskis* (n. 139), paras. 31-32.
[168] See, e.g., European Commission, 'Communication: Renewable Energy – a major player in the European energy market', COM (2012) 271, available at: http://ec.europa.eu/energy/renewables/doc/communication/2012/comm_en.pdf. In the past, this has been considered, but it was said, that the shares of renewable energy would still be too low. For the future, this argument may become stronger. See e.g. A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Nomos, Bonn, 2011), p. 319. At the same time, it should be acknowledged that the relatively unpredictable intermittency of many RES-E sources is, for others, a reason to consider that renewables may endanger other aspects of security of supply (e.g. continuity and reliability of power supplies), and may have other infrastructure implications (capacity, the need to introduce technological changes, etc).
[169] Case 72/83 *Campus Oil* [1984] ECR 2727, para. 34. See, further, Johnston & Block, *EU Energy Law* (Oxford, OUP, 2012), ch. 9, emphasising that the case law has tended to recognize this justification only in exceptional situations.
[170] E.g. Case 127/73 *BRT* v. *SABAM* [1974] ECR 313. Also: Craig & de Búrca, *EU Law*, p. 1081.

a purchase obligation may be considered to be undertakings which have been "entrusted"[171] with the "operation of services of general economic interest"; and, second, whether they have been "assigned" the "particular task" of supporting renewable energy sources. The CJEU has held in this context that the task assigned to the undertaking must be *specific* to the undertaking and its activities.[172] Whilst energy suppliers engage in selling energy to consumers, they do not normally support renewable energies, and it would therefore be difficult to argue that this task is *specific* to them.[173] Furthermore, the undertakings must have been "entrusted" with the operation of these services by the Member State: e.g. through a national law. A general purchasing obligation does not seem to fall within this category.Therefore, although there are possible constructions in national law which might fall under Article 106(2) TFEU,[174] it does not generally seem to be applicable here.

To sum up, a soft harmonisation - type EU measure on RES, which would support domestic renewable energy generation and oblige the Member States to introduce a specific RE support system, would constitute a *prima facie* breach of Article 34 TFEU. It is likely that this obstacle to the free movement of goods is justifiable on the grounds of Article 36 TFEU and/or the mandatory requirements of *Cassis*.

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, the Court looks at whether the measure is necessary to achieve the aims pursued, something which requires there to be at least a "reasonable connection" between the measure and its objectives.[175] Second, the Court engages in a weighing or balancing exercise, assessing the impact upon free movement and determining whether this is justified in view of the objective pursued.[176] Generally speaking, the Court looks to whether the measure in question has the least distortive effects on free movement, or whether

[171] Which requires some act by the State, such as a law, providing certain rights to the undertaking and establishing a certain relationship with the government: see, e.g., Case C-159/94 *French gas and electricity monopoly* [1994] ECR I-5815.
[172] Case C-159/94 *French gas and electricity monopoly* [1994] ECR I-5815, para. 69.
[173] Compare: A. Pomana, *Förderung Erneuerbarer Energien in Deutschland und im Vereinigten Königreich im Lichte des Europäischen Wirtschaftsrechts* (Bonn, Nomos, 2011), p. 323. This may be different in cases where just one undertaking is entrusted with the task. However, such a design option would be left to the Member States under the soft harmonisation approach, so that no assessment can be made here. Further, the State aid rules may pose yet other specific problems: compare Commission Decision C 24/09 [2011] OJ L235/42.
[174] And thus be justifiable thereunder.

[175] Case 132/80 *United Foods* [1981] ECR 995, para. 28.
[176] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 171 ff.; T. Tridimas, 'Proportionality in Community law: Searching for the appropriate standard of scrutiny', in E. Ellis (ed.), *The principle of Proportionality in the Laws of Europe* (Oxford, OUP, 1999), p. 68.

the same objectives could be achieved through less restrictive means.[177] The principle of proportionality applies both to measures adopted by the Union legislator and to national measures, adopted by the Member States.[178] Thus, the question also needs to be addressed whether an EU measure imposing a national renewable energy target and the choice of one specific support scheme is proportionate to the objective of the protection of the environment. In *PreussenElektra*, 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, it is important to highlight that, with regard to 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*,[179] 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 (see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123)." The barrier of "manifestly inappropriate" is significantly higher than that of "proportionality" *tout court*. Whilst this level of discretion is open to judicial review, it should be remembered that the Court must confine itself to examining whether or not the EU measure is vitiated by a manifest error or misuse of power, or whether the institution in question has manifestly exceeded the limits of its discretion.[180]

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,

[177] E.g. Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37; Case C-183/95 *Affish* [1997] ECR I-4315, para. 30.
[178] Compare: Joined Cases 167 to 285/88 *Wuidart* et al. [1990] ECR I-435, para. 35.
[179] 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. 52.
[180] 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

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, like FITs or quotas, 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 harmonised FITs or quotas on 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. While it should be remembered that there is no legal basis fully to harmonise in the area of (renewable) energy, regardless of the merits of a fully harmonised framework, our analysis here is concerned with imposing one single RE support scheme, whilst at the same time allowing Member States to retain a large level of discretion to develop their own design elements. 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.

Based on the foregoing discussion, it can be argued that imposing one single RE support scheme in the form of harmonised FITs or quotas 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. We therefore conclude that a soft harmonisation measure, which would set one single RE support scheme but allow Member States to retain a large level of discretion to decide on national design elements, is very likely to satisfy the proportionately test (provided, of course, that the benefits of the chosen support scheme clearly could be shown).

Conclusion

To conclude, a soft harmonisation approach with national targets, but the introduction of one single support scheme within the EU, whether this is a Feed-In system or a Quota system, appears to be in line with Article 34 TFEU. Even if such a measure constituted an MEEQR, it could be justified on grounds of environmental protection. It is proportionate for as long as this prescribed system is somehow proven to be more advantageous than others, and of course is conditional upon the Union legislator not exceeding its competences. As explained earlier (§1.2, above),

this depends upon the correct interpretation of Article 194 TFEU as the relevant legal basis for such EU legislation, and its inherent limitations. Still, this does not removefrom the Member States the responsibility to respect this provision when implementing the soft harmonisation legislation. They are – and remain – equally bound to make their national systems meet the requirements of Article 34 TFEU, where they have discretion to do so under EU law.

Score: 10

§3.1.9 Article 35 TFEU (Quantitative Restrictions and MEEQRs on Exports)

Article 35 TFEU prohibits quantitative restrictions and measures having equivalent effect ("MEEQRs") on *exports* in the same manner as Article 34 TFEU does in relation to imports. However, it appears that, at least until recently, the CJEU seemed to apply it only to discriminatory provisions, arguing that only in that situation would a "double burden" be imposed upon the exporter, who would then have to comply with national legislation and the extra-rules for goods exported to other Member States. Recently, though, the Court has seemed to develop – in parallel with the developments relating to Article 34 TFEU – and apply a more market-based approach.[181]

As discussed in detail above, national support schemes including a purchase obligation, either in the form of some kind of Feed-In mechanism or a Quota system, would constitute a measure having equivalent effect to a quantitative restriction on imports, as they would limit the chances of producers from other Member States to sell within the State in question and the possibilities for suppliers to purchase from other producers.

However, they do not generally restrict exports: producers could theoretically sell to traders other than the ones under the obligation, including those from other Member States. The reason for them not to do so rather lies in practical considerations, as producers may miss out on the economic advantage of their 'home' national support scheme. However, a higher price offered elsewhere[182] could be an incentive. Experience from some countries already shows that renewable energy producers who can achieve higher prices and better conditions on the market are likely to opt out of the support scheme and sell their production independently. The problem is then rather a technical one, as the "renewable

[181] See, in general: C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 100 ff; Craig & de Búrca, *EU Law*, p. 650.
[182] Whether on an adjacent electricity market for the *electricity itself*, or under a different national RES-E support scheme, *provided* that that neighbouring State's scheme was also open to supplies to renewable electricity sourced from *other* Member States.

quality" is lost once the energy has been fed into the national grid. At that point, the electricity generated is normally also counted towards the national target of the Member State in which the energy is fed-in and thus helps the Member State in question achieve its national target. This is then, again, the very reason why Member States generally design their support schemes so as to support only generation within their own territory.[183]

Renewable energy can be exported regardless of the existence of a national RE support scheme. However, without being able to prove that the energy is indeed from renewable sources, producers may not get a better price than what is offered through the support scheme, so the incentive to export is lost. A system of Guarantees of Origins ("GOs") was therefore introduced[184] by Directive 2009/28/EC, which instead aims to encourage trade in renewable energy within and between producers and suppliers in the different Member States. The Directive aims to encourage the use of GOs by: obliging Member States to recognise GOs from other Member States (mutual recognition); requiring the setting up of an electronic register; and setting standards on the format and information content of GOs. GOs allow producers to prove to other suppliers and customers the "quality" (origin) of the energy source.[185] If GOs become a valuable commodity - e.g. because of increased consumer demand for RES - then a market for renewable energy may develop *outside* the framework of RE support schemes.[186] Due to the required mutual recognition of the GOs from other Member States under the Directive, there seems to be nothing in national support schemes which would restrict the export possibilities of renewable energy.

A soft harmonisation - type measure would therefore not create any restrictions on exports of renewable energy *per se*, regardless of the policy pathway chosen. Energy could not only still be exported, it could even be encouraged through the setting up of a system of GOs. Soft harmonisation of RES would therefore not conflict with Article 35 TFEU.

[183] Directive 2009/28/EC offers them the possibility of supporting renewable energy generation via support schemes, with a discretionary choice on whether to support generation abroad. Further, the Member State can use the cooperation mechanisms, but they do not have to do so. See Art. 3(3) of Directive 2009/28/EC and discussion in A. Johnston & G. Block, *EU Energy Law* (Oxford: OUP, 2012), ch. 12.

[184] See, first, Article 5 of Directive 2001/77/EC [2001] OJ L283/33, at least in part in response to the problems identified in Case C-213/96 *Outokumpu* [1998] ECR I-1777.

[185] But not requiring their recognition by a Member States as if they were a tradable green certificate (TGC), thus qualifying for support under a national RES-E support scheme. The situation at issue in Joined Cases C-204 to 208/12 *Essent Belgium* (Opinion of AG Bot, 8 May 2013; judgment pending before the CJEU) shows the difficulties which can be created when a national regulator accepts 'home' GOs as if they were a TGC, but refuses to do the same with 'foreign' GOs.

[186] It should be noted that Guarantees of Origin ('GOs') do not contribute to a Member State's compliance with its national target: see Art. 15(2) Directive 2009/28/EC.

However, in their implementation of the harmonised RE support scheme, Member States could introduce certain restrictions as part of their national design elements. These restrictions would have to comply with the requirements of Article 35 TFEU. Article 35 TFEU has been interpreted by the CJEU in a similar (albeit more restricted) fashion to Article 34 TFEU (see the previous section), and therefore national restrictions on exports could potentially be justified based upon environmental protection, provided again that they comply with the principle of proportionality.

We therefore conclude that Article 35 TFEU would not conflict with a soft harmonisation approach. However, Member States will have to respect this provision when implementing the EU provisions into national law and designing their own national systems thereunder.

Score: 10

§3.1.10 Article 63 TFEU

Article 63 TFEU protects the free movement of capital, thus aiming at a situation in which entrepreneurs can satisfy their need for capital and investors can offer their disposable capital in the country where conditions are best.[187] While "capital" is not explicitly defined in the Treaties, the CJEU often refers to the Annex to Directive 88/361/EC to determine the scope of Articles 63 TFEU *et seq*.[188] The Court has so far held that: mortgages; investments in real property; and direct or portfolio investments fall within the scope of this provision. Inheritances, banknotes and coins, gifts (in money or in kind), commercial credits and guarantees may also fall within the scope of the free movement of capital.[189] However, it appears that, when considering the relationship between free movement of capital and the other freedoms, the Court on the one hand sees free movement of capital as a precondition, but on the other hand looks to the principal purpose of the rules – goods, establishment, services or capital – and then applies the relevant Treaty provision accordingly. So it has been held that, even if legislation has effects on another free movement provision, as long as those are only unavoidable consequences of the restrictions on the free movement of

[187] W. Molle, *The Economics of European Integration: Theory, practice, policy* (Aldershot, Ashgate, 2006), p. 218.
[188] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L178, 1988, p.5-18.
[189] C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford 2010, p. 563f.

capital, then no separate independent examination of that other freedom is justified.[190] Article 63 TFEU has been applied mainly in the five following areas:

- property purchase and investment;
- currency and other financial transactions;
- loans;
- investment in companies especially where the national rule affects those who do not have a dominant interest in the company; and
- 'golden share' cases, which typically concern newly privatized companies in which the Member State in question defended its former degree of influence through certain shares which grant special rights of voting and/or control to the State.

Furthermore, Article 63 TFEU applies to the taxation of those capital movements.[191]

A soft harmonisation - type EU measure does not seem to pose any restrictions upon the movement of capital. Rather, the national support schemes may be the reason why investors may want to invest in one Member State rather than in another, be it through investment in property or in companies. Similarly, support schemes do not restrict entrepreneurs from (e.g.) getting loans from abroad. On the contrary, if the EU were to adopt the "most" efficient RE support scheme and impose it upon the Member States, then this should be in the interest of both investors and entrepreneurs. It would allow for a better comparison between the different conditions offered in the different Member States. Those differences, which may pose problems in particular under the free movement of goods, have already been assessed in light of Article 34 TFEU above, as they seem to relate more to the marketing of the relevant products rather than investment decisions and the capital movements required to put them into practice.

We conclude that Article 63 TFEU does not appear to be in conflict with the introduction of a soft harmonisation - type measure on RES. However, the Member States will have to respect this provision when implementing the EU measure and make sure that national design elements do not interfere with the free movement of capital, which would be the case if foreign investment were restricted.

Score: 10

[190] Case C-464/05 *Geurts* [2007] ECR I,9325, para. 16; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, para. 51. Compare: C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford 2010, p. 567f.
[191] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 569.

§3.1.11 Article 107 TFEU – Prohibition of State aid

Article 107 TFEU does not clearly define "State aid", but it is generally understood from the CJEU's case-law as: an advantage conferred upon the recipient[192] by a Member State or through State resources[193] which distorts or threatens to distort competition[194] and which has an effect on inter-Member State trade.[195]

State aid therefore does not address any financial or other support granted by the EU. Member States' national measures, on the other hand, may risk falling within the scope of the provision.[196] As regards the question whether a national measure constitutes State aid or "EU Aid", one has to look at the margin of discretion left to the Member States in implementing the EU legal framework. Where the EU measure gives clear and precise instructions to the Member States on how to implement a certain system and requires this to be applied in the same way across all the Member States, then the "aid" should not be attributed to the Member States. It would not be an initiative taken by the Member States but, on the contrary, by the EU *through* them.[197] However, if there is some discretion left to the Member States, in particular when it comes to the amounts of aid being granted and the manner of distribution, then the State aid rules apply and the measure is attributable to the Member State, rather than to the EU.[198]

A soft harmonisation-type measure on RES, which would have one single type of support scheme but allow for different design elements among the Member States, could affect inter-Member State trade given that the Member States will adapt their national support levels to their respective potentials and ambitions to develop RES. In one Member State, producers may therefore get more financial support than in another Member State, without producers from other countries being able to participate in those higher support levels. The producers in Member State 'A' may then get a competitive advantage over those in Member State 'B'.

[192] E.g., Case 173/73 *Italy* v. *Commission* [1974]; ECR 709; Craig & de Búrca, *EU Law*, p. 1088.
[193] E.g. Case C-345/02 *Pearle* [2004] ECR-I7139; ECFI, Case T-351-02 *Deutsche Bahn* v. *Commission* [2006] ECR II-1047; Case 173/73 *Italy* v. *Commission* [1974] ECR 709; Craig & de Búrca, *EU Law*, p. 1091.
[194] E.g. Case 173/73 *Italy* v. *Commission* [1974] ECR 709; Craig & de Búrca, *EU Law*, p. 1092.
[195] E.g. Case 730/79 *Philip Morris* [1980] ECR 2671; Craig & de Búrca, *EU Law*, p. 1093.
[196] W. Cremer, in: Calliess & Ruffert (eds.), *EUV AEUV* (C.H. Beck, 4. Auflage, 2011), Article 107, para. 80; U. Ehricke, in: U. Immenga & E.-J. Mestmäcker, *Wettbewerbsrecht, Band 1/Teil 1 EG, Kommentar zum Europäischen Kartellrecht* (München, C.H. Beck, 4. Auflage, 2007), p. 84, para. 32.
[197] 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.
[198] 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.

Furthermore, there are certain limitations on the possibilities for imports and exports (see previous sections).[199]

Soft harmonisation would not lead to EU aid, because the Member States would retain the discretion to decide on the *amount* of aid which can be granted. Accordingly, the rules on State aid would not form an obstacle to the introduction of a soft harmonisation approach in EU-level legislation, regardless of the policy pathway chosen.

As mentioned above and as has been the case for example in the current Directive 2009/28/EC, the proposed measure could contain a clause along the lines of: "This Directive is without prejudice to Articles 107 and 108 TFEU". This would re-emphasize the consistency between the different EU laws and policies and would remind the Member States to respect those when implementing the EU legal framework and thus adapting the support scheme to their individual circumstances.

However, as discussed elsewhere and thus merely repeated as a note of caution, the EU legislator has to pay due attention to the objective of a competitive market[200] and the freedoms of the market.[201] So, before adopting any legislation, its effects on inter-Member State trade need to be assessed. If the EU legislation to be adopted would interfere with free trade between the Member States, then it would have to be justified by a general interest, necessary and proportionate and may not be discriminatory.[202] The obstacles to inter-Member State trade created by the legislation would thus have to be taken into account in the balancing exercise of whether the legislation is necessary and proportionate under Article 5 TEU.

National renewables support schemes *can*, however, fall within the scope of Article 107 TFEU and constitute State aid. This was the case for example with the Austrian FIT, or the UK green certificate scheme. In practice, the aid can normally be justified on grounds of environmental protection, especially when it is for the support of renewable energy. Such aid would benefit from a "simplified investigation" by the Commission, pursuant to the Commission's Environmental Aid Guidelines. In the course of this procedure, the Commission assesses mainly whether – based upon the information submitted by the Member States – the

[199] See above, in the course of the discussions on Articles 34 and 35 TFEU: §§3.18 and 3.19.
[200] Joined Cases 41 to 44-70 *NV International Fruit Company and others* v. *Commission* [1971] ECR 411, paras. 68, 69.
[201] M Rodi, *Die Subventionsrechtsordnung* (Mohr-Siebeck, Tübingen, 2000), p. 283; P Cichy, *Wettbewerbsverfälschungen durch Gemeinschaftsbeihilfen: eine Untersuchung der Kontrolle von Gemeinschaftsbeihilfen anhand wettbewerbsrechtlicher Maßstäbe des europäischen Gemeinschaftsrechts* (Baden-Baden, Nomos, 2002), p. 158ff.
[202] 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.

measure would be proportionate and necessary, and thus not result in over-compensation of the renewable energy producers, but would rather only set the right incentives in situations where the market would otherwise not deliver.[203] The current Guidelines even explicitly address so-called "market based instruments", expressly mentioning green certificates and tendering. Still, even those types of aid are not *automatically* allowed. Member States need to submit various sources of information and the Commission will need to assess whether the financial 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.[204]

Thus, the current Guidelines do not advise on which type of RE support scheme to choose,[205] and the question arises whether a certain type of support scheme favoured and imposed by the EU legislator could then receive more favourable treatment under the State aid rules. However, even such legislation would not make the assessment of the scheme along the State aid rules redundant, since, as long as the Member States can set the support levels, it is necessary to check whether this would not result in over-compensation. Thus, while soft harmonisation legislation could lead to one single type of support scheme being used among all the Member States, it would not solve the question whether the individual national schemes constitute State aid and whether they are compatible with the internal market. Thus, the introduction of a soft harmonisation approach would – from a State aid perspective – not change much compared with the current situation. For example, a tendering regime in which the difference between the bid price for renewables and the market price for electricity would be covered by a fund financed from general taxation would clearly amount *prima facie* to State aid in need of justification, while one funded by a levy on electricity customers might do so, depending upon the level of State involvement with the institutions and mechanisms for disbursing those funds (as in the case of the Austrian and UK schemes discussed in the immediately preceding paragraphs).

The rules on State aid thus do not conflict with the introduction of a soft harmonisation-type measure on RES. However, the Member States will still have to respect these provisions in their implementation of the EU measure and any aid

[203] Compare: European Commission, *Community guidelines on State aid for environmental protection*, [2008/C 82/01], OJ C 82, 1.4.2008; See also e.g. 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. 33ff.

[204] European Commission, *Community guidelines on State aid for environmental protection*, [2008] OJ C 82/1, 1.4.2008, para. 110.

[205] Although the latest Draft Guidelines do emphasise particular types of scheme (accessible from http://ec.europa.eu/competition/consultations/2013_state_aid_environment/index_en.html), which has led to criticisms from some Member States (see http://www.euractiv.com/energy/eu-states-unite-bid-bury-energy-news-533510?utm_source=EurActiv).

granted will be subject to the Commission's assessment. Thus, the relevant EU legislation and Commission Guidelines on these issues will be crucial for Member State schemes in practice.

Score: 10

§3.1.12 Article 310 TFEU – EU budget implementation

The soft harmonisation approach does not foresee the introduction of any cost equalisation mechanism between the Member States. No common fund would need to be created, since the allocation of the contribution from each Member State would be achieved through the national target. Accordingly, no EU-level budget implications and no problems with the special provisions are to be expected in this regard. Article 310 TFEU is thus no obstacle to the soft harmonisation of RES.

Score: 10

§3.1.13 Article 311 TFEU – The Union's own resources

The soft harmonisation approach will not touch the EU budget. The Member States' share in the efforts to reach the EU target on renewable energy will be allocated by means of their binding national target and they will individually set the level of support they deem appropriate in order to reach this target. Thus, support for renewables will not occur through the EU budget, and the procedures of Article 311 TFEU need not be followed. Article 311 TFEU thus does not stand in the way of soft harmonisation.

Score: 10

§3.1.14 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*". This should *not* be understood as an absolute limit of competence and barrier to EU legislation, as the EU can in any event only exercise competences which have been conferred upon it (Article 5 TEU). Rather, the provision directs the way in which the EU legislator

may exercise its power.[206] The CJEU has interpreted Article 345 TFEU restrictively and has upheld, in this respect, that the EU may regulate some of the incidents of private property ownership – e.g. in the context of the Common Agricultural Policy or intellectual property – in order to achieve important EU objectives. Furthermore, the Member States cannot use Article 345 TFEU to escape the application of the provisions of the Treaty. While they may have the competence to decide and control their system of property ownership, they are still bound by the provisions of the Treaties.[207]

Legislation introducing soft harmonisation of renewable energy support would comply with Article 345 TFEU. It would set national targets and determine the type of support scheme which the Member States have to use in order to reach the targets. The Member States would remain relatively free as regards the design of their support scheme and it is not foreseen that they would have to privatize public undertakings or *vice versa*.[208]

However, the Member States, in designing their national support schemes, will still have to respect the provisions of the Treaty and cannot use Article 345 TFEU as an excuse for, e.g., the anticompetitive behaviour of public undertakings or for barriers to the free movement of goods.[209]

Score: 10

§3.1.15 Fundamental rights

It has long been established by the CJEU that fundamental human rights are part of the general principles of EU law. The CJEU based this on the rights enshrined in the European Convention of Human Rights ("ECHR")[210] and on the constitutional traditions common to the Member States.[211] It is therefore important that EU law and policy be drawn up with respect for fundamental human rights. This is especially so since the EU Charter of Fundamental Rights ("the Charter"), proclaimed in 2000, was granted the same legally binding status as the Treaties by the entry into force of the 2009 Lisbon Treaty. Whilst the Charter does not extend

[206] See e.g. T. Kingreen, Art. 34, in Callies/Ruffert, *EUV, AEUV Kommentar* (C.H. Beck, München, 2011), para. 4f.
[207] E.g. Case C-235/89 *Commission* v. *Italy* (1992), ECR I-777, para. 14; Case C-30/90 *Commission* v. *United Kingdom* [1992] ECR I-829 para. 17ff.
[208] Compare e.g. T. Kingreen, Art. 34, in Callies/Ruffert, *EUV, AEUV Kommentar* (C.H. Beck, München, 2011), para. 11.
[209] See also: T. Kingreen, Art. 34, in Callies/Ruffert, *EUV, AEUV Kommentar* (C.H. Beck, München, 2011), para. 12.
[210] The ECHR is not (yet) legally binding on the EU, until the EU formally accedes to the ECHR (a possibility explicitly provided for by Art. 6(2) TFEU, and currently (it is understood) nearing completion).
[211] E.g. Case 4/73 *Nold v. Commission* [1974] ECR 491

the EU's competences beyond those laid down in the Treaties (Article 6(1) TEU), it clarifies the basis on which the CJEU guarantees respect for human rights.

For the purpose of drafting a proposal for a measure on RES, the following fundamental rights especially should be taken into account: the freedom to conduct a business in accordance with EU and national law and practice (Article 16 of the Charter); and the right to property (Article 17 of the Charter). While EU law must respect these principles, they are not absolute in nature. The right to property is explicitly subject to a caveat, since no-one may be deprived of his possessions "except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest" (Article 17(1) of the Charter). Fundamental rights are general principles of EU law and have always constituted a limited means for annulling EU legislation. The CJEU has more often than not been deferential to the EU legislator when considering challenges to EU law based upon fundamental rights, the exception being the context of asset-freezing laws adopted to combat terrorism.[212] The Court's reservations are clear from the early case of *Nold*,[213] where the Court examined whether a Commission Decision introducing new (restrictive) trading rules violated the rights to property and to pursue a business activity. Whilst emphasising the importance of ensuring fundamental rights, the Court highlighted that such rights were not absolute. "Far from constituting unfettered prerogatives, (fundamental rights) must be viewed … subject to limitations laid down in accordance with the public interest", including the "social function of property" and those limits justified by the overall objectives pursued by the EU, "on condition that the substance of these rights is left untouched".[214] In this particular case, the Court decided that the disadvantages claimed by the applicant, who argued that the trading rules deprived him of direct supplies and therefore seriously jeopardized its undertaking (a wholesale coal business), were in fact the result of the recession in coal production (i.e. economic change) and not the Decision in question. This point is important, because it is not straightforward to prove that an EU measure did indeed "cause" a violation of fundamental rights. This is especially so where the rights in question are of an economic nature.[215] Another important consideration, other than the difficulty in establishing causation, is the "fettered" nature of

[212] E.g. Cases C-402 and 415/05 P *Kadi & Al Barakaat International Foundation v. Council and Commission* ('*Kadi I*') [2008] ECR I-6351 and Case T-228/02 *Organisation des Modjahedines du people d'Iran [OMPI] v. Council* [2006] ECR II-4665; but also (unrelated to anti-terrorism laws) Joined Cases C-92/09 *Volker und Markus Schecke GbR* and C-93/09 *Harmut Eifert v. Land Hessen* [2010] ECR I-11063; see Craig & de Búrca, *EU Law*, pp. 374-378.
[213] Case 4/73, n. 211, above.
[214] Case 7/73 at para. 14.
[215] For parallel causation difficulties, see the return of Case C-46/93 *Brasserie du Pêcheur* [1996] ECR I-1029 to the German courts: discussed by F. Smith & L. Woods, 'Causation in *Francovich*: the Neglected Problem' (1997) 46 *International and Comparative Law Quarterly* 925.

fundamental rights. Fundamental rights are, and always have been, subject to the principle of proportionality. This is evident from the CJEU's case-law on the general principles of EU law; from the reasoning employed under the ECHR[216] (whose interpretation by the European Court of Human Rights has been a source of inspiration for the CJEU); and from the text of the Charter itself (see Article 52 of the Charter). More specifically, Article 52(1) of the Charter allows limitations to fundamental rights if these are provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of "general interest" as recognised by the Union, or the need to protect the rights and freedoms of others. Objectives of "general interest" may be those explicitly included in the Treaties, such as the principle of transparency (Articles 1 TEU and 10 TEU, and in Article 15 TFEU).[217] A soft harmonisation-type EU measure on RES could therefore affect the right to property and the right conduct a business, provided this aims at an objective of general interest recognised by the EU (e.g. environmental protection). The measure must be necessary and proportionate, i.e. appropriate for attaining that objective not go beyond what is necessary to achieve the objective.[218] Given that any proposal for an EU measure, including a soft harmonisation-type measure on RES, will have to be proportionate, this requirement imposes no significant extra hurdle (above at §3.1.8), although it will require the specific issue of interference with a *prima facie* fundamental right to be assessed (which may not always be identical in substance to the free trade or competition issues typically raised in the proportionality analysis).

Further, it should be emphasised that Member States are also bound by such EU Law fundamental rights when acting to implement (Article of the Charter) or derogate from[219] EU law. Thus, these considerations will be relevant for Member State systems under any such EU soft harmonisation measure.[220]

We conclude that there is a considerable degree of leeway allowed when deciding whether or not an EU measure violates fundamental rights. This results both from the explicit wording of the Charter and from the CJEU's case-law on challenges to EU law on grounds of fundamental rights (being general principles of EU law). Considering that it will be difficult to prove that an EU measure will cause any disadvantages for undertakings beyond those resulting from economic change more generally, and given that an EU measure on RES pursues the legitimate objective

[216] *Gillow* v. *United Kingdom*, European Court of Human Rights, 24 November 1986, § 55, Series A no. 109.
[217] Joined Cases C-92 and 93/09, n. 212, above, para. 68.
[218] Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, para. 51 and the case-law cited.
[219] See Case C-260/89 *Elliniki Radiophonia Tileorassi* ('*ERT*') [1993] ECR I-2925.
[220] E.g. in transitional measures which seek to bridge from the current to any new system, where such property rights (etc) may be affected by abrupt changes which do not consider the impact upon undertakings operating under the previous regime (e.g. which hold green certificates, long-term contracts, etc).

of environmental protection, compliance with fundamental rights will not pose a significant obstacle, particularly under the less intrusive soft harmonisation approach.

Score: 10

§3.1.16 The principle of legal certainty, the protection of legitimate expectations and the prohibition on retroactivity

According to Article 2 TEU, the Union is founded (*inter alia*) on the rule of law. The rule of law is a concept known to all Member States, but differences exist in its interpretation and application. The CJEU has established the meaning of this common value at EU level and has derived certain general principles of law from the rule of law. Those include the principle of legal certainty, the protection of legitimate expectations and the prohibition on retroactivity.[221]

The principle of legal certainty protects *"… any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations."*[222] The EU institutions may thus not introduce or apply any administrative practice, ruling or the like to events which have already taken place in the past without adequate notice so as to permit those affected to adjust their position. The question therefore arises which expectations may be considered legitimate, and the Court applies the standard of whether a *"prudent and circumspect economic operator could have foreseen them".*[223]

So far as legislation is concerned, the CJEU has held that the principle of legal certainty prohibits application of a law to facts which have occurred *prior* to its publication.[224] This is generally referred to as the prohibition on retroactivity. The prohibition is not absolute, and retroactive changes can be justified based upon pressing EU needs, provided that the legitimate expectations of those affected are duly respected.[225] The reasons for the retroactive application of a measure have to be published (i.e. made publicly available), and it must be unequivocal from the wording, the rationale and the general structure of the law in question that it applies retroactively.[226]

These principles not only apply to the EU institutions but also to the Member States. They should therefore be taken into account when Member States implement EU legislation, and in particular in their transition to the chosen RE

[221] E.g. Case 120/86 *Mulder* [1988] ECR 2321.
[222] E.g. Case C-289/91 *Mavridis* v. *Parliament* [1983] ECR 1731, para. 21.
[223] Case C-201/08 *Plantanol* [2009] ECR I-8343, para. 53.
[224] E.g. Case 98/78, *Racke* [1979] ECR 69, para. 15ff.
[225] E.g. Case C-459/02 *Gerekens and Association agricole pour la promotion de la commercialisation laitière Procola* v. *Luxembourg* [2004] ECR I-7315 para. 26ff.
[226] E.g. Case C-293/04 *Beemsterboer Coldstore Services* v. *Inspecteur der Belastingdienst - Douanedistrict Arnhem* [2006] ECR I-2263, para. 24

support scheme imposed by the soft harmonisation-type measure. Unless the exception mentioned above applies, the EU measure would not require Member States to make retroactive changes. Neither would the measure infringe legitimate expectations. No legislative framework currently exists at EU level for the time after 2020, and Directive 2009/28/EC explicitly refers to its revision and the Commission's task to submit a Renewable Energy Roadmap for the post-2020 period, which shall "*if appropriate, be accompanied by proposals to the European Parliament and the Council for the period after 2020*".[227] No "promises" have therefore been made with regard to the continuation or discontinuation of the existing framework on RES. Accordingly, it seems that there is currently nothing upon which a prudent and circumspect economic operator could base its legitimate expectations.

Member States, however, must ensure that their implementing legislation does not apply retroactively and does not frustrate legitimate expectations.

Score: 10

§3.1.17 Directives 2009/72/EC and 2009/71/EC on the internal energy market

Directives 2009/71/EC and 2009/72/EC aim at the establishment of a well-functioning energy market, in which consumers have a real choice. There currently still exist "obstacles to the sale of electricity on equal terms and without discrimination or disadvantages in the [EU]" and, in particular, "non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist".[228] Directives 2009/71 and 2009/72 therefore oblige Member States to take the measures set out below and adapt some of their national energy legislation.

In principle, rules favouring one type of energy over others such as in the context of RE support could be seen as distortive and thus contrary to the idea of the internal energy market. However, Directive 2009/72/EC explicitly allows the Member States to discriminate and thus support certain technologies and capacity to be built. In the interest of security of supply, the Member States must also ensure the possibility of tendering for new capacity, when the generating capacity built under the normal authorization procedure is insufficient.[229] In the interest of environmental protection and to promote infant and new technologies, they may

[227] Directive 2009/28/EC, Art. 23(9).
[228] Directive 2009/72/EC, Rec. 4.
[229] Directive 2009/72/EC, Art. 8(1).

use similar methods.[230] Thus, supporting specific projects is not a new concept. The Directive anticipates the potential future need for market intervention so as to avoid market failure, but suggests that in such cases the least distortive means should be used. This is supported by the fact that, currently, Directives 2009/71/EC and 2009/72/EC coexist with Directive 2009/28/EC, which mandates favourable treatment for renewable energy and asks the Member States to promote their deployment.

Article 15(3) of the Directive 2009/72/EC exemplifies the most frequently used way of dealing with apparent incompatibilities between instruments of secondary EU law. The provision explicitly refers to Directive 2009/29/EC and simply takes up the requirement that RES-E shall be dispatched with priority. In doing so, Directive 2009/72/EC integrates the rules on priority dispatch for renewable energy and thereby provides an exception to its own general rules. The two instruments therefore do not conflict with each other but, in fact, constitute a coherent whole. The question of compliance with the internal energy market rules could thus similarly be achieved through the careful coordination of the different instruments.

We conclude that a soft harmonisation - type EU measure would not conflict with Directives 2009/72/EC and 2009/73/EC *per se*. A coordinated approach would allow the existing framework to be integrated into the new measure, thus allowing for a more coherent and transparent framework and facilitating Member States' compliance with the obligations resulting therefrom. At the same time, certain elements of these two internal energy market Directives could be clarified in their application, so as to facilitate and even encourage RES-E deployment and investment. One pertinent example concerns the status of grid connection from offshore wind farms to the onshore transmission network: in particular, it is currently unclear whether this is part of the TSO's responsibilities or whether a wind farm owner/operator is responsible.[231]

Score: N/A

§3.1.18 Directive 2003/87/EC (EU Emissions Trading Scheme)

Directive 2003/87/EC (the "ETS Directive") establishes an EU scheme for the trading of emissions from certain greenhouse gases (the "EU ETS"). The Directive

[230] Directive 2009/72/EC, Art. 8(2).
[231] And if the latter is the case, are there unbundling consequences for that offshore portion of the grid? I.e. might other offshore operators then seek access to the offshore grid to facilitate connecting their own offshore wind farms to the grid? Such potential difficulties cause regulatory and financing uncertainty, thus deterring investment or at least pushing up the cost of financing for such projects.

has been amended several times, *inter alia* so as to include aviation.[232] When proposing a soft harmonisation - type measure on RES, based upon Article 194 TFEU, several elements of the EU ETS should be considered. The EU ETS is a mandatory "cap and trade" scheme which requires industry operators in certain sectors[233] to obtain a greenhouse gas emissions permit authorising them to emit greenhouse gases, and annually to surrender allowances for the greenhouse gases they emit. The specific greenhouse gases for which operators must surrender allowances are sector-dependent and include CO_2, NO_x and PFCs. The bulk of the EU ETS concerns CO_2 allowances, which must be surrendered by the majority of operators concerned: namely with regard to: power plants; a wide range of energy-intensive industry sectors; and commercial airlines (see Annex I of the ETS Directive[234]). Limited amounts of allowances are allocated for free, and a gradually increasing number of allowances are traded by way of an EU auctioning scheme. By gradually reducing the amount of allowances issued each year throughout the EU, the aim is significantly to reduce the total amount of greenhouse gas emissions. There is the hope that a sufficiently high price for CO_2 allowances (the "carbon price") will incentivise the industry to emit fewer tonnes of greenhouse gas and instead to invest in renewably energy sources and Carbon Capture and Storage (CCS).

A proposal for a measure on RES should take into account that the objectives and structure of the EU ETS may change beyond 2020, when the current (third) phase of the EU ETS comes to an end. The third phase runs from 2013 to 2020 and is characterised by the following: the auctioning of an increasingly larger share of allowances; the setting of an EU-wide cap on greenhouse gas emissions, thus replacing the previous 27 national caps; the harmonisation of certain rules for the free allocation of remaining allowances; and the inclusion of several more sectors and greenhouse gases within the scope of the ETS Directive. Considering the uncertain position with regard to global emissions reductions instruments and the current failures of the EU ETS – which are mainly due to a surplus in emissions allowances and (therefore) an excessively low carbon price - it is uncertain how and to what extent structural changes will be adopted in view of the fourth phase.[235] What is fairly certain is that emissions will continue to be traded by way

[232] See Directive 2009/29/EC. But note the subsequent proposal for a Decision temporarily to defer the enforcement of the ETS obligations of aircraft operators in respect of flights into and out of the EEA [COM/2012/697 Final].
[233] The specific activities to which the EU ETS applies are listed in Annex I.
[234] When referring to the EU ETS Directive in this Report, we will be referring to the consolidated version of Directive 2003/87/EC, dated 25 June 2009.
[235] Current proposed structural changes include amending the EU ETS Directive so as to give the Commission the power to amend the auctioning timetable laid down in Commission Regulation (EU) No 1031/2010. The Commission proposed the back-loading of allowances, which would involve withholding ~900 million allowances from the years 2013-2015 until 2019-2020 and as such redistributing them more equally over the third phase (see the Commission's Proposal, COM(2012) 416 final). The Commission has recently (in January 2014) finally gained the approval of the EU's Climate Change Committee to make an amendment providing for back-loading of allowances in the

of the EU auctioning scheme. There is the hope that the carbon price will have risen by 2020 so as to provide a real incentive to reduce emissions. Whether or not more greenhouse gases will be included in the scope of the ETS Directive and whether or not more activities will be covered, such as shipping, is not yet known.

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. In particular, if the EU were to choose to set quota obligations combined with TGCs, it would be important to set the quotas in such a way that they would exist harmoniously alongside the greenhouse gas emissions cap set under the EU ETS. 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.

It should be highlighted that by including specific activities and by setting a cap on the amount of greenhouse gases which may be emitted, the EU ETS is, or at least has the potential to be, *in and of itself* a tool to promote RES.[236] However, the scheme's effects are limited both by its general application and lack of promotion of any specific type of RES support, and by the current low carbon price. A measure aiming at the soft harmonisation of RES could potentially further undermine the EU ETS's problems. Quantitative targets set for a TGC and for emissions allowances may influence each other. It has already been argued that the combination of RES policies (with subsidies, support and obligations) and the EU ETS had the effect of adding to depressed EU ETS allowance prices. By making it economic to contribute RES-E, even in the absence of high carbon prices, (some of the) pressure is effectively taken off those very carbon prices. The possible interdependencies between the trading of emissions allowances and a RES support scheme of quotas with TGCs will clearly have to be taken into account so as to achieve a coherent and holistic legal framework. This is especially important given that, if a measure on RES were to restrict the application of the EU ETS without adequately achieving its renewable energy goal, or vice versa, this would arguably breach the principle of proportionality (see above, §3.1.2). Furthermore, the adoption of a harmonised RES support scheme poses certain risks to the

2014 auctions (with the volume of allowances to be back-loaded depending upon how soon such back-loading can commence). For details, see: http://ec.europa.eu/clima/news/articles/news_2014010801_en.htm (at the time of writing, the measure was still awaiting the completion of scrutiny and formal approval). From all of this, it is at the very least clear that there is both the need for restructuring the EU ETS, and a level of disagreement within the EU institutions on how to achieve this.

[236] As acknowledged in the inclusion within this project of the "Only ETS" scenario, discussed at §3.3, below.

effectiveness of the EU ETS. It has been suggested that the interaction of emissions caps and tradable emissions allowances (or tradable "black" certificates) with a scheme of quotas for RES with TGCs may have some adverse economic effects, such as an increase in the use of carbon-intensive technologies.[237] It is therefore important, both for the functioning of the EU ETS and for that of a new EU measure on RES, to develop the latter in parallel with the former.

Beyond the need for a holistic framework, it should also be noted that 50% of the revenues generated from the auctioning of emissions allowances, or the equivalent in financial value, "should" be used for one or more of the purposes listed in Article 10(3)(a) ETS Directive to (i): i.e. the further reduction of greenhouse gas emissions, developing renewable energies, forestry sequestration or carbon capture and storage (CCS). Article 10(3)(b) ETS Directive refers to the development of renewable energies to meet the EU's commitment to using 20% renewables by 2020, as well as to develop other technologies contributing to the transition to a safe and sustainable low-carbon economy and to help meet the commitment of the EU to increase energy efficiency by 20% by 2020. The provision has a limited temporal application, and will have to be updated so as to reflect the situation beyond 2020. This would provide an opportunity to revisit the current freedom of Member States to determine the use to be made of revenues from auctioning. It would be possible to provide a cross-reference with any proposed RES measure so as to make a more explicit use of the revenues from auctioning allowances as a source for RES support. It should be remembered that the soft harmonisation approach would not require a redistribution of the costs for RES support across the EU, since it would allow Member States to set their own levels of support, albeit within certain parameters (such as compliance with EU State aid law: §3.1.11, above). Nevertheless, a minimum level of harmonisation of the allocation of costs could be achieved by obliging Member States to spend a set percentage of the revenues gained from auctioning emissions allowances on promoting specific renewable energy technologies.

To conclude, the ETS Directive does not prohibit a soft harmonisation-type measure on RES. However, as mentioned above, this would require careful drafting so as to not undermine either the EU ETS or the proposed RES scheme.

Score: N/A

§3.1.19 Directive 2009/28/EC (RES)

Directive 2009/28/EC sets out the current framework for the support of renewable energy at European level. The Directive is designed to allow the EU to reach its

[237] C. Böhringer & K. E. Rosendahl, 'Green Serves the Dirtiest. On the Interaction between Black and Green Quotas', *Discussion Papers No. 581* (2009), *Research Department of Statistics Norway*.

target of at least 20% renewable energy of its final energy consumption by 2020.[238] It sets binding national targets, asks the Member States to take supportive action to reach their respective national targets[239] and to submit so-called National Renewable Energy Action Plans ("RNEAPs") in which they describe what measures they will take to reach the 2020 objectives.[240] The more substantive provisions of the Directive - for example Article 13 on the facilitation of administrative procedures and Article 16 on grid access - are to be understood as minimum measures which each Member State must take. The Directive itself stipulates that in 2018, the European Commission shall submit a post-2020 Roadmap and if appropriate propose (new) legislation.[241] It thus seems that the Directive is constructed to be limited in time.

The scope of a new, soft harmonisation-type EU measure as proposed in this report would overlap with that of Directive 2009/28/EC. It is impossible to envisage a scenario in which one instrument would impose a single RE support scheme at EU level, while according to another EU measure the Member States would retain the discretion to decide which RE support scheme to adopt. The two instruments being mutually exclusive, we therefore consider that there is no need to assess the compliance of the new measure with the old. A soft harmonisation-type EU measure on RES would build on and *replace* Directive 2009/28/EC, from 2020 onwards, rather than sit alongside it.

Any legislative proposal to replace the current Directive would need to consider any transitional issues to the regime of a successor measure, although for the most part such matters would be likelier to affect Member States when implementing the new measure. Any such legislative proposal may take into account Directive 2009/28/EC and its various provisions, depending upon whether or not that substance has proven effective. If not, there would be no obligation to retain provisions currently found in the Directive; equally, the new measure could build upon and develop further any of the various mechanisms introduced by the current Directive, such as GOs, flexibility mechanisms or priority grid access.

Score: N/a

§3.1.20 Directive 2012/27/EU (Energy Efficiency)

Directive 2012/27/EC on energy efficiency (the "EE Directive") repeals Directive 2006/32/EC on energy efficiency and Directive 2004/8/EC on the promotion of cogeneration. The EE Directive also amends both Directive 2009/125/EC on ecodesign requirements for energy-related products and Directive 2010/30/EC on labelling requirements and product information of energy consumption by energy-

[238] Compare Directive 2009/28/EC, Rec. 13.
[239] Directive 2009/28/EC, Art. 5.
[240] Directive 2009/28/EC, Art. 6.
[241] Directive 2009/28/EC, Art. 23(9).

related products, mainly by extending their scope and accelerating their application. The EE Directive is in many ways a significantly more ambitious instrument than its predecessors.[242] The framework set out in the EE Directive aims to ensure the achievement of the EU's 20% energy efficiency target for 2020 by removing barriers in the energy market and by establishing "indicative" national energy efficiency targets for 2020 (Article 1 EE Directive).

The Directive anticipates a thorough review by the Commission of the progress achieved by 30 June 2014 (Article 3(2) EE Directive). The original Proposal for a Directive included a provision stating that the review submitted by the Commission should, if "appropriate", be followed by a "legislative proposal laying down mandatory national targets". The final EE Directive, however, merely refers to the possibility, if "necessary", to accompany the assessment with a proposal for "further measures" (Article 24(7) EE Directive).[243] The innovative idea of effectively providing for a "penalty" in the event that national measures were found lacking has clearly been somewhat diluted. However, the original proposal would possibly have triggered more questions than answers as to what "binding" targets would entail in practice. In any event, the EE Directive does include an apparently binding target with regard to public buildings, since Member States "shall" ensure that, as of 2014, 3% of the total floor area of heated and/or cooled buildings owned and occupied by their central government is renovated each year, so as to meet at least certain minimum energy performance requirements (Art. 5 EE Directive). Member States may take alternative policy measures to those laid down in the Directive – e.g. measures to require and/or encourage behavioural change on the part of occupants - provided that certain conditions are fulfilled and provided the Commission is notified of them.

The EE Directive also lays down a purchasing obligation on public bodies, requiring central governments to buy only products, services and buildings with high energy performance (Article 6 EE Directive). This obligation is subject to a large degree of flexibility which allows for economic concerns to come into play and ensures fair competition. The Commission will review the purchasing obligation by December 2015, which may prompt further measures.

The EE Directive introduces the energy efficiency obligation scheme (Article 7 EE Directive). Initially, it was considered to introduce an EU-wide system of tradable "white" certificates ("TWCs").[244] However, this was rejected so as to allow

[242] A. Johnston & G. Block, *EU Energy Law* (Oxford, OUP, 2012), p. 408.
[243] 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 (2011/0172(COD)), COM(2011) 370 (22 June 2011), Article 19.
[244] Article 4(5) of Directive 2006/32/EC on energy end-use efficiency and energy services (repealed by the EE Directive) specified that the Commission would examine the appropriateness to come

Member States to adjust the schemes to their national circumstances or retain their current schemes, to some degree.[245] Recital 20 of the EE Directive more explicitly states that a European white certificates scheme would, in the current situation, create excessive administrative costs and would risk a concentration of the energy savings in a number of Member States, instead of savings being spread across the EU. In a similar vein, it was decided that, whilst certain key features needed to be harmonised at EU level (targeted sectors; level of ambition; and counting methods), the need for flexibility at national level required that a degree of discretion be left to the Member States.[246] The final obligations laid down can be summarised are as follows: each Member State must set up an energy efficiency obligation scheme, which requires designated energy suppliers or distributors ("obligated parties") to meet an annual energy-saving target equal to 1.5% of their energy sales by volume in the previous year. The scheme may also pursue social aims: e.g. by requiring a share of energy efficiency measures to be implemented as a priority in poorer households or in social housing. Furthermore, the schemes may include the possibility for obligated parties to count energy savings achieved by third parties towards their own obligation, and/or the possibility to bank energy savings for subsequent years. Member States may also take alternative policy measures to setting up an energy efficiency obligation scheme: e.g. voluntary agreements that lead to a reduction in end-use energy consumption; energy labelling schemes; or CO_2 taxes, provided that certain criteria are fulfilled (Article 7(9), (10) and (11) EE Directive). These measures must be notified to the Commission, which may make suggestions for modifications within 3 months. By 30 June 2016, the Commission will report on the implementation of the energy efficiency obligation scheme requirements and, if appropriate, propose legislative changes concerning the harmonised design elements (including the final end-use energy savings target date and the counting methods).

First of all, it is clear from the above that the EU framework for energy efficiency may undergo more changes in the years to come. These forthcoming review dates will have to be kept in mind when drawing up a proposal for a measure on RES. The new measure will have to take into account the energy efficiency targets set under the EE Directive and the design elements used by Member States to fulfil the requirements of the energy efficiency obligation schemes. Adopting an integrated approach is especially relevant with regard to the use of TWCs. Whilst the Directive does not lay down a harmonised EU system of TWCs, it leaves room for Member States to use them in order to fulfil the requirements of their energy savings obligation scheme (see Article 7(4) and (7)(b) EE Directive). The use of TWCs should be taken into account in the event of a soft harmonisation measure

forward with a proposal for a Directive to further develop the market approach in energy efficiency improvement by means of white certificates.

[245] Explanatory memorandum to the Proposal for an EE Directive, COM(2011) 370 final.

[246] *Ibid*.

on RES structured around national quotas with TGCs. Quantitative targets set for a TGC and a TWC may influence each other. For example, lowering the overall energy demand by increasing energy efficiency allows an easier attainment of certain quantitative renewable energy shares as it is fostered by TGC.[247] It is unlikely that the existence of an RE support scheme in the form of harmonised TGCs would in and of itself jeopardise Member States' energy efficiency obligations, and in doing so create an inconsistency with the EE Directive. Considering that the national energy efficiency targets are, as of yet, indicative rather than mandatory, and given the wide scope of the discretion left to the Member States to fulfil these targets, even if future TGCs were to create unintended interdependencies with existing energy efficiency measures then this could hardly be seen as a direct breach of the EE Directive. The possible interdependencies between energy efficiency and RES will, however, have to be taken into account so as to achieve a coherent and holistic legal framework. This is especially important given that, if a measure on RES were to restrict the application of the EE Directive without adequately achieving its policy objectives, or *vice versa*, then this would arguably breach the principle of proportionality (see §3.1.2, above).

Second, with regard to efficiency in energy supply more generally, the EE Directive obliges Member States to carry out an assessment of the potential for the application of high-efficiency cogeneration and efficient district heating and cooling (Article 14 EE Directive). Moreover, Member States must adopt policies to "encourage" local and regional levels to take into account the potential of using efficient heating and cooling systems, in particular those using high-efficiency cogeneration, and to consider the possibility to develop local and regional heat markets. Whilst the Directive's general wording ("encourage"; "take into account") leaves room for discretion, national implementing policies will also be likely to affect the development of RES. Moreover, Article 14(5) EE Directive imposes a more specific obligation on Member States to take adequate measures for efficient district heating and cooling infrastructure to be developed and/or to accommodate the development of high-efficiency cogeneration and the use of heating and cooling from waste heat and renewable energy sources where there is a potential to do so. Whilst this obligation equally leaves room for discretion - e.g. by allowing a cost-benefit analysis to be carried out - there is a clear emphasis on, first, providing for cogeneration where possible and, second, linking this to renewable energies. The IEA has indeed highlighted the synergies between cogeneration and renewables and the need for these low-carbon options to be developed holistically, so as to take advantage of a "double low-carbon

[247] EuroWhiteCert Project, *White Certificate Schemes and [National] Green Certificate Schemes*.

benefit".[248] As it has pointed out, in most cases cogeneration and renewable energies complement one another. Biomass, geothermal and concentrating solar power (CSP) can be operated in cogeneration mode; and co-generation can assist in balancing electricity production from variable renewables. If, for example, the soft harmonisation approach were to involve the setting of banded quotas with TGCs, the banding could be envisaged in such a way as to encourage the development of those renewable energy sources operated in cogeneration mode. This could feed into national policies adopted under the EE Directive and, more generally, lower the costs for cogeneration combined with renewables.

Third, a measure on RES would have to build on certain of the structural requirements put in place by the EE Directive, such as those regarding grid access and dispatch. Article 15(5) EE Directive is especially relevant, following which Member States must ensure that Transmission and Distribution System Operators: 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; and, when dispatching electricity generating installations, provide priority dispatch of electricity from high-efficiency cogeneration insofar as the secure operation of the national electricity system permits. These obligations are explicitly without prejudice to Article 16 of Directive 2009/28/EC on the promotion of renewable energy (see §3.1.19, above). Article 16 establishes priority- or guaranteed access to the grid for electricity produced from RES, as well as priority to generating installations using RES when dispatching electricity generating installations, insofar as that is secure. A similarly worded notice would have to be included in a proposal for a new measure on RES so that this would not prejudice against grid access and dispatch requirements with regard to electricity from high-efficiency cogeneration. However, the "without prejudice" wording leaves room for speculation as to whether electricity from RES, or rather electricity from high-efficiency cogeneration, would have to be prioritised if ever a choice had to be made. This is especially relevant if the proposal for a new RES measure were to adopt an EU-wide support scheme based upon FITs or FIPs, which both contain a purchase obligation and, as such, require guaranteed access to the grid for electricity from RES. Most FIT-schemes therefore include a provision that eligible plants must be connected to the grid. Such a provision could potentially conflict with the grid access requirements under the EE Directive unless a specific provision was introduced with a cross-reference to the EE Directive.

To conclude, the EE Directive does not *necessarily* conflict with a soft harmonisation-type EU measure on RES. However, similar to the interaction with

[248] International Energy Agency, *Co-generation and Renewables, Solutions for a Low-Carbon Energy Future* (OECD/IEA, 2011).

the ETS Directive (§3.1.18, above), the proposal will have to be carefully drafted. The new measures should: not compromise any national TWC schemes; feed into the obligation on Member States to promote high-efficiency cogeneration; and not undermine the priority grid access currently being given to electricity from high-efficiency cogeneration.

Score: 10

§3.1.21 Directive 2003/96/EC (Energy Taxation)

Directive 2003/96/EC (the "Energy Taxation Directive") sets minimum rates of taxation for certain energy products and electricity, namely where they are used as motor or heating fuel. The Directive allows, however, for preferential treatment of renewable energy by means of tax exemptions by the Member States (Article 15 Energy Taxation Directive). The tax exemption currently applies to "taxable products used under fiscal control in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources" (Article 15(1)(a)) as well as electricity from a range of RES: e.g. solar, wind, and tidal (Article 15(1)(b) Energy Taxation Directive). These products may be totally or partially exempt, "without prejudice" to other EU provisions.

It would be contrary to its very purpose if an EU measure on RES were to include a form of taxation on electricity from RES. It is therefore unlikely that a proposal for a soft harmonisation-type measure on RES would prohibit Member States from exercising their option to exempt, partially or totally, electricity derived from RES from the minimum taxation imposed by the Energy Taxation Directive. On the contrary, a soft harmonisation-type measure on RES could include an obligation for Member States *not* to impose an energy tax on electricity derived from RES. This would be contrary to the Energy Taxation Directive since it would render the exemptions under Article 15 Energy Taxation Directive obligatory. Similarly, any provision imposing a tax on electricity from non-RES sources would, if the tax were higher than that laid down by the Energy Taxation Directive, be contrary to the latter. Logically, any tax equivalent to that laid down in the Energy Taxation Directive could legally be imposed; however, such a tax would add nothing to the existing legal framework.

It should be noted that Art. 194(3) TFEU specifically requires that "measures of a fiscal nature" shall be adopted in accordance with the special legislative procedure with unanimous voting in the Council. Any "fiscal" elements of a proposed measure aiming at the soft harmonisation of RES will therefore require unanimity among all the Member States. Given the difficulties which arise when the agreement of all Member States is required, it is not likely that any fiscal

measures on RES would be of a far-reaching nature. It is unlikely that any measure on RES would impose taxation requirements which are more stringent than those laid down in the Energy Taxation Directive; however, if this were indeed achieved, then it would require amendments to the existing Energy Taxation Directive.

Score: 9 (although probably avoiding such issues, so in practice 10)

§3.1.22 EU Policies

EU policies in the field of energy and environmental policy provide relevant guiding material which should inform any proposal for a measure on RES. However, policy instruments are not legally binding in and of themselves. Policy documents do not have the same democratic foundation as EU secondary law, having not been adopted by the EP and/or Council. Whilst a new legislative measure, such as an EU measure on RES based upon Article 194 TFEU, would have to comply with the existing legal framework in the EU, there is no need for a similar form of compliance with regard to policy documents. However, they provide the necessary background information upon which a proposal for a measure can, and should, build, so as to create a comprehensive document and facilitate its adoption.

In October 2009, the European Council confirmed its commitment to: reduce greenhouse gas emissions; increase the share of renewables; and improve energy efficiency by 20% by 2020 (the 20/20/20 targets). Moreover, it 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.[249] Moreover, at the end of 2012, the Council adopted its conclusions on renewable energy, setting out several objectives so as to achieve the 20% renewables target by 2020. It stated that a RES post-2020 framework should be "established within the broader climate-energy context" and should be "supportive of security of supply, innovation and competitiveness and thus contribute to promoting long-term EU objectives for an energy and resource efficient, safe and sustainable low-carbon European economy".[250] These Conclusions built on an earlier Communication from the Commission on renewable energy, which outlined possible RES policy options for beyond 2020, and which

[249] EU press office, *Background European Council 4 February 2011, EU Energy Policy,* p. 2. Available at: http://www.european-council.europa.eu/media/171257/ec04.02.2011-factsheet-energy-pol_finaldg.en.pdf.
[250] 3204th Transport, Telecommunications and Energy Council Meeting, *Council Conclusions on Renewable Energy*, Brussels, 3 December 2012. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/trans/133950.pdf.

highlighted that fragmentation of the internal market should be avoided as much as possible. [251]

Likewise, the Commission's "Energy Roadmap 2050" is a useful document which may inform a proposal for a soft harmonisation-type EU measure on RES.[252] The Roadmap acknowledges that the decarbonisation path mentioned above cannot be achieved under the current EU policies and measures. Whilst the Roadmap does not lay down a definite strategy, it explores routes towards decarbonisation of the energy system with a prime focus on: energy efficiency; a higher share of renewables; a short-term substitution of coal with gas (which, in order to reduce its emissions, would rely upon the commercialisation of CCS); and a contribution by nuclear power to the energy mix. Whilst some of its suggestions should be reviewed in light of current economic and regulatory developments,[253] the overall ambitions of both the Roadmap and the abovementioned Communication seem in line with a soft harmonisation-type EU measure on RES. This ambition should be formulated along the lines of the objectives listed in Article 194(1) TFEU, for the obvious reasons stated above (see §§3.1.1 and 3.1.2 on subsidiarity and proportionality). The final "result" aimed at both by the Roadmap and an EU measure on RES is therefore the decarbonisation of the EU economy through, amongst other things, an increased share of RES, whilst ensuring a level of market integration that avoids fragmentation and secures energy supply.

The Commission recently adopted a Green Paper entitled "A 2030 framework for climate and energy policies", currently open for public consultation.[254] The Green Paper emphasizes once more the policy strategy for 2020 (the "20/20/20 targets") and reviews some of the changes which have taken place since drawing up existing strategies. With regard to RES, the Green Paper highlights the need for "massive investments in transmission and distribution grids, including through cross-border infrastructure, to complete the internal energy market (so as to) accommodate renewable energy", as well as the necessity to make RES more cost-efficient, so that support schemes may be limited only to those technologies and areas that need it.[255] The latter statement would seem in favour of a RES support scheme with banding. The Green Paper puts several questions out for consultation, including the following: whether targets should be set at EU, national or sector

[251] Communication from the Commission 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.
[252] 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*, COM(2011) 885 final.
[253] CCS, for example, is in many (indeed almost all) EU countries not being commercialised beyond certain pilot projects because of low carbon prices, technical difficulties and public opposition.
[254] COM(2013) 169 final.
[255] *Ibid*, p. 5

level; whether targets should be binding; whether there is the need to *combine* the different instruments on RES, greenhouse gas emissions reduction (outside the ETS) and energy efficiency; whether there are new ways to foster the competitiveness of the EU economy; and whether there is a need to maintain current flexibility and distribution tools which allow Member States to spread the burden of energy and climate policy and regulation. The responses to these questions are expected to come from Member States, industry, NGOs and the public. They will provide useful information which must be taken into account when drawing up a proposal for a measure on RES (see §3.1.1 above on subsidiarity).

It seems that there is nothing in the (relatively vague) terms of such policy instruments which would cause a political obstacle to a soft harmonisation-type EU measure on RES.

Score: N/a

§3.2 Minimum harmonisation

§3.2.1 Article 5(3) TEU - Principle of Subsidiarityand

§3.2.2 Article 5(4) TEU - Principle of Proportionality

As highlighted above with regard to soft harmonisation, the principles of subsidiarity and proportionality require various considerations to be balanced and weighed against one another. Questions to be asked are: whether it is necessary that action be undertaken at EU rather than Member State level; and whether the measure has some "added value". Moreover, for the measure to be proportionate it must be shown that minimum harmonisation does not go beyond what is necessary to obtain the objectives set. It is therefore a priority concern clearly to define the *goals* which the measure aims to achieve (see our previous discussion on soft harmonisation (§3.1, above). With regard to minimum harmonisation of RES these will, at least in part, be the objectives outlined in Article 194(1) TFEU. In the unlikely event that the measure is based on Article 193 TFEU instead, the measure will have to be justified as being necessary and proportionate in light of the objectives of Article 191 TFEU.

Given that minimum harmonisation leaves the greatest level of discretion to the Member States of all the EU legislative measures which we have considered throughout this project, and given that the current EU Directive on RES was deemed to be necessary and proportionate, it is not *likely* that a minimum harmonisation measure would fall foul of either principle. However, the Commission should fulfil its obligations of consulting widely and duly justifying its proposal as part of the required Impact Assessment, taking into account stakeholders' comments and Member States' Parliaments' reasoned Opinions on the proposal. Similarly to soft harmonisation, there remains a risk that a majority of Member States' Parliaments will oppose a draft proposed measure on the basis of subsidiarity, thus triggering the "orange card" mechanism outlined above. This will trigger a review of the proposed measure in question and slow down, if not entirely hinder, the decision-making process. Otherwise, the relevant analysis applicable here is so similar in substance to that already conducted under the soft harmonisation heading (§3.1, above) that it does not bear repeating here.

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

According to Article 7 TFEU, the EU 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 EU is bound by its law and policies to that extent that it shall pursue its objectives in the most consistent way possible.

The CJEU can review the legality of acts by the EU institutions, bodies, offices or organisations on the following grounds: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; and/or misuse of powers (Article 263 TFEU). It is not in the scope of this analysis further to discuss who can challenge EU law before the CJEU and to what end. In brief, it should be noted that there exist several categories of plaintiffs, only some of which have standing *without* having to demonstrate any interest in taking action. Individuals can only bring an action before the CJEU under very strict conditions.

With regard to adopting an EU measure on RES, the main implication of Article 7 CJEU is that the measure will have to be consistent with existing EU law and policies. The following provisions aim to assess whether this is likely to be the case for a minimum harmonisation-type EU measure on RES.

§3.2.4 Article 11 TFEU – Integration of Environmental Protection

According to Article 11 TFEU, all EU policies and activities including legislation need to pay due respect to environmental protection objectives and the principle of sustainability.

A minimum harmonisation-type EU measure on RES would either be based on Article 193 TFEU or Article 194 TFEU. In the former case, the measure would necessarily be in line with Article 11 TFEU given that its primary aims would be the environmental objectives outlined in Article 191 TFEU. In the latter case, we have outlined above (§1.2) that the objectives of Article 194(1) TFEU have a strong environmental dimension. In either scenario, it appears that a minimum harmonisation-type EU measure on RES would integrate concerns of environmental protection, in line with Article 11 TFEU.

Score: 10

§3.2.5 Article 12 TFEU – Consumer Protection

Article 12 TFEU requires the Union legislator to take into account consumer protection requirements, which in particular relate to the health, safety and economic interests of the consumer.

Minimum harmonisation would be very likely to respect those requirements. First, the transition towards renewable energy helps in protecting the environment and mitigating climate change, and would thus be in the consumer's interest. Second, it may also contribute to increased safety: e.g. considering that in practice it is likely to mean moving away from nuclear power plants and/or avoiding the exploitation of shale gas, which both come with high and even unknown risks. The contribution to security of energy supply is also an important benefit to the consumer.

As regards the economic interests of the consumer, minimum harmonisation legislation would not directly impose charges on the consumer. Rather, it would be left to the Member States whether and to what extent they pass on the costs for renewable energy support to the consumers. However, there may be arguments brought forward that the introduction of a mandatory, binding renewable energy target would in and of itself expose the consumers to a financial burden as the Member States are likely to adopt a system which will somehow pass on the costs to customers. Where those customers are consumers, higher energy prices could follow; and where businesses face higher energy prices, ultimately those input costs will affect the cost of goods and services for consumers as well. In the longer term, if fossil fuel input prices were to rise then an energy system strongly based upon renewables might end up being less expensive; and in the interim transition, as the efficiency and effectiveness of renewable generation improve, renewables may also increase competition in energy supply. Overall, it would seem that such shorter-term costs would be acceptable in return for medium- to long-term benefits. In showing that this balance is satisfactory, the goals of any EU measure need to be clearly defined and analysis offered concerning projected costs and benefits.

Score: 9

§3.2.6 Article 18 TFEU - Principle of Non-Discrimination

As mentioned above, the prohibition of discrimination based upon nationality as set out in Article 18 TFEU does not apply to measures which do not discriminate based upon factors relating to the person concerned, but e.g. based upon the origin of certain goods.[256] The provision itself does not stand in the way of different national legislation in the different Member States.

EU legislation introducing minimum harmonisation of renewable energy support would not include any differential treatment of persons due to their nationality within one Member State. While there may be discriminatory impacts stemming

[256] See the discussion of Art. 18 TFEU (§3.1.6, above).

from the continued existence of different legislation in different Member States, which the minimum harmonisation approach would allow, those are to be assessed under the specific free movement provisions, and do not fall within the scope of Article 18 TFEU.

Score : N/a

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

Similar to the soft harmonisation approach assessed above, the minimum harmonisation approach would not include any *quantitative* restrictions on energy imports or exports, so that this element of Article 34 TFEU seems not to be at stake. But the most relevant provision remains Article 34 TFEU and the concept of MEEQRs and possible justifications for any trade restrictions. Accordingly, and with reference to the arguments developed above (see §3.1.8), this provision will be looked at in more detail.

§3.2.8 Article 34 TFEU (Quantitative Restrictions and MEEQRs on Imports)

As explained in detail above, national support schemes may constitute measures having equivalent effect to a quantitative restriction ("MEEQRs") to the free movement of goods. It is likely that these restrictions can be justified in light of the protection of the environment, provided that they comply with the principle of proportionality.

In a minimum harmonisation approach, the Member States would themselves choose the type of support scheme and the design elements, which would be likely to lead to more differences between the national systems and thus arguably to more potentially distortive effects. Those distortive effects would therefore be the result of *national* policy choices and legislation, rather than being "imposed" by the EU measure.

Logically, Member States always have to respect EU law when implementing an EU measure, including the requirements of Article 34 TFEU. Sometimes, an EU measure which needs to be implemented therefore refers to specific Treaty provisions to which particular attention should be paid. This has been done, for example, in Article 3(3) of the Directive 28/2009/EC, which provides that, *"(w)ithout prejudice to Articles 87 and 88 of the Treaty, Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to*

which extent they support energy from renewable sources which is produced in a different Member State". Something similar could be done with legislation introducing a minimum harmonisation approach to stress in particular that the restrictions to free trade resulting from the differences among the support schemes are *prima facie* justifiable on environmental protection grounds and should in practice be proportionate in their impact. [257]

Score: 10

§3.2.9 Article 35 TFEU (Quantitative Restrictions and MEEQRs on Exports)

According to Article 35 TFEU, quantitative restrictions to exports of goods and measures having equivalent effect to a quantitative restriction are prohibited. This provision has to be respected by the European legislator as well as by the Member States when implementing EU legislation. The CJEU has interpreted this provision to aim at measures imposing a "double burden" for producers who seek to market their goods in another Member State. As mentioned above, in the context of the soft harmonisation approach, most renewable energy support schemes with purchase obligations and some kind of instrument to grant renewable energy producers an additional stream of revenue, do not impose any such restriction on exports, and do not impose extra burdens on producers wanting to export their goods. In particular, it seems that the system of GOs would allow and facilitate trade in the "renewable energy quality" of electricity: thus, it could in theory prefectly well be traded between producers and suppliers in different Member States. The reason why this is not done (yet) may rather lie in the fact that the markets do not deliver the necessary incentive(s) to do so. However, that by itself does not constitute an MEEQR to exports caused by the relevant national RES-E scheme(s).

We thus conclude that Article 35 TFEU does not conflict with the introduction of a minimum harmonisation measure.

Score: 10

[257] Although note the challenge posed to this suggestion by the reasoning of AG Bot in Case C-573/12 *Ålands Vindkraft* v. *Energimyndigheten* (Opinion of 28 January 2014; judgment of the CJEU pending).

§3.2.10 Article 63 TFEU

As mentioned previously, Article 63 TFEU aims at creating the situation in which both entrepreneurs and investors can make use of the best conditions across the EU for their individual investment projects[258] and is sometimes treated by the CJEU as a precondition for the other freedoms.[259] However, national RE support schemes normally do not interfere with this freedom. On the contrary, national RE support schemes try to offer "good" market conditions in order to attract investors and make foreign investment possible. Furthermore, the barriers to free movement that may exist because of national RE support schemes have already been discussed in the context of the free movement of goods. The free movement provisions are of specific relevance since RE support schemes do not affect the conditions for investments but the means of how and where to market the products resulting from the investment. According to the CJEU's approach to applying the free movement provisions, which focuses upon the principal object of the rules,[260] any application of Article 63 TFEU may then be held in abeyance, after first applying (e.g.) Article 34 TFEU.[261] Thus, a minimum harmonisation approach, in which the Member States had to determine which support scheme to choose, would in principle pose no problems under this provision: and even less so when it is borne in mind that the Member States will have to respect Article 63 TFEU *et seq.* when implementing that EU legislation in any case.

Score: 10

§3.2.11 Article 107 TFEU – Prohibition of State aid

As already mentioned, some renewable energy support schemes are designed as State aid - thus as benefits granted to a certain beneficiary by the State or through Member State resources which distort or threaten to distort competition and have an effect on inter-Member State trade -, while others are not. There is no general rule whether FITs or Quota schemes do or do *not* amount to State aid. This depends upon the particular design features of the support scheme. For example, the former German Feed-In law (Stromeinspeisungsgesetz, StREG) was held not to be State aid: 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 instead.[262] By contrast, the FIT scheme in Austria, where the system

[258] W. Molle, *The Economics of European Integration: Theory, practice, policy* (Aldershot, Ashgate, 2006), p. 218.
[259] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 567ff.
[260] E.g., Case C-464/05 *Geurts* [2007] ECR I-9325, para. 16; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, para. 51.
[261] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 569.
[262] Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

was by managed a publicly controlled body, was found to amount to State aid.[263] Similarly, the UK quota scheme was found to amount to State aid, as it involved the possibility to make a "buy-out" payment to a specific publicly-managed fund, the amount of which was then again used to support renewable energy producers.[264] However, those support schemes, as State aid schemes for renewable energy in general, could be justified based upon the Commission's Environmental Aid Guidelines.

Thus, the question whether a support scheme for renewables constitutes State aid within the scope of Article 107 TFEU depends upon the concrete design of the system and cannot be generalized. In the minimum harmonisation approach, the EU legislation would not stipulate specific design elements for national RE support schemes. The choice of support scheme, level of support and all related questions would be left to the Member States. The support scheme would thus emerge from Member States' national policy choices, rather than from the EU,[265] and the obligation to make the scheme comply with State aid rules would therefore lie with the Member States. As mentioned previously in the context of soft harmonisation, the EU legislator could include a clause specifically referring to Articles 107 and 108 TFEU, both in order to stress the consistency of EU legislation with the general rules of the Treaties and to remind the Member States of the EU law provisions that they have to respect.

Accordingly, none of the policy pathways within the minimum harmonisation approach would pose a problem with regard to Article 107 TFEU and the State aid rules. Rather, as it is currently the case, the Member States have to respect those rules, when setting up their own national support schemes, and it is the role of the European Commission to check the compatibility of such schemes with EU law and thus safeguard the functioning of the Internal Market. The crucial implication of this conclusion is that the precise substance and wording of any relevant EU legislation or Guidelines on State aid will be crucial to the practical implementation of national RES support schemes under the minimum harmonisation approach.

Score: 10

[263] Commission Decision [2006] State aid NN 162/B/2003 and State aid N 317/B/2006.
[264] Commission Decision [2005] State aid N 362/2004.
[265] 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), [2009] OJ L 159/11 (20.06.2009), para. 57.

§3.2.12 Article 310 TFEU- EU budget implementation

Similar to the soft harmonisation approach, minimum harmonisation does not anticipate an equalisation mechanism between the Member States. No specific European fund would therefore have to be created. The contribution to the EU target for the generation of renewable energy which each Member State has to deliver will be allocated to them by means of an individual, binding, national target. There are therefore no implications for the EU budget and no problems with the EU's special provisions in this regard.

We conclude that Article 310 TFEU does not pose an obstacle to minimum harmonisation.

Score: 10

§3.2.13 Article 311 TFEU – The Union's own resources

A minimum harmonisation-type EU measure on RES would rely upon binding, national targets in order to distribute the tasks and costs of renewable energy support among the Member States. Given that lack of direct EU financial contributions, the minimum harmonisation approach will therefore not touch on the EU budget. No conflict therefore arises with the principle that the EU has to finance the budget wholly from its own resources.

We conclude that Article 311 TFEU does not pose an obstacle to minimum harmonisation.

Score: 10

§3.2.14 Article 345 TFEU - Member States' systems of property ownership

As discussed above, Article 345 TFEU prevents the EU from interfering with the Member States' systems of property ownership when legislating. However, it does not serve as a justification for the Member States to disregard other Treaty provisions when implementing an EU measure.[266] Article 345 TFEU has been

[266] See above, §3.1.14. See also e.g. T. Kingreen, Art. 34, in Callies/Ruffert, *EUV, AEUV Kommentar* (C.H. Beck, München, 2011).

interpreted restrictively, and the CJEU has allowed some interference with the right to property in situations where the EU is competent to legislate.[267]

A minimum harmonisation-type EU measure would not include any requirements relating to the ownership of the renewable energy power plants, as this would be irrelevant to its objective. Thus, it would comply with Article 345 TFEU.

Given that Article 345 TFEU cannot be used by the Member States to escape the application of the other provisions of the Treaty, they would still have to comply with, for example, the rules on freedom of establishment or State aid, when implementing the EU legislation and designing their national support schemes.

Score: 10

§3.2.15 Fundamental rights

It has been mentioned above that there are three main sources of fundamental rights: the EU Charter on Fundamental Rights ("the Charter"), the European Convention of Human Rights ("ECHR") and the general principles of EU law (Art. 6 TEU). Similar to a soft harmonisation-type measure on RES, *especially* the following fundamental rights should be taken into account: the freedom to conduct a business in accordance with EU and national law and practice (Article 16 of the Charter); and the right to property (Article 17 of the Charter). Fundamental rights have always constituted a limited ground for annulling EU law, and therefore constitute a relatively insignificant hurdle to an EU measure on RES. This is especially true in the event of minimum harmonisation, for the reasons set out below. The CJEU has more often than not been deferential to the EU when considering challenges to EU legislation based upon fundamental rights, other than in the context of anti-terrorism measures.[268] First, it is difficult to prove that the EU measure indeed "caused" a violation of fundamental rights, especially where the rights in question are of an economic nature. More importantly, fundamental rights may be limited so long as certain conditions are fulfilled. Article 52(1) of the Charter allows limitations to fundamental rights if this is provided for by law and respects the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others. Objectives of "general interest" may be those explicitly included in the Treaties, such as the principle of transparency (Articles 1 TEU and 10 TEU, and Article 15 TFEU).[269] This means that an EU

[267] See also, e.g., Advocate General Mischo's Opinion in Case C-363/01 *Flughafen Hannover-Langenhagen* v. *Deutsche Lufthansa* [2003] ECR I-11893, para. 37ff.
[268] E.g. Cases C-402 and 415/05 P *Kadi I* and Case T-228/02 *OMPI,* but also [unrelated to anti-terrorism laws] Joined Cases C-92 and 93/09 *Schecke*; see also Craig & de Búrca, *EU Law*, pp. 374-378.
[269] Joined Cases C-92 and 93/09 (n. 212, above), para. 68.

measure on RES may limit the fundamental rights to property and to conduct a business (i.e. providing for the limitation by law) if this genuinely meets the objective of (e.g.) "environmental protection" (an objective of general interest recognised by the EU). This is subject to the measure being appropriate for attaining that objective and not going beyond what is necessary to achieve it (the proportionality test).[270] Given that any proposal for an EU measure, including a minimum harmonisation-type measure on RES, will have to be proportionate, this requirement imposes no significant extra hurdle, provided that care is taken to address the justification for interference with any fundamental right specifically and separately (since it will often be the case that such fundamental rights do not line up neatly alongside a trade or other general interest objective).

It will be difficult to prove that an EU measure will cause any disadvantage to undertakings beyond those resulting from economic change more generally. Moreover, an EU measure on RES, whether based on Article 194 TFEU or Article 193 TFEU, will pursue among other things the legitimate objective of "environmental protection". Therefore, compliance with fundamental rights will be unlikely to pose an obstacle.

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

As discussed above, the principle of legal certainty, the protection of legitimate expectations and the prohibition of retroactivity are general principles of EU law and apply both to the European institutions and to the Member States when they are implementing EU law.[271]

First of all, a minimum harmonisation-type EU measure on RES, as discussed, is intended to apply *beyond* 2020 and is not intended to apply retroactively. Of course, insofar as any transitional measures are required in the transfer to the new regime post-2020, care should be taken to consider the position and rights of parties operating under the current system.

Second of all, no legitimate expectations appear to be violated by the proposed type of measure. The targets of Directive 2009/28/EC are for the year 2020, and no promise has been made to *continue* this framework "as it is" after that date. It seems that a prudent and circumspect economic operator has little ground to "expect" *any* particular type of RES framework beyond 2020.[272] This may change over the years up to 2020, and later communications by the European institutions may give rise to such expectations. This would inhibit the Commission from

[270] Case C-58/08 *Vodafone* (n. 218, above), para. 51 and the case law there cited.
[271] See §3.1.16, above.
[272] *Ibid*.

proposing a measure on RES which would then drastically and suddenly change the shape of RES in Europe.

At the moment, minimum harmonisation legislation seems to comply with the principle of legal certainty and its corollary principles.

It should be remembered that Member States will have to implement the EU measure in a way which does not infringe the principle of legal certainty, and have to be careful not to frustrate any existing legitimate expectations, particularly when designing their own transitional rules.

Score: 10

§3.2.17 Directives 2009/71/EC and 2009/72/EC on the internal energy market

As discussed above, Directives 2009/72/EC and 2009/73/EC aim to remove existing barriers to and establish a functioning the European energy market.[273] To that end, Member States have to implement certain features into their national energy legislation. Those features may be different from the measures in the minimum harmonisation legislation for renewable energy support, as the latter may (e.g.) require priority dispatch for renewables, while the former demands equal treatment. However, as has been done under the current regime, the solution lies in explicitly coordinating the two sets of legislation. For example, Article 15(3) Directive 2009/72/EC reiterates the priority dispatch obligation of Directive 2009/28/EC, so that the two form an integrated, coherent system.

Thus, the minimum harmonisation legislation could refer to and introduce explicit exemptions from the internal energy market legislation. Future internal energy market legislation could do the same the other way round.

In any event, it seems that compliance with Directives 2009/72/EC and 2009/73/EC is not a problem in practice, but the two sets of legislation can be coordinated and adapted to one another. As noted above (in §3.1.17), of course, there may be elements of the current internal energy market Directives which might be clarified or developed, with a view to facilitating renewables development, deployment and operation: this depends upon practical experience, but could be achieved by small amendments to the existing Directives.

Score: N/a

[273] See §3.1.17.

§3.2.18 Directive 2003/87/EC (EU Emissions Trading Scheme)

Directive 2003/87/EC (the "ETS Directive") establishes an EU scheme for the trading of emissions from certain greenhouse gases (the "EU ETS"). As mentioned above with regard to soft harmonisation, the EU ETS is a mandatory "cap and trade" scheme which requires industry operators in certain sectors to obtain a greenhouse gas emissions permit authorising them to emit greenhouse gases, and to annually surrender allowances for the greenhouse gases they emit. The bulk of the EU ETS concerns CO_2. A limited amount of allowances is allocated for free, and an EU auctioning scheme allocates a gradually increasing number of allowances.

As for a soft harmonisation-type measure, a proposal for a measure on RES should take into account that the objectives and structure of the EU ETS may change beyond 2020, when the current (third) phase of the EU ETS comes to an end. This includes paying attention to the uncertainties pointed out above.

A proposal for an EU measure on RES should take into account whether and how the EU ETS incentivises the further development of particular renewable energy technologies. However, under a minimum harmonisation-type measure on RES, Member States will be able to choose their own support schemes. The interaction between the ETS and all possible RE support schemes should therefore examined. We have highlighted the difficulties which may arise from the coexistence of ETS allowances and TGCs; this remains true for TGCs at national, rather than EU, level.

Moreover, if a measure on RES were to restrict the application of the EU ETS without adequately achieving its renewable energy goal, or *vice versa*, this would arguably breach the principle of proportionality (see above, at §3.1.2). This is rather unlikely in the event of a minimum harmonisation-type approach, given the minimalist nature of the measure.

A revisiting of Article 10 of the ETS Directive, regarding the revenues from auctioning, would provide an opportunity to revisit the current freedom of Member States to determine the use to be made of revenues from auctioning. It would be possible to provide a cross-reference to any proposed EU RES measure so as to make a more explicit use of the revenues from auctioning allowances as a source for RES support. Like soft-harmonisation, minimum harmonisation would not require a redistribution of the costs for RES support across the EU, since it would allow Member States to set their own levels of support, albeit within certain parameters. Nevertheless, Member States could be encouraged (rather than legally obliged) to spend a set percentage of the revenues gained from auctioning emissions allowances on promoting specific renewable energy technologies.

To conclude, the ETS Directive does not prohibit a minimum harmonisation-type measure on RES. However, as mentioned above, this would require careful drafting so as to not undermine either the EU ETS or the proposed RES scheme.

Score: 9

§3.2.19 Directive 2009/28/EC

As mentioned above, legislation introducing minimum harmonisation should *de facto* and *de jure* aim to replace Directive 2009/28/EC. Introducing minimum harmonisation on RES, which include setting new renewable energy targets both EU-wide and for the Member States, whilst *maintaining* Directive 2009/28/EC, seems impractical. The targets and the National Renewable Energy Action Plans of Directive 2009/28/EC would in any even be redundant post-2020. Whether the new legislation takes on features of the current Directive or not will depend upon the effectiveness of the instruments and the policies and needs at the time. For example, provisions on grid access for renewables might be dropped in the future if the Commission were to consider them no longer necessary and appropriate, and others might be introduced instead.

Score: N/a

§3.2.20 Directive 2012/27/EU (Energy Efficiency)

Directive 2012/27/EC on energy efficiency (the "EE Directive") repeals and amends certain EU legislation (above, §3.1.20, on "soft harmonisation"), providing a significantly more ambitious instrument than its predecessors.[274] The framework set out in the EE Directive aims to ensure the achievement of the EU's 20% energy efficiency target for 2020, and does this e.g. by laying down rules which remove barriers in the energy market and establishing "indicative" national energy efficiency targets for 2020 (Article 1) and by introducing the energy efficiency obligation scheme (Article 7). Only certain key features of the scheme are harmonised at EU level (targeted sectors, level of ambition and counting methods).

The EU framework for energy efficiency may undergo more changes in the years to come. These forthcoming review dates will have to be kept in mind when drawing up a proposal for a measure on RES, since this will have to take into account the energy efficiency targets set under the EE Directive, as well as the design elements used by Member States to fulfil the requirements of the energy efficiency obligation schemes. This is especially relevant with regard to the use of TWCs. The

[274] A. Johnston & G. Block, *EU Energy Law* (OUP, Oxford, 2012), p. 408.

EE Directive leaves room for Member States to use them in order to fulfil the requirements of their energy savings obligation scheme (see Article 7(4) and (7)(b)), in the same sense that a minimum harmonisation-type measure on RES would allow Member States to adopt national support schemes at their discretion (e.g. quotas with TGCs). This can create unintended economic disadvantages.

Similarly to the EU ETS Directive, if a measure on RES were to restrict the application of the EE Directive, without adequately achieving its renewable energy goal, or *vice versa*, this would arguably breach the principle of proportionality (see above, at §§3.1.2 and 3.2.2]). However, the nature of minimum harmonisation is such that this is unlikely to be the case.

A minimum harmonisation-type measure on RES would have to build on certain of the structural requirements put in place by the EE Directive, such as those regarding grid access and dispatch (where the new measure sets minimum requirements on these design elements). Article 15(5) is especially relevant, following which Member States must ensure that Transmission and Distribution System Operators: 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; and, when dispatching electricity generating installations, provide priority dispatch of electricity from high-efficiency cogeneration insofar as the secure operation of the national electricity system allows. These obligations are explicitly without prejudice to Article 16 of Directive 2009/28/EC on the promotion of renewable energy, which provides priority grid access or guaranteed access to the grid-system of electricity produced from RES, as well as priority to generating installations using RES when dispatching electricity generating installations, insofar as that is secure. A similarly worded provision would have to be included in a proposal for a new EU measure on RES so that this would not prejudice grid access and dispatch requirements with regard to electricity from high-efficiency cogeneration.

To conclude, the EE Directive does not appear to preclude a minimum harmonisation-type measure on RES. However, a proposal for a measure on RES will have to be carefully drafted so as not to compromise any national TWC schemes and so as not to undermine the priority grid access currently being given to electricity from high-efficiency cogeneration.

Score: 10

§3.2.21 Directive 2003/96/EC (Energy Taxation Directive)

Directive 2003/96/EC (the "Energy Taxation Directive") sets minimum rates of taxation for certain energy products and electricity, namely where they are used as motor or heating fuel. The Directive allows, however, for preferential treatment of renewable energy by means of tax exemptions by the Member States (Article 15). The tax exemption currently applies to "taxable products used under fiscal control in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources" (Article 15(1)(a)) as well as electricity from a range of RES, e.g. solar, wind, and tidal (Article 15(1)(b)). These products may be totally or partially exempt, "without prejudice" to other EU provisions.

It should be noted that Article 194(3) TFEU specifically requires that "measures of a fiscal nature" shall be adopted in accordance with the special legislative procedure, with unanimous voting in the Council. Any "fiscal" elements of a proposed measure aiming at the soft harmonisation of RES will therefore require unanimity among all the 28 Member States. Given the difficulties which arise when the agreement of all Member States is required, it is not likely that any fiscal measures on RES would be of a highly intrusive nature. It is unlikely that any measure on RES would impose taxation requirements which are more stringent than those laid down in the Energy Taxation Directive; however, if this were indeed achieved, then it would require amendments to the existing Energy Taxation Directive. Considering the minimalist nature of a minimum harmonisation on RES, it is unlikely that the taxation of energy sources would be considered as being one of the elements which require harmonisation beyond what is currently being achieved by the Energy Taxation Directive.

Score: 10

§3.2.22 EU Policies

The same policy documents as those listed with regard to soft harmonisation should inform a minimum harmonisation-type measure on RES. The main difference here is that the most recent Green Paper highlights that RES support schemes "should be designed to avoid overcompensation, improve cost efficiency, encourage high GHG reduction, strengthen innovation, ensure sustainable use of raw materials, to be adaptable to cost developments to avoid subsidy dependence, be consistent across Member States and, in particular with regard to biofuels, ensure WTO compatibility".[275] This emphasis on consistency across the Member States arguably suggests the need for a harmonised RES support mechanism, which

[275] COM(2013) 169 final, p. 5.

would not be the case under minimum harmonisation. However, and as mentioned with regard to soft harmonisation, these policy instruments provide no legal obligations with which a proposed measure on RES should comply. Nonetheless, they should feed into a proposal for a measure on RES so as to make the measure more informed, more acceptable to those who must vote on its contents (MEPs in the European Parliament, and Member State governments in Council) and eventually easier to implement.

§3.3 "Only ETS"

As has been shown above, the "Only ETS" policy pathway as it had been originally defined in Report D2.1 is not legally feasible, as such an approach would have to be adopted based on Article 192 TFEU (the environmental provision) and the Member States would then in any event retain the right to adopt more stringent protective measures based on Article 193 TFEU. The policy pathway defined in the Report D2.1 does not foresee such a right for the Member States. However, a less resolute version of this pathway, in which the Member States could set, for example, more ambitious national carbon emission savings targets, could feasibly be based on Article 192 TFEU.

The "Only ETS" approach had not yet been thoroughly defined during the earlier phases of this project. Following discussions with the project partners, it has now been decided to assess the compatibility of an "Only ETS" approach with general EU law. We base this assessment on the assumption that *this* "Only ETS" approach can legally be based on Article 192 TFEU. This pathway would be characterized by EU legislation introducing or maintaining the current EU emission trading system as the only support mechanism for carbon reduction measures including renewable energy. As such, the system would be technology-neutral and it would be fully harmonised, in the sense that the emission allowances issued would be exactly the same and could be traded all over Europe, as is the case under the current EU ETS. There would be no minimum price set for emissions. The emissions price would be entirely regulated by the market, and the current "Cap-and-Trade" system would be retained.

However, it follows from Article 193 TFEU that the Member States would have the right to adopt more stringent protective measures aiming at environmental protection. There is a debate in the literature whether Article 193 TFEU would allow only for more stringent protective measures using the same instrument, thus for example a certain minimum price for carbon emissions, or whether a different instrument such as a support scheme for renewable energy could fall under this provision as well.[276] The "Only ETS" pathway will be based on the former and more restrictive interpretation of Article 193 TFEU, which is more in line with the original definition of the "Only ETS" approach set out in Report D2.1. Thus, the Member States' more stringent protective measures will be limited to measures using the same instrument. Such measures could involve, for example, a minimum price for carbon emissions (achieved by a reserve auction price for emissions

[276] Compare: C. Calliess, Art. 193 AEUV, in: C. Calliess/M. Ruffert (eds), *EUV/AEUV* (München, C.H. Beck, 4th edn., 2011), para. 8ff; M. Nettesheim, Art. 193 AEUV, in: E. Grabitz/M, Hilf/M. Nettesheim (eds.), *Recht der Europäischen Union* (C.H. Beck, München., 49th updating supplement, 2012), para. 13ff.; Krämer, *E.C. Treaty and Environmental Law* (2nd edn., 1995), p. 102; H.D. Jarass, 'Verstärkter Umweltschutz der Mitgliedstaaten nach Art. 176 EG', NvWZ 2000, 5209, p. 530.

allowances). However, it should be kept in mind that, absent an authoritative judgment of the CJEU on that topic, it may be possible that Article 193 TFEU would allow for all kinds of more stringent protective measures, including (e.g.) a support scheme for renewable energy (or, perhaps, a carbon price floor set by a separate carbon tax, as in the UK's current system).

§3.3.1 Article 5(3) TEU - Principle of Subsidiarity and

§3.3.2 Article 5 (4) TEU Principle of Proportionality

The analysis of the principles of subsidiarity and proportionality follows the framework elaborated above in our analysis of soft harmonisation (see §§3.1.1 and 3.1.2). In principle, a fully harmonised regime has a more intrusive impact upon national autonomy to adopt rules in a given field and would thus need stronger justification for EU-level action at all and to the extent envisaged. Yet the current EU ETS operates very much in this fashion and has been accepted by Member States as appropriate for EU-level legislation due to the pan-European trading system involved; indeed, the evolution of the EU ETS into its most recent form has in many ways been a story of more detailed EU-level specification of key elements of the system.

However, the distinction under a genuinely "Only ETS" pathway would be that it would become much more difficult for Member States to adopt any (or at least any far-reaching) domestic renewables promotion schemes without conflicting with an EU ETS designed to address renewables as well: a genuine "Only ETS" pathway would therefore even prohibit any renewables support. This is particularly the case if more stringent Member State measures in the field may only be adopted using the same instrument, as discussed above. Justifying that more far-reaching impact upon national autonomy and interests will require detailed specification of the goals to be achieved and the evidence that an "Only ETS" approach will be suitable and effective for achieving them. Nevertheless, given that there is less intense judicial scrutiny of EU legislative measures on such complex and finely-balanced issues of socio-economic policy-making (due to the wide scope of discretion afforded to the EU legislature in striking such balances), the real significance of the subsidiarity and proportionality analysis will be in the context of convincing national governments and national parliaments that such a proposal will be politically acceptable as it makes its way through the EU legislative process.

Score: 8/9

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

There is little to add under this section to what has been explained previously with regard to Article 7 TFEU (above, §§3.1.3 and 3.2.3). Nevertheless, it should be emphasised that reliance solely upon a version of the current EU ETS to achieve both climate and renewables/environmental goals would require careful design to ensure that the pursuit of one main goal (ultimately, the de-carbonisation of energy usage) did not endanger the achievement of other elements (including, e.g., some of the security of potential supply benefits of renewables identified above (§3.1.8)).

§3.3.4 Article 11 TFEU – Integration of Environmental Protection

According to Article 11 TFEU, all EU policies and activities including legislation need to pay due respect to environmental protection and sustainability objectives of the Union.

A legislative proposal introducing the "Only ETS" pathway would have as its main objective environmental protection, since such a measure would aim at reducing carbon emissions and combating climate change. Article 11 TFEU would therefore not constitute an obstacle to such legislation: environmental protection would be duly integrated in the legislation itself.

Score: 10

§3.3.5 Article 12 TFEU – Consumer Protection

According to Article 12 TFEU, the EU legislator has to take into account consumer protection requirements. In particular, these relate to the health, safety and economic interests of the consumer.

The "Only ETS" policy pathway appears not to conflict with consumer interests, and arguably may even benefit consumers. Reducing carbon emissions would help in protecting the environment and mitigating climate change, which could ultimately be in the consumer's interest in continuing to provide direct energy supplies as well as reducing the environmental impact of goods and services provision to consumers, while retaining (and even enhancing) choice and competition. Moreover, the "Only ETS" approach could contribute to increased safety and security of supply, although arguably it would achieve this to a lesser extent than policy pathways explicitly oriented towards promoting renewable

energy.[277] As regards the economic aspects, unlike in a soft or minimum harmonisation scenario, the "Only ETS" approach prescribes that the costs of the development of low-carbon technologies, including energy efficiency, will generally not be borne by the Member State budgets, but rather by those operators required to manage and reduce their emissions under the ETS. Member States do not have great discretion in this regard, and the system only offers limited room for State aid measures.[278] The "Only ETS" pathway would not directly impose costs upon consumers, but it would – as under the present EU ETS – follow from the system that the firms subject to the emission trading regime pass their costs on to their customers. The EU legislator should therefore consider the costs to consumers when proposing such a measure and will have to justify that those costs are not an unreasonable burden on the consumers' economic interest, or that Member States are able to mitigate such costs for those consumers unable to bear such financial burdens (e.g. via some form of social security support). Some calculations would thus be needed to support the adoption of such legislation, e.g. proving that it is a cost-efficient way to achieve the objectives pursued. This is a delicate balance, since part of the point of the EU ETS is (and would remain under this pathway) to internalise the environmental costs of energy production/consumption, requiring that more heavily polluting energy sources bear the costs which they impose upon the broader environment and citizenry.

Provided that there would be evidence of cost-efficiency and thus that consumer interests have been respected, Article 12 TFEU would not stand in the way of "Only ETS legislation". Nevertheless, care should be taken in elaborating the relevant goals to be pursued, how they are able to serve or at least take into account consumer interests, and to justify any potential negative impact upon consumer interests by reference to other relevant (environmental, supply security, etc) benefits stemming from the ETS.

Score: 8/9

§3.3.6 Article 18 TFEU - Principle of Non-Discrimination

As mentioned above in relation to soft and minimum harmonisation,[279] the prohibition of discrimination based on nationality of Article 18 TFEU is not concerned with measures which discriminate based on factors other than those relating to the characteristics of the person in question. "Only ETS" legislation

[277] As "Only ETS" legislation would be per se technology neutral and would promote all technologies to reduce carbon emissions. Those could include CCS or nuclear power, in principle, about which there are however significant safety concerns.
[278] See below, §3.3.14.
[279] See §§3.1.6 and 3.2.6, above.

would not introduce such differential treatment, and therefore there would be no breach of Article 18 TFEU.

Score: N/a

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

"Only ETS" legislation would not directly address energy imports or exports, and would not impose any quantitative restrictions upon such trade. There is therefore no breach of this element of Article 34 TFEU.

Score: N/a

§3.3.8 Article 34 TFEU

As explained above, national support schemes for certain technologies such as renewable energy may constitute measures having equivalent effect to quantitative restrictions (MEEQRs) on the free movement of goods.[280] However, "Only ETS" legislation would not provide for different national support schemes, but would prohibit them altogether. While Member States may take more stringent measures to protect the environment on the basis of Article 193 TFEU, they would be limited to measures within the same instrument: thus, e.g., a certain minimum price for carbon emissions, introduced (perhaps) through a reserve auction price for emissions allowances.[281] Any such restriction would not be a result of the "Only ETS" legislation itself, but rather stem from the national implementation of such legislation by the Member States. The "Only ETS" legislation itself would not be contrary to Article 34 TFEU. To remind the Member States of their obligation to comply with Article 34 TFEU when implementing the EU legislation and thus not unreasonably to restrict the free movement of goods, one may include a specific reference to Articles 193 and 34 TFEU in the legislation, such as "within the scope of Article 193 TFEU and without prejudice to Article 34 TFEU, the Member States may introduce more stringent protective measures".

Score: 10

[280] See §§3.1.8 and 3.2.8, above.
[281] Compare above, §§1.1, 1.2, 2.4.4.2 and 3.3; and see: C. Calliess, Art. 193 AEUV, in C. Calliess/M. Ruffert (eds), *EUV/AEUV* Kommentar (München, C.H. Beck., 4th edn., 2011), para. 8ff; H.D. Jarass, 'Verstärkter Umweltschutz der Mitgliedstaaten nach Art. 176 EG', NvWZ 2000, 5209 p. 530.

§3.3.9 Article 35 TFEU

As discussed above,[282] quantitative restrictions on exports of goods and measures having equivalent effect are prohibited under Article 35 TFEU. This provision has to be respected by the European legislator as well as by the Member States when implementing EU legislation. However, and despite the fact that national renewable energy support schemes do not normally restrict exports,[283] "Only ETS" legislation would not introduce but rather prohibit the adoption of such national support schemes. The more stringent protective measures the Member States may take based on Article 193 TFEU would then again fall within the responsibility of the national legislator: it cannot be excluded that the impact of such more stringent national measures might restrict exports, in that the extra costs imposed by those measures upon domestic products could discourage exports (although showing that this was directly discriminating against exports might be difficult, so this would be a real issue only if the Court's approach to Article 35 TFEU in future extends more clearly to indirectly discriminatory national rules as well: see our discussion at §3.1.9, above). It would remain up to the Member States to ensure compliance with the respective provisions of the Treaty and to justify and *prima facie* export-restrictive national rules.

Therefore, Article 35 TFEU will not conflict with the adoption of "Only ETS" legislation.

Score: 10

§3.3.10 Article 45 TFEU

As set out above, Article 45 TFEU prohibits the discriminatory treatment of workers regarding access to national job markets. "Only ETS" legislation will not be concerned with the personal characteristics of the workers in the energy sector. The legislation would simply require the firms subject to the ETS to submit a certain amount of carbon emission allowances and would not distinguish between the location or nationality of the firm or its employees. The provisions of such EU legislation would not relate to matters coming within the scope of Article 45 TFEU and would thus comply with that provision.

Still, Member States would have to respect Article 45 TFEU when taking any more stringent national measures (although it is difficult to see how a nationality criterion concerning workers could generate environmental benefits); and, as the

[282] See above, §§3.1.9 and 3.2.9.
[283] *Ibid.*

provision also applies to private individuals,[284] discrimination in the employment policies of the firms themselves would be prohibited as well.

Score: 10

§3.3.11 Article 49 TFEU

As with the other freedoms discussed previously,[285] "Only ETS" legislation would not conflict with Article 49 TFEU and the freedom of establishment. The EU ETS legislation itself would not impose an obligation on Member States to restrict the freedom of establishment of natural or legal persons from other Member States in their territory or to treat them differently.

The "more stringent" protective measures under Article 193 TFEU would not only have to build upon the EU "Only ETS" legislation and relate to the same instrument, but they would also have to show that they achieve a greater level of environmental protection. Restrictions on the freedom of establishment seem unlikely to fall within the scope of that provision.[286]

Score: 10

§3.3.12 Article 56 TFEU *et seq.*

"Only ETS" legislation would not include any provisions on where the companies subject to the system are located or where they provide their services. Rather, all companies would have to meet their individual calculations based on their own past emissions. The EU legislation would not include any requirements or restrictions on the location of the undertaking or the place where it may offer its services.[287] It would therefore not be in conflict with Article 56 TFEU *et seq*.

Similar to what has been said in the context of the other freedoms assessed above, Article 193 TFEU would again only allow for "more stringent" protective measures with a view to achieving a higher standard of environmental protection, and such

[284] Case C-281/98 *Angonese* v. *Cassa di Risparmio di Bolzano* [2000] ECR I-4139.
[285] See above, §§3.1.7ff, 3.2.7ff and 3.3.7ff.
[286] While, as mentioned previously, there may be good reasons for (e.g.) licensing certain activities of companies under the emissions trading scheme, the Member States seem to have little incentive to discriminate against foreign investors to the detriment of their own economy in this respect.
[287] Compare also the provisions of the current 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 [2003] OJ L 275/32, according to which assessments are done on Community level, and generally no distinctions are made between companies in the different Member States. See also below in the context of the discussion of Article 107 AEUV.

measures would have to relate to the same instrument as the EU legislation from which they deviate. This hardly leaves any room for measures coming within the scope of the freedom to provide services according to Article 56 TFEU. In any event, the Member States would have to respect this provision when drawing up national implementation measures and, if they chose to do so, additional "more stringent" protective measures.

Score: 10

§3.3.13 Article 63 TFEU

As discussed above,[288] Article 63 TFEU aims at creating the situation in which both entrepreneurs and investors can make use of the best conditions across the EU for their individual investment projects[289] and is sometimes seen as a precondition for the exercise of the other market freedoms.[290] "Only ETS" legislation would – by eliminating national differences in investment conditions in low-carbon technologies, including energy efficiency – be fully in line with this objective and, as such, would remove barriers rather than create them. With one single system applying to all economic operators subject to it, no matter where in the European Union they were based, Article 63 TFEU seems not to pose an obstacle to the introduction of such "Only ETS" legislation.

However, as the Member States have the (limited) possibility to adopt "more stringent" protective measures under Article 193 TFEU, they would have to make sure that they do not unjustifiably restrict the free movement of capital in doing so.

Score: 10

§3.3.14 Article 107 TFEU – Prohibition of State aid

The current ETS Directive provides for special and temporary State aid measures for certain undertakings.[291] Four different instruments exist:

[288] See above §3.1.13.
[289] W. Molle, *The Economics of European Integration: Theory, practice, policy* (Aldershot, Ashgate, 2006), p. 218.
[290] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford, OUP, 2010), p. 567ff.
[291] Compare: 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 [2003] OJ L 275/32.

- aid to compensate for increases in electricity prices resulting from the inclusion of the costs of greenhouse gas emissions due to the EU ETS (so-called 'indirect emission costs') and thus to avoid carbon leakage;[292]
- investment aid to highly efficient power plants, including new power plants that are ready for the environmentally safe CCS;[293]
- optional transitional free allowances in the electricity sector in some Member States;[294]
- and the exclusion of certain small installations from the EU ETS if the greenhouse gas emission reductions can be achieved outside the framework of the EU ETS at lower administrative cost.[295]

The use of each of those instruments is at the discretion of the Member States, so that it is the Member States which decide whether and to what extent to use them. All of them are considered State aid and thus have to be notified to the European Commission according to Article 108 TFEU.[296] The Commission has issued detailed Guidelines - similar to the Guidelines for Environmental Aid discussed above[297] - setting out under which circumstances the aid will be considered compatible with the internal market and would thus not be prohibited by Article 107 TFEU.[298]

Similarly to the Environmental Aid Guidelines, these Guidelines are based on the idea that the aid will have to lead to a higher reduction of GHG emissions than would occur without the aid. Where this can be shown, this should ensure that the

[292] 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 [2003] OJ L 275/32, Art. 10(6)a).
[293] 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 [2003] OJ L 275/32, Art. 10(3).
[294] 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 [2003] OJ L 275/32, Art. 10c)
[295] 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 [2003] OJ L 275/32, Art. 27.
[296] Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 [2012] OJ C 158/04, para. 3.
[297] See above, §3.1.11.
[298] Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 [2012] OJ C 158/04, para. 3..

positive effects of the aid outweigh its negative effects in terms of distortions of competition in the internal market.[299]

In addition, the ETS provides for the free allocation of emissions allowances for certain sectors facing a high risk of carbon leakage. The Commission defines those sectors according to criteria laid down in the ETS legislation. The Member States therefore have no discretion as to whether or not they grant free allowances on this basis.[300] As Article 107 TFEU is only applicable to aid granted "by the State or through State resources" but does not apply to national measures adopted to implement clear and well-defined obligations under EU law,[301] the free allocation cannot be considered State aid.[302] Furthermore, as all undertakings active in the sector identified by the Commission benefit from the free allocation, the free allocation is not selective. Rather, the exclusion of these sectors from the EU ETS system (i.e. acquiring allowances via auctions under phase 3) – even if only temporary – is an inherent and integral part of the system, intended to mitigate the risk of carbon leakage and the resulting damage that would otherwise be caused to the European industry.[303]

For the assessment of the compatibility of "Only ETS" legislation with EU law, the legislation is considered to be built upon and intending to keep the key features of the current ETS legislation.[304] Thus, the provisions allowing for special and temporary aid in particular circumstances would be carried over into the new measure. With regard to the provisions on free allocation, it is to be presumed that, for the time beyond 2020, there will be even fewer sectors considered eligible for free allocation. However, in light of the foregoing discussion, it appears that neither the free allocation of allowances in certain sectors, nor the

[299] Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 [2012] OJ C158/04, para. 5.
[300] Although note that the current version of the Directive does allow some Member States to apply for an exemption from obligatory auctioning under the 3rd phase, which thus authorises them to continue to conduct some free allocation of allowances.
[301] Case T-351/02 *Deutsche Bahn* v. *Commission* [2006] ECR II-1047, para. 101ff.
[302] Arguing differently, but concluding that there is no State aid involved as the criterion of selectivity is not met, since all undertakings in those sectors defined by the European Commission benefit from free allocation, see N. Meyer-Ohlendorf, C. Pitschas & B. Görlach, 'Weiterentwicklung des Emissionshandels unter besonderer Berücksichtigung von Maßnahmen betreffend energieintensive Industrien', Im Auftrag des Umweltbundesamtes, June 2010, available at: http://www.ecologic.eu/download/projekte/2200-2249/2209_Gutachten.pdf.
[303] Compare 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 (2003) OJ L 275/32, Art. 10a(14), according to which *"the Commission shall assess, at Community level, the extent to which it is possible for the sector or subsector concerned, at the relevant level of disaggregation, to pass on the direct cost of the required allowances and the indirect costs from higher electricity prices resulting from the implementation of this Directive into product prices without significant loss of market share to less carbon efficient installations outside the Community."* (emphasis added) Thus all companies active in the respective sectors or subsectors within the EU would thus in principle be treated equally as regards free allocation based on the results of the Commission's assessment. .
[304] See above, §3.3, introducing this section on "Only ETS".

grant of temporary financial aid which would result in a higher reduction of GHG emissions, constitutes a breach of Article 107 TFEU on State aid. Thus, those rules could be carried over without creating incompatibilities.

Aside from these harmonised EU rules on free allocation, the ETS legislation itself does not mandate State aid. The Member States "may" use the abovementioned special and temporary measures under certain circumstances. However, the rules themselves refer to the existing and future rules on State aid, so that the Member States may only use those mechanisms to the extent they are compatible with the State aid framework.[305]

Given that the "Only ETS" legislation will build upon this framework, the "Only ETS" legislation does not, like the current EU ETS, necessarily mandate State aid. Rather, as the provisions on special and temporary measures set out above show, it allows the Member States under certain circumstances to grant such aid. Such aid will require notification to the Commission, which will assess its compatibility with EU law on State aid Guidelines.[306]

As the "Only ETS" legislation is supposed to continue this approach, it will not conflict with Article 107 TFEU itself. However, the Member States will have to comply with the State aid rules when implementing the measure, so that it might make sense to add a reference like "without prejudice to Article 107 TFEU" to the wording of any new ETS measure.

Score: 10

§3.3.15 Article 310 TFEU – EU budget implementation

"Only ETS" legislation, like the current EU ETS, would not touch upon the EU budget. There seems to be no conflict with Article 310 TFEU.

Score: 10

§3.3.16 Article 311 TFEU – The Union's own resources

Given that the "Only ETS" legislation would not result in any additional expenses to the EU and would not touch upon its budget, it would not raise questions as regards the EU's ability to cover the costs of its policies from own resources.

[305] Compare: 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 [2003] OJ L 275/32 Art. 10a)(6)1).
[306] Compare, e.g., Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 [2012] OJ C 158/04, para. 3.

Score: 10

§3.3.17 Article 345 TFEU - Member States' systems of property ownership

According to Article 345 TFEU, the EU legislator may not interfere with the Member States' systems of property ownership when adopting secondary legislation.[307] However, as the ownership structures of the firms subject to the emission trading system would be irrelevant to its functioning, "Only ETS" legislation would not include any requirements to that end. It would therefore comply with Article 345 TFEU.

Score: 10

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

As set out above, the principles of legal certainty, protection of legitimate expectations and prohibition of retroactivity apply to the EU institutions in their adoption, and to the Member States alike in their transposition, of EU law.[308]

However, "Only ETS" legislation is not intended to apply retroactively, but only for the time after its adoption and publication, and only for the time after 2020. For that time period after 2020, no specific renewable energy framework exists as of now, so that a prudent and circumspect economic operator may not have legitimate expectations as to the relevant regime for that period. While this may change, depending upon later developments, communications by the European institutions might possibly give rise to such expectations; but at the moment "Only ETS" legislation for the time beyond 2020 seems to comply with the principle of legal certainty.

It should be noted that the Member States will have to respect those rules as well, when implementing the "Only ETS" legislation into national law, which will be of particular relevance in the design of any transitional measures and their treatment of pre-existing holdings of any allowances which have been validly obtained under the ETS legislation which applied at the time of the allowances' acquisition.

Score: 10

[307] As discussed in more detail above, §§3.1.14 and 3.2.14.
[308] See above, §§3.1.15 and 3.2.15.

§3.3.19 Directives 2009/72/EC and 2009/73/EC on the internal energy market

Directives 2009/72/EC and 2009/73/EC ("the Internal Energy Market Directives") aim to remove existing barriers to the trade in energy and establish a functioning internal energy market. Currently, they co-exist without conflict with the relevant legislation on the EU ETS. The two areas have a different scope, and the ETS is not directly concerned with the trade in energy, while the internal energy market legislation does not address carbon emissions. Thus, as the two sets of rules are currently "neutral" towards each other, it is not apparent why there should be any conflict with future EU legislation such as the "Only ETS" pathway, which would retain the EU ETS as the only support for low carbon technologies including energy efficiency measures. Indeed, a well-functioning EU ETS should ultimately promote the functioning of the internal energy market by sending carbon pricing signals in a clear, transparent fashion. Further, the prohibition of other support mechanisms - which would be the result of the "Only ETS" approach - may even be considered to be more fully in line with the internal energy market objectives, in its removal of multiple different support regimes and their potentially market-distorting effects.

Score: 10

§3.3.20 Fundamental rights

It has been mentioned above that there are three main sources of fundamental rights: the EU Charter on Fundamental Rights ("the Charter"), the European Convention of Human Rights ("ECHR") and the general principles of EU law (Article 6 TEU). As for a soft harmonisation-type measure on RES, the following fundamental rights especially should be taken into account: freedom to conduct a business in accordance with EU and national law and practice (Article 16 of the Charter) and the right to property (Article 17 of the Charter). Fundamental rights have always constituted a limited means for annulling EU law, and as such form a reasonably insignificant hurdle to an EU measure such as the "Only ETS" measure. The CJEU has more often than not been deferential to the EU when considering challenges to EU legislation based on fundamental rights, other than in the context of anti-terrorism measures.[309]

First, it is difficult to prove that the EU measure indeed "caused" a violation of fundamental rights, especially where the rights in question are of an economic nature. More importantly, fundamental rights may be limited so long as certain

[309] E.g. Cases C-402 and 415/05 P *Kadi and Al Barakaat Foundation ('Kadi I')* [2008] ECR I-6351 and Case T-228/02 *OMPI* [2006] ECR II-4665, but also (unrelated to anti-terrorism laws) Joined Cases C-92 and 93/09 *Schecke* (n. 212, above); see also Craig & de Búrca, *EU Law*, pp. 374-378.

conditions are fulfilled. Article 52(1) of the Charter allows limitations to fundamental rights if this is provided for by law and respects the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Objectives of "general interest" may be those explicitly included in the Treaties, such as the principle of transparency (Articles 1 and 10 TEU, and in Article 15 TFEU).[310] This means that an "Only ETS" measure may limit the fundamental rights to property and to conduct a business if this genuinely meets the objective of environmental protection, an objective of general interest recognised by the EU, provided the measure is appropriate for attaining that objective and does not go beyond what is necessary to achieve it (the proportionality test).[311] Given that any proposal for an EU measure, including a proposal for "Only ETS", will have to be proportionate (see above), this requirement does not impose a significant hurdle, provided that the fundamental rights-specific questions are raised (alongside, e.g., free trade rights) and answered clearly in proportionality terms.

Given that it will be difficult to prove that an EU measure will cause any disadvantages for undertakings beyond those resulting from economic change more generally, and given that an "Only ETS" measure pursues the legitimate objective of environmental protection, compliance with fundamental rights seems unlikely to pose a major hurdle. Although the fuller harmonisation envisaged by the "Only ETS" pathway could be more intrusive that soft or minimum harmonisation approaches in some respects, the various elements of discretion left to Member States (with regard to free allocation, e.g., as discussed in the preceding paragraphs) should provide sufficient leeway to take into account genuine fundamental rights considerations where the evidence of significant impact is cogent.

Score: 10

§3.3.21 ETS Directive

The "Only ETS" legislation would constitute the successor to the current ETS Directive. It would thus per definition not be able to conflict with it, but replace it. Furthermore, for the definition of this policy pathway it was assumed that the "Only ETS" legislation would build upon the current ETS, and take over its features.

[310] Joined Cases C-92 to 93/09 (n. 212, above), para. 68.
[311] Case C-58/08 *Vodafone* (n. 218, above), para. 51 and the case-law cited.

Thus there is no compliance issue in first place, as the ETS Directive will be replaced.

Score: N/a

§3.3.22 Directive 2009/28/EC (RES)

"Only ETS" legislation would by definition replace the Directive 2009/28/EC and would not take over its features with regard to, e.g., national support schemes, but rather would exclude such schemes. Therefore, the provisions of the Directive 2009/28/EC would no longer exist and no conflict could occur.

Score: N/a

§3.3.23 Directive 2012/27/EU (energy efficiency)

Directive 2012/27/EC on energy efficiency (the "EE Directive") repeals and amends certain EU legislation (above, on "soft harmonisation": §3.1.20), providing a significantly more ambitious instrument than its predecessors. The framework set out in the EE Directive aims to ensure the achievement of the EU's 20% energy efficiency target for 2020, and does this by (e.g.) laying down rules which remove barriers in the energy market and establishing "indicative" national energy efficiency targets for 2020 (Article 1 EE Directive) and by introducing the energy efficiency obligation scheme (Article 7 EE Directive). Only certain key features of the scheme are harmonised at EU level (targeted sectors, level of ambition and counting methods).

The EU framework for energy efficiency may undergo more changes in the years to come. These forthcoming review dates shall have to be kept in mind when drawing up a proposal for an "Only ETS" measure, since this will have to take into account the energy efficiency targets set under the EE Directive, as well as the design elements used by Member States to fulfil the requirements of the energy efficiency obligation schemes. This is especially relevant with regard to the use of TWCs. The EE Directive leaves room for Member States to use TWCs in order to fulfil the requirements of their energy savings obligation scheme (see Article 7(4) and (7)(b) EE Directive). This can create unintended economic disadvantages, e.g. by affecting the carbon price and/or increasing the cost of achieving the EU ETS cap.[312] Policy-makers could use and build upon the knowledge we have gained

[312] NERA for the European Commission DG Environment, 'Interactions of the EU ETS with Green and White Certificate Schemes: Summary Report for Policy Makers' (2005) <http://ec.europa.eu/clima/policies/package/docs/ec_green_summary_report051117_en.pdf> accessed 20 May 2013.

regarding the unintentional interactions and crossovers between the current EU ETS and the EE Directive.

If the "Only ETS" measure were to restrict the application of the EE Directive without adequately achieving its renewable energy goal, or *vice versa*, this would arguably breach the principle of proportionality (see above, at §3.1.2). However, the nature of the "Only ETS" pathway is such that this is very unlikely to be the case.

Score: 10

§3.3.24 Directive 2003/96/EC

Directive 2003/96/EC (the "Energy Taxation Directive") sets minimum rates of taxation for certain energy products and electricity, namely where they are used as motor or heating fuel. The Directive allows, however, for preferential treatment of renewable energy by means of tax exemptions by the Member States (Article 15 Energy Taxation Directive). The tax exemption currently applies to "taxable products used under fiscal control in the field of pilot projects for the technological development of more environmentally-friendly products or in relation to fuels from renewable resources" (Article 15(1)(a)) as well as electricity from a range of RES, e.g. solar, wind, and tidal (Article 15(1)(b) Energy Taxation Directive). These products may be totally or partially exempt, "without prejudice" to other EU provisions.

The "Only ETS" pathway does not include provisions on taxation, and therefore does not conflict with the Energy Taxation Directive.

Score: N/a

§3.3.25 EU Policies

The same policy documents as those listed with regard to soft harmonisation should inform an "Only ETS" measure: e.g. the Energy Roadmap 2050 and the Green Paper on a 2030 Framework for Climate and Energy Policies.

As mentioned above, these policy instruments provide no legal obligations with which a proposed measure on RES, including the "Only ETS" pathway, should comply. Nonetheless, they should feed into a proposal for a measure so as to make the measure better informed, more acceptable to those who must vote on its contents at EU level and eventually easier to implement.

The current EU ETS is functioning badly due largely to the existing surplus in allowances. The abovementioned Green Paper emphasizes that these failures have pushed Member States to consider taking national measures, such as taxes for carbon intensive fuels in ETS sectors, and sees this as undermining the role of the ETS and the level playing field which it was meant to create. The Commission has recently (in January 2014) finally gained the approval of the EU's Climate Change Committee to make an amendment providing for back-loading of allowances in the 2014 auctions (with the volume of allowances to be back-loaded depending upon how soon such back-loading can commence).[313] Moreover, the Green Paper explicitly states that "consideration should also be given to whether an increased renewable share at EU level could be achieved without a specific target but by the ETS and regulatory measures to create the right market conditions".[314] Therefore, a proposal for an "Only ETS" measure could be framed in such a way that it builds both on concerns regarding ETS reform and EU policies on renewable energy sources. In doing so, the "Only ETS" measure would not only present itself as a tool to promote renewables, but as a solution to the failing ETS.

On the other hand, the latest Report on the State of the European Carbon Market 2012 (COM(2012) 652 final), which addresses various possible structural reforms of the EU ETS, does not even allude to the possibility of using the ETS as the sole promoting instrument of renewables. There is clearly no common "drive" to use the ETS in such a way, or at least not yet. Moreover, the recent review of the RES Directive (COM(2013) 175 final) and forthcoming Guidance on RES, do not address the possibility to solely rely upon the ETS.

To conclude, it does not necessarily seem to be in line with existing policies on RES to propose an "Only ETS" measure. However, given that EU policies are not legally binding and are highly adaptable, it is not impossible to frame a proposal for an "Only ETS" measure in such a way that it feeds into on-going debates on ETS reform and the promotion of RES.

Score: N/a

§3.3.26 Conclusion on "Only ETS"

It is clear from the foregoing assessment that "Only ETS" legislation, which would continue to allow the Member States to adopt more stringent protective measures under Article 193 TFEU, is legally feasible and would in principle comply with EU

[313] See http://ec.europa.eu/clima/news/articles/news_2014010801_en.htm: at the time of writing, the measure was still awaiting the completion of scrutiny and formal approval.
[314] COM(2013)169 final, p.8.

primary and secondary law. There may be slight concerns as regards the protection of consumer interests under Article 12 TFEU, but it is assumed that the EU legislator would be able to justify the introduction of a system which allows for some costs being passed on to consumers, as they benefit from the results and the costs are not unreasonably high. Article 12 TFEU was not considered to be an obstacle to the current EU ETS Directive nor were any other provisions of the Treaties. We therefore conclude that legislation which would continue to use all the core features of the current ETS Directive would seem to be compatible with EU law.

4. The form of EU harmonisation legislation: legal instruments

The previous discussion established that, out of the four degrees of harmonisation which this project has examined up until now, only soft and minimum harmonisation are legally feasible. The question now arises which form EU legislation to that effect should take. Article 288 TFEU sets out the available EU instruments: Regulations, Directives and Decisions are the three instruments with legally binding effect; and Recommendations and Opinions are the main instruments without it.[315] Both soft and minimum harmonisation would include at least some binding provisions: e.g. the national renewable energy targets, or framework conditions on grid access. Therefore, only the former three legislative instruments are relevant.

It should be noted that there is no inherent hierarchical relationship between those instruments. The superiority of one instrument over the other is established based on whether it is a legislative, delegated or implementing act.

In some cases the Treaty specifies which instruments should be used. However, Article 194 TFEU does not restrict the European legislator in its choice of instrument (referring as it does simply to "measures"), so that in theory any of them could be used. In such a case, the institutions have to determine on a case-to-case basis which instrument is most appropriate.[316]

[315] Compare also: Craig & de Búrca, *EU Law*, p. 104.
[316] *Ibid*.

§4.1 Soft harmonisation

§4.1.1 Regulations

According to Article 288 TFEU, a Regulation is generally applicable, binding in its entirety and directly applicable in all Member States. "General application" refers to the fact that Regulations apply to all Member States. "Directly applicable" means that Regulations are automatically part of the national legal system from the day on which they come into effect; in other words, Regulations need not be implemented or adopted by separate national instruments first.[317] The term "binding in its entirety" reiterates this aspect: the Member States have no discretion in the implementation of a regulation, and the provisions of the Regulation will apply in exactly the same way in all Member States.[318] The CJEU has been very clear in stressing that Regulations create legal effects independent of the existence of any national legislation, and that Member States are obliged not to obstruct this effect.[319]

The basic features of soft harmonisation would be the binding national renewable energy targets to be achieved by the Member States and the obligation to reach the target using one particular support scheme. However, the Member States would retain significant freedom in the design of this support scheme. The EU legislation would thus not go into the details here, but instead would remain rather general in its terms. With those characteristics in mind, the direct application of the soft harmonisation legislation does not seem possible, as it inherently calls for the Member States to adopt legislation specifying the design elements of their support schemes. Soft harmonisation would not result in the same rules applying in all Member States, and thus not be binding in its entirety.

Accordingly, a regulation does not seem to be the appropriate instrument for the introduction of soft harmonisation legislation of renewable energy support.

§4.1.2 Directives

A directive is "binding, as to the result to be achieved, upon each Member State to which it is addressed", but "shall leave to the national authorities the choice of

[317] Craig & de Búrca, *EU Law*, p. 105: indeed, they cannot, for to do so would disguise their EU law character: Case 34/73 *Variola* v. *Amministrazione delle Finanze* [1973] ECR 981.
[318] By contrast with directives, which are binding only to the result to be achieved: see below in the subsequent text. Of course, if the terms of a regulation differentiate between different Member States, then it will apply differently as expressly defined.
[319] E.g. Case 34/73 *Variola* (n. 317, above), para. 10ff.

form and methods".[320] Thus, unlike regulations, directives do not have to be addressed to all Member States and they are not binding in their entirety. Rather, the Member States addressed by the directive will have to take legislative measures to achieve the result of the EU legislation. Often, formulations such as "the Member States shall ensure" are chosen in Directives, which reflects that the obligation to achieve the result is on the Member States. Wording such as "Member States shall take appropriate measures to …" may refer to the Member States' margin of appreciation, in leaving it to their judgement what they consider appropriate to achieve the required result.

The current Directive 2009/28/EC is a good example of this system: the Member States have to ensure that they reach their binding renewables target, but they can take different measures to do so, none of which is prescribed in detail in the Directive itself. The more substantive provisions of Directive 2009/28/EC, for example on Guarantees of Origin, meanwhile, show that Directives need not necessarily be vague and can indeed lead to often quite extensive harmonisation: the ends which the Member States have to achieve can be set out in considerable detail.[321] Article 15 of Directive 2009/28/EC is quite explicit about the characteristics of Guarantees of Origin and the Member States have to ensure that the guarantees issued according to their national legislation meet at least those requirements. In this way, all Guarantees of Origin will have more or less the same format, no matter from which Member State they originate.[322] Article 15(9) of Directive 2009/28/EC furthermore provides that Member States are required mutually to recognize each other's Guarantees of Origin. If they do not, they have to inform the Commission. The Commission will then investigate, and if appropriate it will take action asking the Member State to justify or change its rules. This way, in the longer term, the different national systems may become almost identical, and designed according to what has turned out to be best practices, so as to facilitate this mutual recognition. The example of Directive 2009/28/EC also shows that Directives need not, but may well be, addressed to all Member States.[323]

Soft harmonisation would set a binding target for each Member State. It would further oblige them to use one specific type of support scheme in order to reach

[320] Art. 288 TFEU.
[321] Craig & de Búrca, *EU Law*, p. 106.
[322] Compare, e.g. on the information content, Art. 15(6) Directive 2009/28/EC: "6. A guarantee of origin shall specify at least: (a) the energy source from which the energy was produced and the start and end dates of production; (b) whether it relates to: (i) electricity; or (ii) heating or cooling; (c) the identity, location, type and capacity of the installation where the energy was produced; (d) whether and to what extent the installation has benefited from investment support, whether and to what extent the unit of energy has benefited in any other way from a national support scheme, and the type of support scheme; (e) the date on which the installation became operational; and (f) the date and country of issue and a unique identification number."
[323] See, e.g., Art. 3(1) Directive 2009/28/EC "Each Member State …".

that target. However, there would be considerable freedom regarding the design of that scheme, as long as in the end the Member States all ensure that they have a functioning support scheme. As seen with the Directive 2009/28/EC, the fact that legislation goes into some detail on some of these elements, such as the information content of Guarantees of Origin, does not militate against choosing a Directive as the appropriate legislative instrument. A Directive could include a provision which sets out a common support scheme that is to be implemented by all Member States, whilst allowing them the discretion on how to design it. The harmonising elements – i.e. the type of support scheme and the framework conditions - would be the results to be achieved by the Member States, as would their binding national renewables targets. The choice of concrete forms and methods for achieving those results would be left to the Member States.

§4.1.3 Decisions

A Decision, which is the third form of binding instrument listed in Article 288 TFEU, is binding in its entirety. In this respect, a Decision is similar to a Regulation. Decisions can be addressed to certain individuals or, alternatively, they may not individually identify their addressees. In the case of the former, they are binding only upon those to whom they are addressed. Decisions with specific individual addressees are quite common in the field of competition law enforcement and State aid.[324] However, there can also be Decisions addressing two or more persons, or one or more Member States. Such Decisions directed to certain addressees are to be distinguished from Regulations, as the latter do not directly or indirectly identify a group of addressees, but are by definition generally applicable measures.[325] With Decisions, out of a pool of potential addressees, one needs to be able to identify those to whom the Decision is actually directed. Decisions without addressees exist as well, but they may not interfere with the rights of third persons. Accordingly, they can only define the legal status of the institutions which have taken them. Such Decisions are generally used for the internal organization of the European institutions and inter-institutional issues,[326] such as comitology.[327] Unlike Regulations, which are generally applicable, they have a merely internal character.

Decisions are binding in their entirety. Thus, measures requiring the Member States to adapt their own legislation such as harmonisation measures do not fit the

[324] Craig & de Búrca, *EU Law*, p. 107.
[325] E. Grabitz *et al.*, *Das Recht der Europäischen Union* (C.H. Beck, München, 49th updating supplement, 2012), Art. 288 AEUV, para. 175; also: Cases 106 and 107/63 *Töpfer u. Getreide Import Ges.* [1965] ECR 554.
[326] E. Grabitz *et al.*, *ibid.*, para. 195.
[327] E.g. Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission 1999/468/EC [1999] OJ L 184/23 (17.7.1999).

nature of a decision, but are better adopted as directives.[328] An attempt to introduce harmonisation by a decision would thus be likely to be treated as, in substance, a directive. As a matter of the content of its provisions, this would then leave some room for the Member States to implement them, and be binding upon them only as to the result. Procedurally, a finding that a measure which in form asserted its status as a decision was, in substance, a directive could also have implications for its validity (in the sense that the appropriate legislative procedure for the adoption of a directive would be unlikely to have been followed when adopting the 'decision'. The CJEU has confirmed that Decisions are directly applicable in the sense that they can be invoked in court, provided that the particular provision of the Decision is sufficiently certain, precise and unconditional, so as to create a direct effect.[329]

As discussed above, soft harmonisation would be EU legislation that would need to address the Member States. Further, soft harmonisation would all the Member States a measure of discretion when it came to the concrete design of their national support schemes for RES. An instrument introducing such an approach can thus not be binding in its entirety (in the sense that it would result in the same rules being applied everywhere). Thus, a decision would clearly be an inappropriate instrument for achieving soft harmonisation as defined in this project.

§4.1.4 Other instruments, and "policy convergence"

Article 288 TFEU lists two further instruments which the EU can adopt, Recommendations and Opinions, which are not of a legally binding nature.[330] Legally non-binding measures are sometimes referred to as forms of "soft law", a term which can encompass a broad range of instruments, the effectiveness of which depends (more or less) on the parties' goodwill in complying with them. A relatively recent mechanism, developed in earnest at the Lisbon Council and so far deployed in various policy areas (such as social inclusion) is the Open Method of Coordination ("OMC"). Depending upon the policy area in which it is deployed, the OMC rests upon a range of relatively voluntary commitments and procedures (e.g. EU-level policy goals, indicators and benchmarks; centralised guidance materials;

[328] E. Grabitz *et al.*, *Das Recht der Europäischen Union* (C.H. Beck, München, 49th updating supplement, 2012), Art. 288 AEUV, para. 181.
[329] E.g. Case C-18/08 *Foselev Sud-Ouest SARL* v. *Administration des douanes et droits indirects* [2008] ECR I-8745.
[330] However, they remain subject to the judicial process. National courts can make a reference to the CJEU regarding the interpretation of a Recommendation or an Opinion (see, e.g., Case 322/88 *Grimaldi* v. *Fonds des maladies professionelles* [1989] ECR 4407; see, further, Craig & de Búrca, *EU Law*, p. 107).

time-frames and reporting obligations; and the exchange of information on best practices). Without entering into an in-depth analysis of the scope and merit of soft law measures, a few words can be said about their use to coordinate Member States' policies in the area of RES.

David Jacobs has written extensively about how various voluntary mechanisms have achieved and can further contribute towards the co-ordination of Member States' RES policies, especially with regard to Feed-in Tariffs in France, Spain and Germany.[331] He has observed, for example, how the convergence of basic feed-in tariff design features in France, Spain and Germany can, to a great extent, be attributed to the intensive communication processes which took place between governmental actors.[332] However, his analysis *also* confirms the influential role played by the EU, *without* resorting to legally binding measures and by using elements of the OMC in its policy on RES. Directive 2001/77/EC influenced national policy design by instigating cross-border learning as a result of setting indicative targets, reporting obligations and the publication of benchmarking reports. Moreover, the "threat" to harmonise national support instruments if necessary played a deciding factor in fostering greater cross-border cooperation.[333] Jacobs predicts that the level of "policy steering", which has already increased with the advent of Directive 2009/28/EC (by setting "binding" targets, introducing National Action Plans and increasing the level of reporting and monitoring of Member States' actions), will continue to increase in the future.[334] It is clear from the premises and conclusions of this report that there is indeed both the intention and possibility to increase the level of coordination between Member States' RES policies, and indeed even a (certain level of) harmonisation.

A good parallel example of an area in which soft law has functioned as a stepping stone to "hard law" is State aid. With regard to State aid, soft law has filled up regulatory gaps left by the Treaties, taking the form of guidelines, codes, communications, frameworks, and at times even letters. Whilst the Commission initially raised the need for formal regulation by the Council, these early attempts (in 1966 and 1972) failed and the Commission became increasingly reliant upon and supportive of its own, flexible, soft law approach to rule-making.[335] However, a gradual "formalisation" of these informal rules took place over the following decades, notably because of pressure from the Courts demanding detailed information on the Commission's State aid decisions, finally resulting in Council Regulation 659/1999/EC, which enabled the Commission to exempt (limited) categories of aid from the notification requirement laid down in the Treaty (the

[331] D. Jacobs, *Renewable Energy Policy Convergence in the EU* (Aldershot, Ashgate Publishing, 2012).
[332] *Ibid.*, p. 99.
[333] *Ibid.,* pp. 229-230.
[334] *Ibid.*, p. 236.
[335] *Ibid.*, p.198.

"Enabling Regulation"), and Council Regulation 994/98/EC, which formalised State aid procedures.

However, whilst soft law has clearly both preceded and enabled hard law on State aid, Cini has also pointed out that – with regard to substantive rather than procedural aspects of State aid - soft law continues to play a *supplementary* role when viewed alongside hard law.[336] The Commission Guidelines still serve both to clarify and influence Member States' policies on subsidy-provision. The Guidelines on Environmental Aid, for example, complement Commission Regulation 2008/800/EC (the "General Block Exemption Regulation" or "GBER"), which lists particular types of environmental aid as complying with the TFEU (see Article 23 GBER). Whilst Guidelines are not legally binding in nature, it is to be expected that the Commission will follow them in practice and not take action against Member States who grant a type of aid which the Commission has included in its own Guidelines; thus, such Guidelines are capable of generating legitimate expectations on the part of undertakings and others when relying upon the terms published in these Guidelines.

There are vast quantities of academic literature on the subject of soft law, and whether (and in which policy areas) soft law measures should be seen as way to facilitate hard law; whether they are (and should be) an alternative (and possibly better) method of regulating; or whether there is the inevitable need for a mix of both soft and hard instruments to make any policy area work. Moreover, co-ordinating policies through means of soft law raises questions of democratic accountability, legitimacy, transparency and reliability – to none of which there is a straightforward answer.[337]

Despite the merits of soft law in achieving a certain level of policy co-ordination in the area of RES, as discussed above, the lack of formal accountability and certainty as to the result to be achieved remain significant hurdles to deploying (only) soft law instruments as the main tool to achieve a level of harmonisation. Therefore, their feasibility in this regard will not be considered in this report. However, their enabling and supplementary role has to be considered when drafting legislation and establishing policy objectives concerning RES, as has already been the case in the two EU renewables Directives to date.

§4.1.5 Conclusion

The appropriate legislative instrument for soft harmonisation is a Directive. Directives are binding as to their result, but the Member States are given the discretion to decide on the forms and methods to achieve this result. Soft

[336] Cited in Jacobs, *ibid.*, p. 204.
[337] This is, at least implicitly, an element in some recent reactions to the Commission's Draft Environmental Aid Guidelines: see n. 205, above.

harmonisation legislation would, on the one hand, aim at setting national renewable energy targets and harmonising one particular type of RES support scheme across the EU. On the other hand, soft harmonisation would leave the design elements of national support schemes up to the discretion of the Member States.

Legally binding instruments are often preceded and/or complemented by non-binding measures. Whilst non-binding measures play a vital role in this respect, they are likely to be insufficient in and of themselves to achieve the level of soft harmonisation discussed throughout this report. Such measures may prove useful to encourage coordination between the Member States: e.g. through sharing information and stimulating discussion. They constitute useful additional tools to a legally binding instrument, such as a Directive.

§4.2 Minimum harmonisation

§4.2.1 Regulations

A Regulation does not seem to be the most appropriate instrument to introduce minimum harmonisation.

As discussed above, Regulations are generally applicable and binding in their entirety. Minimum harmonisation, however, would only set an EU-wide target and national targets for the Member States. In addition, the Member States would have to implement some measures to facilitate the development of renewables. It is likely, however, that those provisions would provide explicit recognition of the Member States' discretion on what they consider appropriate actions to achieve these renewables targets. Therefore, the Member States would still be able to develop and apply different legal frameworks for the support or renewable energy: e.g. regarding the choice of the support scheme and its concrete design. Thus, minimum harmonisation would not, in and of itself, lead to the same rules being applied in each Member State. If there were particular provisions intended to apply in identical terms in all Member States, it would be possible to adopt them in a regulation; however, given the need to combine more prescriptive measures with areas where Member States will retain discretion as to implementation choices (concerning the scheme(s) adopted, their precise terms, support levels, etc), and in light of the comments above (§§3.1.1 and 3.1.2) concerning subsidiarity and proportionality, a regulation would not be an appropriate instrument to cover all of these elements contained in a minimum harmonisation approach.

§4.2.2 Directives

Minimum harmonisation should, it is suggested, be introduced by a directive.

According to Article 288 TFEU, Directives are binding only as to the result to be achieved, but leave discretion to the Member States on how to achieve the result. Minimum harmonisation would require the Member States to achieve their binding national targets within the overall EU target. Still, they would be able (e.g.) to choose whichever support scheme they prefer and design it in accordance with their own potentials and needs. Only a few framework conditions to facilitate the development of renewables would be harmonised. Those obligations would all bind the Member States only to the result to be achieved, which is why a directive seems the most appropriate instrument to introduce minimum harmonisation.

§4.2.3 Other instruments

Decisions are not appropriate for the introduction of soft harmonisation and non-binding instruments such as recommendations and opinions by definition cannot be used (although they may accompany binding measures in a useful fashion).

As discussed above, decisions are either directed towards specific addressees or the addressees are left open, in which case the Decision cannot interfere with the rights of third persons and can thus only affect the European institutions themselves. Decisions are then binding in their entirety and, as discussed above (§4.1.3), where a decision seeks to harmonise the national rules applied in the Member States they are in substance better regarded as directives. As minimum harmonisation would aim at harmonising some basic framework conditions for the development of renewables such a measure could not be introduced by a Decision, but would by its nature have to take the form of a Directive. Similarly, the targets set in the minimum harmonisation would leave the Member States discretion rather than binding them entirely, which would conflict with the characteristics of a Decision according to Article 288 TFEU. A Decision is therefore not the appropriate instrument.

By definition, non-binding instruments cannot oblige the Member States either to reach any specific target or to implement certain measures. They can only encourage suggest the Member States to take such action, offer devices for learning about and facilitation of such action, and perhaps pave the way for future, binding measures. As minimum harmonisation would go further, in the sense that the target would be binding and at least some measures would need to be implemented, non-binding instruments (such as recommendations or opinions) cannot be used as the sole or main measure for achieving minimum harmonisation.

§4.2.4 Conclusion

Based on the brief assessment above, and considering that the directive has been the instrument most used for harmonisation measures, minimum harmonisation should be introduced by a directive. Directives bind the Member States only as to the result to be achieved but leave them sufficient discretion on how to do this, in line with the type of minimum harmonisation on RES considered here.

Non-binding instruments could nevertheless be useful to assist the Member States with the implementation and the design of their national legislation. They could also be used to promote more coherence among the different national systems based on experience and best practices.

§4.3 Only ETS

§4.3.1 Regulations

A Regulation does not seem to be the most appropriate instrument to introduce Only ETS legislation.

As discussed above, Regulations are generally applicable and binding in their entirety. "Only ETS" legislation on the other hand, would – just as the existing ETS Directive – still leave some room for the Member States to manoeuvre. Member States can decide, for example, whether they want to apply the temporary and special State aid measures concerning free allocation (etc). While this discretion exists only within a fully harmonised framework, it will still result in different approaches in different Member States. Furthermore, the "Only ETS" legislation – in order validly to be based on Article 192 TFEU - would have to allow the Member States to take more stringent measures with the objective of environmental protection. Doing so, by definition it could not fully harmonise all aspects of the system, and should not be introduced by an instrument binding in its entirety.

§4.3.2 Directives

"Only ETS" legislation should be introduced by a directive.

The current ETS legislation takes the form of a Directive. This is in line with Article 288 TFEU, and the idea that Directives are binding only as to the result to be achieved, but leave discretion to the Member States on how to achieve the result. The current ETS Directive introduces a common system on emissions trading and provides some of the details on how this system must be implemented by the Member States. However, these common rules may also be supplemented by more stringent" measures to protect the environment, which Member States may adopt on the basis of Article 193 TFEU. This allows Member States to go beyond the provisions of the Directive: e.g. by introducing more ambitious targets. Accordingly, the legislation cannot be considered binding in its entirety. Rather, it is binding upon the Member States as to the minimum result that they are required to achieve. "Only ETS" legislation would be the successor of the current ETS Directive, and a directive would be the appropriate instrument by which to introduce it.

§4.3.3 Other instruments

Decisions are not appropriate for the introduction of Only ETS legislation, and neither are non-binding instruments such as recommendations and opinions.

As discussed above, decisions are either directed towards specific addressees or can only affect the European institutions themselves.[338] Where a measure formally entitled a 'decision' seeks to harmonise the national rules applied in the Member States, in substance that measure would really be a directive, which raises serious questions about the competence to adopt the relevant measure in an inappropriate form. "Only ETS" legislation would provide for a harmonised system for the issue and trading of emission allowances, so that it should by definition be introduced by a directive rather than by a decision. With the "Only ETS" legislation being binding upon all Member States, non-binding instruments are inappropriate instruments for achieving the binding and relatively far-reaching harmonisation envisaged by this pathway.

§4.3.4 Conclusion

"Only ETS" legislation should take the form of a Directive, similar to the current EU ETS Directive.

[338] See above, §4.1.3.

5. Conclusion & further remarks

This report has built upon, and developed, two previous works developed in the course of this project: "D3.1: Report on potential areas of conflict of a harmonised RES support scheme with European Union Law"[339] and "D2.1: Key policy approaches for harmonisation"[340]. The former presented a first inventory of all the legal provisions in European Union ("EU") primary and secondary law relevant for the development and introduction of a harmonised support scheme beyond 2020. The latter identified different degrees of harmonisation as well as matching policy pathways.

In this Report, the policy pathways identified in Report 2.1 were then analysed according to their respective legal feasibility and their compatibility with existing EU law. Its findings have been taken into account in the "multi-factor criteria analysis" for the overall assessment and ranking of the different policy pathways, and the outcome of this exercise has been used to develop policy recommendations and overall conclusions from the project.

The legal feasibility of the different harmonisation approaches and policy pathways has been assessed based upon the current EU legal framework. The legal feasibility of a measure can be established if an appropriate legal basis exists and a relevant procedural framework is available under the relevant existing EU law (i.e. the Treaty on the Functioning of the European Union ("TFEU" or "Treaty")). We have not considered the possibility of Treaty amendment, the procedures for which are provided in Article 48 of the Treaty on European Union ("TEU"), since this would open up unlimited possibilities.

A policy pathway has been considered 'compatible' when it does not conflict with the provisions of the Treaty, as well as relevant secondary legislation, or when it can be designed in such a way so as to be compatible.[341] A measure has been considered incompatible when it inherently conflicts with those provisions. Where the degrees of harmonisation and policy pathways leave room for different design options, wherever possible it has been indicated in the foregoing analysis which options should be chosen to make the measure compatible.

With regard to the question of an EU legal basis for a future measure on renewables, the most significant problem has been posed by the uncertainties in the application of the new energy competence in Article 194 TFEU. As summarised

[339] D. Fouquet, *et al.*, *Report on potential areas of conflict of a harmonised RES support scheme with European Union Law*, 2012.
[340] P. Del Rio *et al.*, *Key policy approaches for harmonisation of RES(-E) support in Europe – Main options and design elements*, 2012.
[341] E.g. by amending pre-existing secondary legislation to ensure compatibility.

in the interim conclusion above (§3), based upon the analysis in §§1 and 2, we conclude that full or medium harmonisation (as well as strong versions of a tendering or "Only ETS" approach) would face serious questions of legal feasibility, given the limitations of Article 194 TFEU. Soft and minimum harmonisation approaches, as well as a light version of the "Only ETS", however, do seem possible to adopt under this provision, and so the detailed analysis of the compatibility of policy pathways was then restricted to these two options in the remainder of this Report (the remainder of §3). While in theory it might be possible to pursue more far-reaching measures if unanimity among Member States in the Council could be achieved, because of the uncertainties concerning opt-outs or derogations under Article 194(2) TFEU, there could be no guarantee that those more far-reaching results would be achieved in practice.

After detailed analysis of soft and minimum harmonisation pathways in the light of the currently applicable EU law (both Treaty provisions and secondary legislation), it is concluded that – provided that care is taken in the definition of objectives and the marshalling of supporting information and evidence – either a soft or a minimum harmonisation approach would be compatible with EU law. Particular areas where care will be needed include: justifying the impact upon the interests of consumers (especially where the necessary consequence of the EU measure would be a significant energy price increase); justifying the *prima facie* restrictive impact of such measures upon the free movement of goods;[342] and the co-ordination of any new RES measure with the terms of pre-existing EU legislation affecting (renewable) energy, to ensure consistency and coherence.

Then, in §4 the clear conclusion was reached that such future EU renewables measures should be adopted in the form of a directive, due to its suitability for accommodating some fairly detailed obligations, while on other topics leaving significant leeway to Member States about how to achieve the required results within their national system. At the same time, it is acknowledged that various 'soft law' instruments could prove beneficial in accompanying any future directive, in that further co-ordination, information- and experience-sharing could be facilitated and encouraged through such non-binding mechanisms.

[342] In addition to the analysis developed above (§§3.1.8 and 3.2.8), two recent Opinions of AG Bot (in Joined Cases C-204 to 208/12 *Essent Belgium* (Opinion of 8 May 2013) and Case C-573/12 *Ålands Vindkraft* v. *Energimyndigheten* (Opinion of 28 January 2014)) - with regard to national RES-E support schemes and their compatibility with Article 34 TFEU - also raise concerns with regard to the scope of any EU-level rules on renewables. This is especially an issue where such EU legislation might seek to bolster a national scheme which restricts support for renewables *solely* to *domestically produced* renewable energy, given that (in his *Ålands Vindkraft* Opinion) doubt has been cast upon the compatibility of Directive 2009/28/EC with Article 34 TFEU, insofar as it seeks to allow such national schemes to stand. At the time of writing, the judgment of the Court of Justice remains pending in both cases, so we are unable at this juncture to offer any further guidance as to the potential impact of these considerations upon the design of EU-level harmonisation measures.

Finally, it should also be emphasised that the practical impact of any new EU RES legislation will – on the basis of the nature and degree of harmonisation involved, and the ongoing applicability of the EU's Treaty provisions (on matters like free movement and State aid, in particular) – be dependent upon Member State implementation. This is true both on the simple point of Member States adopting appropriate measures to meet the binding goals set by such legislation *and* with regard to the need for Member States to design such measures so as to meet the requirements of the primary rules of the TFEU. In particular, the following issues should be stressed:

> (i) care must be taken to consider the *implementation* at national level of an EU measure on RES so as not to create a situation in which national measures which follow the logic and pattern – or even the exact wording - of that EU measure nevertheless do not comply with Article 34 TFEU (see the analysis of Article 34 above (esp. §3.1.8, and in particular the uncertainty prevailing after recent developments);[343]
>
> (ii) the EU is not empowered – through other means than legislation – to interfere with the rules of the Treaty. For a very current example, the Commission's Draft Guidelines for Energy and Environmental Aid include some rules for particular types of RES support (tendering, e.g.), which may arguably amount to an infringement of Article 194(2) TFEU insofar as it effectively "regulates" Member States' energy rights (by exempting certain types of support from normal State aid scrutiny). At the very least, such guidelines might be criticised for not being the product of Commission experience from extensive decisional practice, but rather may be seen as reflecting a particular view on a design for a national RES promotion scheme which is being 'pushed' or supported by the Commission, via the State aid control process.

Overall, therefore, the legal analysis concludes that soft and minimum harmonisation approaches would appear to fall within the EU's competence legal basis in the TFEU, and would also (if carefully designed) be compatible with the requirements of EU law. At the same time, care is required to ensure that such EU-level measures are capable of sensible, practical and effective implementation by the Member States if the goals of any such future EU RES measure are to be achieved in an efficient and timely fashion.

[343] See the Opinions of AG Bot in *Essent Belgium* and *Ålands Vindkraft* (discussed above: nn. 142, 155, 257 and esp. 342).