

# **The legal framework for energy provisions in the European Union**

With special regard to providing of energy provisions within the scope of Article  
194(2) TFEU

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Master of Laws thesis

Environmental law

University of Turku, Faculty of Law

January 2016

Turku

UNIVERSITY OF TURKU

Faculty of law

TOVE BACKLUND: The legal framework for energy provisions in the European Union – With special regard to providing of energy provisions within the scope of Article 194(2) TFEU

Master of Laws thesis, xvi + 74 p. + 1 appendix p.

Environmental law

January 2016

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The thesis interprets the caveat of Article 194(2) TFEU in order to assess the use of the Article as a legal basis for energy provisions provided by the European Union. The research subject is the Energy Title in the Treaty of the Functioning of the European Union and the possibilities of the application of the legal basis provided therein. The purpose is analysis of the possibilities for providing of provisions within the scope of the caveat found in Article 194(2) TFEU with special regard to the possibilities of providing renewable energy legislation. The purpose of the thesis is on one hand to provide an overview of the premises for providing of energy provisions in the EU, and on the other hand to analyse the Treaty text in order to determine the legal basis for energy provisions. The ultimate objective is to determine the correct legal basis for renewable energy provisions, aimed at the mitigation of climate change.

According to Article 194(2) TFEU, the practice of the shared legislative powers in the field of energy are restricted by the retention of certain energy matters within the power of the Member States. The wording of the caveat containing the restrictions is open to interpretation and has been a subject of extensive discussion. Many scholars have argued that the caveat in Article 194(2) TFEU might obstruct decision-making in energy matters. This argument is contested, and the factual impact of the codification of the energy competences is analysed. The correct legal basis for energy provisions depends on the final interpretation of the text of the caveat and the level of significance of the effect of the measure. The use of Article 194(2) TFEU as a legal basis might not be the only option. There is a possibility that the legal bases within the Environmental Title might be used as legal bases for energy provisions in addition to Article 194(2) TFEU.

Key words: environmental law, energy law, European Union law, renewable energy, vertical division of powers, legal basis

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## List of Abbreviations

CJEU	The European Court of Justice
CPI	Climate Policy Integration
EEC	European Economic Community
ECO	European Coal Organisation
ECSC	European Coal and Steel Community
EU	European Union
Euratom	European Atomic Community
EPI	Environmental Policy Integration
GHGs	Greenhouse gases
OEEC	Organisation for European Co-Operation
RE	Renewable energy
SEA	Single European Act
SLP	Special legislative process
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
The caveat	Article 194(2)(2) TFEU



# 1 Introduction

## 1.1 The vertical division of powers in EU energy law

The European Union (EU) enjoys shared legislative powers with the Member States in energy-related matters. The vertical division of powers in energy matters is determined by Article 194 of the Energy Title (Title XXI) in the Treaty on the Functioning of the European Union (TFEU). The Energy Title determines the objectives related to the Union's energy policy and provides a legal basis in Article 194(2) TFEU for attaining the objectives. The use of the legal basis for energy-related provisions is restricted by a caveat found in the second paragraph of the Article. According to Article 194(2)(2) TFEU, the Member States maintain the power to decide in matters concerning the conditions for exploiting their energy resources and in matters concerning the choice between different energy sources and the general structure of the Member States' energy supplies<sup>1</sup>, without prejudice to Article 192(2) TFEU in the Environmental Title.<sup>2</sup> Article 192(2) TFEU determines 'measures *significantly*<sup>3</sup> affecting a Member State's choice between different energy sources and the general structure of its energy supply' to be subject of a special legislative procedure, leaving the choice of a legal basis for provisions affecting the Member States' energy rights up to a certain level of signification open. Whether provisions with effect on the energy rights can be provided under Article 194(2) TFEU up to a certain level of significance or not, is unclear. The wording of the caveat, including the lack of a significance threshold for measures affecting a Member States' energy rights, makes the Energy Title open to multiple interpretations. Because of the referral in the Energy Title to Article 192(2) TFEU in the Environmental Title, the Member States' energy rights are not absolute. The European legislator's process of providing provisions infringing on the Member

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<sup>1</sup> The in Article 194(2)(2) TFEU granted rights for the Member States' to decide in matters concerning 'the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' are hereinafter throughout the text referred to as the Member States' *energy rights*.

<sup>2</sup> The restrictions in Article 194(2) TFEU will hence be referred to as 'the caveat' of the Energy Title.

<sup>3</sup> Italics added by author.

States' energy rights is however restricted and complicated and might lead to undetermined hardships.

According to the caveat, the starting point is that the Member States retain the power to determine which energy sources to use and can make decisions regarding the use of coal, gas, fossil fuels, nuclear energy or renewable energy (RE) sources as well as solely decide on the Member State's individual energy mix. This retention of power is however restricted and steered by the general principles and the secondary provisions provided by the EU. Secondary provisions concerning the promotion of renewable energy are especially restricting from this point of view.

The direct reference to Article 192(2) TFEU might empower the Union to provide legislation affecting the energy rights attained by the Member States within the context of the Union's environmental policy. If one Member State disagrees in the legislative process, and the process is halted, this might lead to struggle in reaching the environmental objectives, which depend on the greening of the Union's energy policy.

The achievement of the environmental and climate objectives set out by the European Union is highly dependent on reduction of the use of fossil fuels and the reduction of greenhouse gas emissions.<sup>4</sup> Since the EU cannot prohibit or restrict the use of certain energy resources in the Member States according to the caveat in Article 194(2) TFEU, promotion of renewable energy might be the pre-eminent tool in enhancing sustainable development and achieving the climate objectives.<sup>5</sup> According to the TFEU provisions, the EU can, for example, not prohibit the use of fossil oil or even force the Member States to invest in the production of certain types of energy production.<sup>6</sup> The method of providing new energy-related secondary provisions without infringing on the powers officially granted the Member States in

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<sup>4</sup> See COM(2011) 885 final, Energy Roadmap 2050.

<sup>5</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, para 1: "The control of European energy consumption and the increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions". *Bechberger in Morata – Sandoval (eds.)* 2012, p. ix, has presented further arguments regarding renewable energy promotion to be seen as "the only strategic option for rapidly reducing European GHG emissions".

<sup>6</sup> *Andoura – Hancher – van der Woude* 2010, p. 11.

the Treaty of Lisbon (2007/C 306/01)<sup>7</sup> (hence referred to as the Lisbon Treaty) requires complex patterns, political persuasion and legal will by the Member States and the EU institutions equally. The process of providing of provisions affecting the energy rights granted the Member States is still unclear in parts. Since neither the scope of the caveat in Article 194(2), nor the level of significance required in Article 192(2)(c) TFEU has been determined as of today, contemplation on the possible effects of the caveat can only be conducted on a theoretical level and answers can only be provided on a hypothetical level.

Both the vertical division of powers in relation to the determination of the level of significance required and the determination of the correct legal basis for certain types of energy provisions are interesting aspects to the interpretation of the Energy Title. Multiple aspects of especially the promotion of renewable energy in accordance with the two interrelated TFEU Articles are open to interpretation and determination, which makes the scopes of the Articles a versatile and interesting research objective.

## **1.2 The theme of research and research premises**

The rapidly increasing climate change calls for appropriate instruments to enable acts of mitigation. Europe is the world's second largest economy<sup>8</sup> with over 450 million energy consumers and an annually growing energy demand by 1-2%.<sup>9</sup> The energy sector is world widely one of the largest contributors to climate change.<sup>10</sup> Thus, actions of mitigation are prerequisite in the energy sector, and actions are especially welcomed on supranational level. The European Union is a leader in demand management, promotion of new and renewable energy resources and the

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<sup>7</sup> Document 2007/C 306/01, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007.

<sup>8</sup> European Commission Publications 2012: The European Union explained: Energy, p. 3.

<sup>9</sup> European Commission Publications: Eurostat 2006: Energy Issues, p. 2.

<sup>10</sup> Within the EU, the energy sector contributes to the greenhouse gas emissions with 27% of the total GHG production. Other major contributors are Industry (26%) and the households (19%), of which energy provisions regarding for example the European emissions trading system, renewable energy and energy efficiency also govern both fields of emitters. Agriculture, and services constitute of the rest of the GHG emissions in the EU. <http://ec.europa.eu/eurostat/news/themes-in-the-spotlight/cop21>.

development of new, requisite technology.<sup>11</sup> The promotion of the two latter is necessary in the pursuit of the EU climate policy objectives aimed at mitigation of climate change. With the right tools, including both policy tools and legislative tools, the EU can be a precursor and a role model for other regions and states in the pursuit of sustainable extraction of energy resources and sustainable energy use. The European Commission has appointed energy matters as one of its top priorities in 2015, and has been ever so active in the field during the last years.<sup>12</sup> Also the TFEU recognizes climate change as the main global environmental issue, in which the EU is expected to play an important role.<sup>13</sup> The EU has provided extensive legislation in the field of energy during the last decade, and has thereby restricted the national legislator. Nevertheless, the EU as of today yet has no common energy policy.

It is clear that the present energy measures are not ambitious enough to combat climate change<sup>14</sup>, and hence more ambitious measures will be vital if the Union is to reach its objective of reducing its Greenhouse gas (GHG) emissions by 80-95% by 2050 compared to 1990 levels.<sup>15</sup> The energy provisions introduced by the Lisbon Treaty have caused fear among scholars that the adoption of future provisions aimed at climate change mitigation could result in a gridlock.<sup>16</sup> Especially the by the Lisbon Treaty introduced Article 194(2) TFEU and its scope has been the object of extensive speculation and concern among scholars.<sup>17</sup>

Reaching the objective of 75 % RE in final energy consumption in the year 2050 (and 97 % in electricity consumption) will, under the current primary EU legislation, require unanimous decisions regarding extensive promotion of RE sources. The objectives including increasing levels of energy from RE sources leads to restriction of the use of certain other resources, which inevitably to a certain extent infringes on the powers granted the Member States. It is interesting to anticipate the extent to

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<sup>11</sup> COM 2006 (105) final, p. 4.

<sup>12</sup> See COM 2015 (80) final and European Commission press release (18.11.2015): The Energy Union on track to deliver. Available at [http://europa.eu/rapid/press-release\\_IP-15-6105\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6105_en.htm).

<sup>13</sup> Article 191(1) TFEU.

<sup>14</sup> See e.g. *Kulovesi – Morgera – Muñoz* 2011, p 891. Substantially more ambitious measures are required in the period from 2020 to 2050 in order to secure the sustainability of the commenced measures aimed at climate change.

<sup>15</sup> COM (2011) 885/2 final, p. 2.

<sup>16</sup> See e.g. *Peeters* 2014, pp. 41-48.

<sup>17</sup> See e.g. *Haraldsdottir* 2015, *Angus – van den Marel* 2015, *Andoura – Hancher – van der Woude* 2010 and *Pielow – Lewendel* in *Delvaux – Hunt – Talus* 2012.

which the measures may affect the energy rights without the requirement of the use of the special legislative process (SLP), requiring unanimity, referred to in Article 194(2) and proscribed in Article 192(2) TFEU. Even though the Lisbon Treaty entered into force in the year of 2009, the new Energy Title and its scope is an increasingly fruitful research objective the closer we get to 2020, when the effectuation of the current RE- directive comes to an end and new policies and provisions regarding renewable energy and the climate objectives need to be provided in some configuration. Before the CJEU determines the scope of the primary energy provisions, interpretation and contemplation of the Energy Title and the Article texts is equally meaningful.<sup>18</sup>

According to Article 194(2) TFEU Member States have the right to decide on “measures affecting 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)”. The thesis will process the aspects to the determination of the scope of Article 194(2) in relation to Article 192(2)(c) TFEU. The relationship could possibly be attended by the CJEU in a case regarding legislative infringement of the rights obtained by the Member States when the legal basis could be faulted due to a certain level of significance of the effect of the measure.

The purpose of the thesis is two folded. The general purpose of the thesis is to provide an overview of the framework and premises for providing of energy provisions, which includes extensive background information regarding the idiosyncrasies of the energy sector and the vertical division of powers in the field of energy. The special undertaking of the thesis is to systematize and unravel the possibilities for promotion of renewable energy as well as to determine the correct TFEU legal basis for renewable energy provisions. The research questions are as follows.

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<sup>18</sup> The European court (formerly the European Court of Justice (ECJ), post-Lisbon the Court of Justice of the European Union (CJEU)) has played a crucial and conclusive role in European integration with a special emphasis on the development of the field of environmental law. The role of the CJEU has not been reduced, and the decisions have effects over the boundaries of different fields of EU law. For an overview of the effects the ECJ has had on the development of EU environmental law, see *Jans – Sevenster – Janssen 2007*.

- What does the introduction of the Energy Title and the codification of the energy competences mean for future energy legislation, either fully or partially aimed at the environmental objectives?
- Does the caveat in Article 194(2) combined with the technical requirements of Article 192(2) TFEU jeopardize the environmental and climate objectives set out by the EU or obstruct the decision-making process in energy matters aimed at mitigation of climate change, as alleged by many scholars?
- Which are the technical issues at hand regarding the provision of environmentally aimed energy provisions, and how are the issues to be addressed?
- How does the caveat in Article 194(2) TFEU affect decision-making in energy-related matters and what is the correct basis for renewable energy provisions?

Because of the character of the issues at hand, no direct answers to the questions can be provided, and the answers to the research questions are provided on a hypothetical level. The hypothetical issues are then accompanied by equally hypothetical solutions.

The theories and facts presented in this thesis will be applied especially in the sub-sector of the promotion of renewable energy codified in Article 194(1) TFEU, which is particularly important for the EU environmental policy. Focus will be on the environmental policy integration (EPI) and the promotion of sustainable development, which both consist of the holistic approach to environmental protection integrated into other sectors.

### **1.3 Material, methodology and structure of the study**

The material of this thesis consists substantially of EU-material: Treaties, secondary legislation, judgments of the Court of Justice of the European Union (CJEU) and the General Court (GC) and administrative decisions by the European Commission. In addition to EU material, the theme is analysed in light of different opinions presented in judicial literature in the field. The intent has been to choose, present and critically analyse literature representing multilateral opinions in order to present a versatile depiction. Especially post-Lisbon literature has processed the vertical division of

powers in energy matters widely, but the Union's energy political development has mostly been presented rather technically and separately from other fields, whereas this thesis strives to address issues holistically and especially from an environmental aspect. The objective of this thesis is avoiding dissection of the separate fields of law and fragmentation, and instead striving to incorporation of the themes into a pluralistic totality, in the manner characteristic of environmental law. Thereby the analysis of the Articles at hand is not solely intended to be of technical character.

The aim of this study is to provide an overview of the possible problems with the promotion of renewable energy related to the introduction of the Energy Title. The methodology of the thesis is dogmatic, since it strives to clarify, interpret and systematize the legal framework. The dogmatic task consists of interpretation of relevant official EU documents and most prominently of analysis of the relevant Treaty Articles, which is the main undertaking of this thesis. Secondary provisions have been used mainly to illustrate competence issues, and are not further processed because of the character of the undertaking. The approach to European Union energy law will be from the perspective of long-term commitments on combating the climate change taken by the EU.

EU energy law and policy are unavoidably permeated by politics. In this thesis the focus will be on the legal aspect, from a somewhat constitutional point of view and thus primarily not on energy politics. The motivation to this derives from the focus on the codification of the energy provisions in the Lisbon Treaty. Due to the codification of the provisions, energy policy is no longer solely a general Union aim, but also a serviceable legal basis, and with that a ground for appeal. The EU objectives need legal bases to become competences, which the energy sector over time has developed. The problem with the Energy Title might not only be the framework, within which new legislation can be provided, but also the determination of the scope of the different interrelated provisions. The scopes of the separate Articles must be determined at latest if an appeal is raised based on the (level of significance) of a measure based either on Article 194(2) TFEU or an alternative legal basis. It is possibly at that point, when the CJEU attends an appeal due to a fault of the legal basis for a certain energy- or environmentally aimed provision, that

the codification of the energy competence might cause previously unseen issues. Possible outcomes of such a process is the mere clarification of the correct legal basis or the failing of a provision due to the lack of the required use of SLP in the legislative process.

The post-Lisbon name of the European Court of Justice, the Court of Justice of the European Union, (hereafter CJEU), will be used throughout the text. There appears to be no distinction between the use of the terms *competence* and *power* in the TFEU, and the terms will be used as synonyms in this text. The vertical division of powers is the focus on this thesis, and the *horizontal division of powers* is not considered momentous. The horizontal relationships between the different *TFEU Articles* constitute an aspect of greater significance than predicted due to the composition of the Energy Title.

This thesis will ultimately analyse the possibility of promotion of renewable energy within the limits of Article 194(2) TFEU. In order to determine the extent to which Article 194(2) TFEU can serve as a legal basis for secondary legislation and national approximation, the boundaries of the caveat need to be determined. In order to do that, the thesis starts by providing background information in section 2. First, a historical background to the energy provisions introduced in the Lisbon Treaty is provided. The idea is to visualise the residuary of original, non-codified energy perceptions and the alternations to the unwritten perceptions codified by the Lisbon Treaty (section 2.2). Section 2 commences with an important aspect to the energy provisions, the relationship between sovereignty over natural resources and the climate and environmental objectives of the EU (section 2.3). The special character of energy matters will be enhanced, and the following section will present the energy policy of the EU (section 2.4). Sections 3 and 4 provide in-depth analysis of the energy provisions. In order to be able to analyse the scope of Articles 194(2) and 192(2)(c) TFEU, fundamental aspects of the vertical division of powers in the EU are presented (section 3.2). The text then proceeds to processing the technical research questions by analysing the scope of the caveat (sections 3.3 to 3.4). After providing different possibilities regarding the interpretation of Article 194(2), the text provides



possible solutions to the different interpretation models presented (sections 4.1 to 4.4).

The thesis strives to commence from the general and progress towards the more specific questions related to the theme of research. Since the stand of the CJEU on the scope of Article 194(2) TFEU is yet (and possibly forever) to be determined, extensive contemplation and solutions will be presented. The text will finally summarise the findings of the research in section 5.

## **2 EU energy law and policy**

### **2.1 Introduction**

The European Union has as of today not succeeded in developing a common energy policy, which appears to be the next large-scale objective of the EU. In the 1980's the energy policy was concerned a 'spectacular failure'<sup>19</sup>, but gradual progress has been made and as of today steps to foster a political climate, which supports a common policy, are visible. Today the development of an energy policy seems to be a priority of the EU institutions based on several communications from the separate institutions.<sup>20</sup> The differences between the Member States' energy sources and systems are a problem for developing a common energy policy. As will be illustrated in sections 3 and 4, also the uncertainties regarding the application of the primary energy provisions of today might be a holdback for developing a common energy policy.<sup>21</sup>

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<sup>19</sup> *Morara – Sandoval* 2012, p. 1. The authors still regard the development of a common energy policy to be a 'work in progress' with an uncertain outcome and far from being a common policy (p. 3).

<sup>20</sup> See e.g. COM (2015) 80 final: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy. Nine months in to the process progress seems to have been made and the Commission is boosting the Energy Union-idea on official websites and in social medias. See also European Commission Press release: The Energy Union on track to deliver, 18.11.2015. Available at [http://europa.eu/rapid/press-release\\_IP-15-6105\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6105_en.htm).

<sup>21</sup> For an extensive overview of the possible obstacles for developing a common energy policy, see *Andoura – Hancher – van der Woude* 2010.

EU energy law has been developed since the 1980's, but it was not until the Lisbon Treaty that energy was formally included in the EU policies. The introduction of the Energy Title with the energy objectives and a legal basis has been subject to vast speculations, but one thing that is clear is that the entering into force of the Lisbon Treaty has not slowed down the providing of energy-related provisions. A stronger legal framework should consequently mean progress for the providing of energy provisions. In order to provide background and present the premises for the energy framework, this section will illustrate the progress from the beginning of European Integration to the situation of today concerning European energy policy and legal framework. The policy issues are also illustrated by discussion regarding the relationship between the sovereignty of the national states over natural resources and the environmental objectives set out by the EU.

This section strives to provide a background for the understanding of the in-depth analysis of the alternations introduced by the Energy Title. Presentation of the historical background and the idiosyncrasies characterizing the energy sector in combination with the presentation of the energy policy of the EU is a prerequisite for proceeding to analysis of the technical issues regarding the Energy Title. According to *Talus*, the interpretation of EU energy law is dependant on the bringing together of both history and policy in order to underpin the understanding of the fundamentals for the interpretation.<sup>22</sup> The aim of the section is to provide a wide overview of the premises for providing of energy provisions in order to produce an answer to the curious research question of whether the introduction of the Energy Title has lead to any amendments to the pre-Lisbon situation regarding the energy competences of the Union.

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<sup>22</sup> *Talus* 2014(b), p. 7.

## 2.2 The historical background for EU energy law

### 2.2.1 Energy in the beginning of European Integration – a driving force

After over 60 years of European integration, the European Union with its Member States has not yet succeeded in the development of a common energy policy. It is fair to say that energy has been a driving force in European integration. Interestingly enough, it has also been one of the matters dividing the Member States the most. A coherent energy policy has never been established, and a coherent energy policy is regarded as one of the weakest achievements of the European Union.<sup>23</sup> Not even when the EU energy policy was widely revised in the 1990s, primarily in the areas of environment and the internal market, was energy included in the formal competences of the Union. It was not until the Lisbon Treaty that energy formally was included in the field of EU policies, and the introduction of energy in the Treaties started a new era for EU energy law with the introduction of a legal basis and a clear vertical division of powers.

With the establishment of the European Coal Organisation (ECO) in 1946 and after that the Organisation for European Co-Operation (OECE) in 1948, the cornerstones of European integration consisted of Energy issues. The first Community establishment, the European Coal and Steel Community (ECSC), was founded on energy-related challenges in 1951<sup>24</sup>, as was the European Atomic Community (Euratom) founded in 1957. Both of these lay the basis of the European Economic Community (EEC), established by the Treaty of Rome in 1957, with the main focus on the two primary energy sources of the time, coal and nuclear energy. No mention of environment was made in the establishing Treaty, neither was the word ‘energy’ mentioned. The Euratom and ECSC Treaties provide for a common policy in the respective energy fields, with delegation of powers exclusively to the supranational level,<sup>25</sup> but in all other energy sectors energy policy and organisation was left to the Member States until the late 1980’s.

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<sup>23</sup> *Morata – Sandoval (eds.)* 2012, p. 1.

<sup>24</sup> The ECSC Treaty’s underlying objective was the creation of a common market for steel and coal, the primary energy sources of the time.

<sup>25</sup> Since the ECSC Treaty expired in 2002, the Euratom Treaty is the only legal basis for a common EU energy policy, which pronouncedly only covers nuclear energy.

Energy was thus the focus of Member State attention from the beginning of European integration. For the time, the ECSC and the Euratom Treaties provided sufficient common energy policies, but no progress was made in integration in energy matters even though new energy-related challenges arose. The Treaty of Maastricht included a reference to the energy sector in the list of fields of EC activities among policy areas like tourism and disaster control, a mere modest statement. Also, in contrary to many of the other policy areas in the list, the EC Treaty did not lay out objectives or procedures in the field of energy.

During the years of 1957-1985 some Member States had ambitious national energy policies, but no unity was reached regarding a common energy policy. Member States were unwilling to delegate the necessary powers and submit the ‘energy sovereignty’ to the supranational level. It is apparent that it was the diverse contextures of the Member States’ energy structures that were the obstacle for a common energy policy, the same obstacle that still exists today.<sup>26</sup> The commitment in the different Member States in regard to their energy mix and the different structures of their energy industry varied greatly between the different Member States from the beginning of European integration<sup>27</sup>, and still does<sup>28</sup>. One important and clearly readable indicator is the energy dependency, but also the general structure of the Member State’s energy supply matters. The energy sector was largely state driven and monopolised from the beginning of the integration, but in the 1980’s the energy monopolies and separation of the market based on state borders gradually started perishing.<sup>29</sup> After the year of 1985 the body of EU secondary

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<sup>26</sup> *Talus 2014(b)*, p. 17. *Talus* highlights the consistent work of the Commission for creating a common energy policy, commencing already in the 1970’s. The Member States’ reluctance to let go of the sovereignty over natural resources was the only holdback, since the legal framework for materializing a common energy policy already existed, at least theoretically.

<sup>27</sup> In the year of 1975 was for example the UK 0% energy dependent, in contrary to e.g. Italy with a close to 100% energy dependency. *Talus 2014(b)*, pp. 17-18.

<sup>28</sup> The energy dependency of the Member States still varies greatly. Member States with an energy dependency of over 85% are Cyprus, Ireland, Italy, Luxembourg and Malta, whereas a less than 30% energy dependency was displayed in Denmark, Czech Republic, Estonia, Romania and the UK in 2013. Denmark even displayed an energy dependency of -24%, which means that the country produced 24% more than its energy consumption. European Commission: Member States’ Energy Dependence: An Indicator-Based Assessment, April 2013, p. 12. Available at: [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/ocp145\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp145_en.pdf) (3.1.2016).

<sup>29</sup> *Talus 2008*, p. 642.

energy law started to expand, largely focused on internal market provisions and based on guaranteeing the fundamental freedoms (i.e. the free movement of goods, services, people and capital)<sup>30</sup>. The EC developed an energy policy in steps by using the general competences of the community, sparked by the communication “The internal energy market” provided by the Commission in 1988.<sup>31</sup>

An energy law reform started advancing in Member State countries, and as no specific legal basis existed for energy matters on EU level, legislation was initially based on Article 95<sup>32</sup> of the EC Treaty, which provided for approximation of domestic laws based on majority voting in the Council as regulated in the Single European Act (1987)(SEA). The evolving network of secondary legislation controlled the threat of disorderly development in a crucially significant sector of the European development, but the providing of provisions itself was disorganised due to the lack of a specific legal basis. The resistance of certain Member States also slowed the development down.<sup>33</sup>

The next alternation of the EC Treaty in 1992, The Treaty of The European Union (TEU), integrated the ECSC and the Euratom Treaty into the new Treaty, but did not further address energy policy issues. The TEU introduced expanded legislative powers for the Union, and provisions on energy matters could after the introduction of TEU be provided based on co-decision, which is now called the ordinary legislative procedure.<sup>34</sup>

### 2.2.2 Recent developments

The shapers of the failed Treaty establishing a Constitution for Europe<sup>35</sup> (hereinafter called ‘the Constitutional Treaty’) drafted an Article regarding energy:

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<sup>30</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus* 2012, p. 193.

<sup>31</sup> The internal energy market, COM (1988) 238, may 2 1988.

<sup>32</sup> Now Article 114 TFEU.

<sup>33</sup> *Talus 2008*, p. 643. The resistance was displayed for example as the lack of implementation of provisions, see e.g. case C-259/01 - *Commission v France*.

<sup>34</sup> *Talus 2014(b)*, p. 18-22.

<sup>35</sup> OJ 2004 C 310/1 notice no. 2004/C 310/01.

“1. In establishing an internal market and with regard for the need to preserve and improve the environment, union policy on energy shall aim to:

- (a) ensure the functioning of the energy market
- (b) ensure the security of energy supply in the Union, and
- (c) promote energy efficiency and saving and the development of new and renewable forms of energy.

2. The measures necessary to achieve the objectives in paragraph 1 shall be enacted in European laws or framework laws. Such laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Such laws or framework laws shall not affect a Member State’s choice between different energy sources and the general structure of its energy supply, without prejudice to Article III-130(2)(c).”

The text proved extremely controversial, and lead to many amendments. Some commentators argued the text to be a step backwards regarding the scope of EU competence, and some Member States feared the Article text would threat national control over national resources.<sup>36</sup> The Article was re-shaped many times due to considerable political opposition, finally to be drafted in the form of Article 194 TFEU, the form in which it finally was passed. The difference in relation to the final text of the Lisbon Treaty is not striking, which illustrates the sensitive character of the matter. The Treaty of Lisbon has overall been called the ‘Constitution in disguise’,<sup>37</sup> which is reasoned also based on the new energy provisions. Even though the “constitutional elements had to disappear”, as much as possible of the failed Constitutional Treaty was preserved in the Lisbon Treaty with the most prominent differences resulting in merely institutional and procedural alternations.<sup>38</sup>

Despite the absence of a specific energy provision in the Treaties before 2009, the EU was active in the energy field and provided extensive energy-related legislation. Before the entering into force of the Lisbon Treaty, the Green Paper<sup>39</sup> and energy and climate package measures illustrate the Union already to have enjoyed extensive implicit competence in energy matters and policy instruments. The measures

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<sup>36</sup> *Hancher – Salerno in Biondi – Eeckhout – Ripley 2010*, p. 370.

<sup>37</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus 2012*, p. 263.

<sup>38</sup> *Vedder 2010*, p. 298. *Vedder* also notes that the Lisbon Treaty primarily concerns the institutional aspect of the EU.

<sup>39</sup> COM/2006/0105 final.

provided before the Lisbon Treaty show that the EC Treaty already was an adequate basis for ambitious energy-related measures aimed at climate change. The legal bases varied Pre-Lisbon, but most energy-specific agreements have been carried out based on implicit power, primarily on Article 95 TEC (now Article 114 TFEU) and gradually based on TEC Article 308<sup>40</sup> (now Article 352 TFEU), which states:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

The permission to the extensive use of the Article in the field of energy was due to the fact that the use of Article 308 TEC was allowed where necessary, as long as no Treaty amendments would limit its application.<sup>41</sup> Another frequently used legal basis for energy-related provisions was Article 175(1) TEC on the environment (now Article 192 TFEU). Clearly already the EC Treaty enabled the EU to realize structural changes and a considerable shift of regulatory power to the Union in the field of Energy.

In 2005, the EU started preparing a new mid- to long-term strategy to confront the challenge of climate change, with the need to demonstrate that the Union was taking the Kyoto commitments seriously. Hence, the Commission commenced in preparing the foundations for a new energy policy, by introducing the Green Paper titled *A European Strategy for Sustainable, Competitive and Secure Energy*,<sup>42</sup> with proposals on the implementation of the new energy policy. After the Green Paper in 2006, launched action plans, communications and packages have stressed the importance of the necessity of GHG reductions, integration and sustainability.

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<sup>40</sup> Presidency Note of the 2000 conference of the Representatives of the Governments of Member States CONFER 4711/00, Brussels, 22 Feb 2000, p. 2.

<sup>41</sup> The use of the Article was allowed only when no other provision did provide the Union with powers to adopt the measure. *Haghighi* 2007, p. 72.

<sup>42</sup> COM (2006) 105 final.

During the development of the Union the focus has not been on a common energy policy, but rather on the principles of development of the internal market and energy security, both deeply rooted in sovereignty. The expansion of EU competences over the years has depended either on alternations of the provisions aimed at the widening of competences of other sectors or on the necessity in the action to reach certain EU objectives.<sup>43</sup> The likeliest explanation for the recent developments of EU energy policy originates from the topical challenge of climate change. It is also evident that the patchwork of legislation suitable for providing of energy provisions with overlapping clauses caused a craving for a specific legal competence in the field. The EU is now at a stage where the necessary tools for achieving any objectives exist, and the execution hinges on political will. In order to enable legal clarity and transparency, as well as finally cause the energy provisions to be regarded as legitimate, the European leaders apparently considered the introduction of clear division of competences vital, and the Energy Title was introduced in the Lisbon Treaty.

According to the Commission, the objectives set out to combat climate change are only attainable if the Member States speak with one voice,<sup>44</sup> an idea mirrored in the Energy Title.<sup>45</sup> Still, the fact that the Climate Package<sup>46</sup> including the RE-directive was threatened to be vetoed by two Member States shows that the objectives still are not the same among all the Member States, which is set to cause problems in the future. The fact that energy now officially is part of the competences of the Union however brings with it that energy provisions can have more effect than earlier, which will be attended in section 3.

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<sup>43</sup> *Haghighi* 2008, p. 464.

<sup>44</sup> COM (2008) 781 final, p. 3.

<sup>45</sup> This is visible furthermost in the reference to solidarity. *Pielow – Lewendel* in *Delvaux – Hunt – Talus* 2012, p. 268.

<sup>46</sup> The new Climate Package consisted of four measures: the Renewable Energy Directive (RE-directive), the directive on Emissions Trade System (ETS) , the ”effort-sharing”-Decision with mandatory targets for emissions for sectors not covered by the ETS and a Directive with a legal framework for environmentally safe carbon capture and storage technologies.



## 2.3 National interests and climate objectives

### 2.3.1 Environment and energy

The history of energy and natural resources law in Europe has been strongly connected with rights to natural resources and property.<sup>47</sup> States do not *own* their resources under international law, but are provided *sovereign rights to exploration and exploitation of them* pursuant to their own environmental and economical objectives.<sup>48</sup> Regarding offshore resources, international law determines sovereign rights of the states to their continental shelves. States have been granted permanent sovereignty over their on-shore natural resources under international law<sup>49</sup>, and hence, the states are free to determine for example which energy resources to exploit, as well as to determine national and private ownership over real property within the territory of the state. The Stockholm declaration of the United Nations determines the states' sovereignty over their resources with the restriction of the 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.<sup>50</sup> The Rio Declaration also addresses the issue, and states that in order to achieve sustainable development, states should reduce and eliminate unsustainable means of production and consumption.<sup>51</sup>

Within the Union context, the Sixth Environmental Action Programme lays out the prudent use of natural resources as a postulate for sustainable development,<sup>52</sup> and the Seventh Action programme highlights the need of environmental policy integration (EPI) in "all relevant policy areas" in order to reduce pressure caused by activities in

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<sup>47</sup> *McHarg – Barry – Bradbrook – Godden (eds.)* 2010, p. 1.

<sup>48</sup> Principle 2 of the Rio Declaration on Environment and Development. See more: *Rønne* in *McHarg – Barton – Bradbrook – Godden (eds.)* 2010, pp. 64-65.

<sup>49</sup> See eg UN resolution 1803 of 14 December 1962 (XVII): Permanent Sovereignty over Natural Resources.

<sup>50</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm 16.6.1972, principle 21. Per se a questionable restriction, since many a measure practiced by the national states has a negative effect on other areas than that of the national territory.

<sup>51</sup> Principle 9 of the Rio Declaration.

<sup>52</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

other sectors.<sup>53</sup> Ironically, the concept of natural resources is unclear in this as well as any other context.<sup>54</sup> Concerning specifically energy resources, the EU gradually declared national sovereignty over the states' respective national energy resources after World War II.<sup>55</sup> Even though the European Union through the TFEU or the former Treaties in no regard explicitly determines the control or ownership of energy resources, e.g. *Guimaraes-Purokoski* regards the energy resources clearly belonging to the ownership of the national states, on the territory of which the resources are located, based on TFEU Article 345 and Union Case law.<sup>56</sup> Article 345 TFEU states that '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership', which as a starting point leaves the states to determine their conditions for ownership and property. The objective of the provision is regulation of the division of powers between the member states and the EU, and the objective is not interpreted to appoint the property rights of the Member States absolutely immune to application of Union law. *Guimaraes-Purokoski* highlights the restrictions on the right to decide over the natural resources consisting of the constitutive principles like the free movement of goods and the prohibition of discrimination.<sup>57</sup>

According to *Guyan – Kühne – Roggenkamp*, the EU may govern the liberalisation but not the organisation of the energy sector based on the principles and provisions of the Treaties and the secondary legislation.<sup>58</sup> The question raised is usually whether the Union should be concerned with the complex and divergent rules regarding exploitation of energy resources in the Member States. Member States' regulatory measures in energy and property law are guided by among others the principle of non-discrimination and the rules of the four freedoms, against which for example

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<sup>53</sup> Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.

<sup>54</sup> COM (2005) 670 final, Communication from the Commission, Thematic Strategy on the sustainable use of natural resources, p. 3: "natural resources, *including* raw materials *such as* minerals, biomass and biological resources; environmental media such as air, water and soil; flow resources such as wind, geothermal, tidal and solar energy; and space (land area)" (italics added by author).

<sup>55</sup> See especially EC/98/101 The Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, Article 18.

<sup>56</sup> *Guimaraes-Purokoski* 2009, pp. 189-190.

<sup>57</sup> *Ibid.*

<sup>58</sup> The EU may for example govern the privatization of national energy companies. *Guyano – Kühne – Roggenkamp* in *McHarg – Barton – Bradbrook – Godden (eds.)* 2010, p. 337.

conditions for exploitation of energy resources cannot be taken.<sup>59</sup> The trend in EU Directives regarding the energy sector is one of dissolving the traditional concepts of ownership, which has had a critical reception in the Member States.<sup>60</sup>

There are different views on the conceptualisation of property rights in relation to national and international regulation, and of these, the probably most common conceptualisations are the natural law approach and the positivist approach. The natural law approach regards property as pre-political and therefore resistant to regulatory alterations, whereas a positivist concept of property rights sees property as a “social institution, created in order to perform social functions” and property rights created by state regulation.<sup>61</sup> Consequently, from a positivist point of view, reorganisation of property rights through regulation is legitimate. In a Union context this, nevertheless, is a complicated matter because of Article 345.

*McHarg – Barry – Bradbrook – Godden* attend a proposed social division in the prospect of property rights, observing the restrictions of property holders’ authority and discarding an apprehension of the property owner having no obligations towards third parties. They show that a majority of modern time scholars accept the flexibility of property rights and the perception of property right as a social institution rather than a limitation on regulations<sup>62</sup>, but the Member States of the European Union are hesitant to give up their sovereignty over resources more than they already have done so far. As an example of property law’s capacity to react, *McHarg et al.* provide two major influencers of EU law: the French *code civile* Article 544, which expresses ownership as ‘the right to enjoy and dispose of things in the most absolute manner’, provided, ‘they are not used in a way prohibited by statutes or regulations’, as well as the German Basic Law requiring property owners to act in a socially responsible manner.<sup>63</sup> Also the nature of property law *per se* recognises limitations

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<sup>59</sup> This is stated by the EC court in Case C-302/97, *Klaus Konle v Republic of Austria* (1999) ECR I-3099, point 38: ‘although the system of property ownership continues to be a matter for each Member State under Article 222 of the Treaty, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty’.

<sup>60</sup> *Guimaraes-Purokoski* 2009, p. 179. Among others is the negativity based on the customary tradition of state ownership in the energy companies.

<sup>61</sup> *McHarg* in *McHarg – Barry – Bradbrook – Godden (eds.)* 2010, p. 360.

<sup>62</sup> *McHarg – Barry – Bradbrook – Godden (eds.)* 2010, p. 7.

<sup>63</sup> *HcHarg* in *McHarg – Barry – Bradbrook – Godden (eds.)* 2010, p. 377.

on property usage by way of agreements, legislation and general legal principles,<sup>64</sup> which also is characteristic of the impact of EU energy provisions on the national legislative systems of the Member States. For example *Bosselmann* regards territoriality, in its classic form, out-dated,<sup>65</sup> which is an extremity to the discussion.

What are then the reasons for limitation of the traditional conception property rights, according to which the natural resources are regarded as sovereign property of the national state upon the territorial land of which the resource are located? At least gradual acceptance of our duty towards the environment might lead to a point of common acceptance of the idea of ecological limitations and redefinition of property rights.<sup>66</sup> Removal of traditional ownership is also motivated by a specific economical and public interest, which in the energy sector constitutes of enhancement of competition and ensuring of the functioning of distributional networks.<sup>67</sup> The economic re-organisation of the Union has required some impact on the traditional ownership and more alterations regarding the concept of sovereignty are to come if the objectives concerning the mitigation of climate change are to be reached. Today, sovereignty is commonly regarded as transformable and elastic.<sup>68</sup> The practice of power in the European Union is described as post-sovereign, due to the depth of its infiltration in the traditionally national fields of power.<sup>69</sup> Restrictions upon national property schemes may be imposed if serving public Community interests<sup>70</sup> and EU common objectives. In the field of energy, certain areas are however left to the discretion of the Member States, intended to be strongly protected.

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<sup>64</sup> *Rønne in McHarg – Barry – Bradbrook – Godden (eds.) 2010*, p. 62.

<sup>65</sup> *Bosselmann 2008*, p. 152-153.

<sup>66</sup> *Bosselmann 2008*, p. 131.

<sup>67</sup> *Guyano – Kühne – Roggenkamp in McHarg – Barry – Bradbrook – Godden (eds.) 2010*, p. 338.

<sup>68</sup> *Guimaraes-Purokoski 2009*, p. 12-13. For a versatile discussion about state sovereignty in the European Union, see Mutanen, Anu: *Towards a Pluralistic Constitutional Understanding of State Sovereignty in the European Union? – The Concept, Regulation and Constitutional Practice of Sovereignty in Finland and Certain Other EU Member States*, Helsinki 2015. *Mutanen* has also discussed the interesting concept of the death of sovereignty and the concept of beyond sovereignty, *Mutanen 2009*, pp. 394-417. Understatedly, *Mutanen* agrees to elasticity in the concept of sovereignty, as she in a Union context does not allege the death of sovereignty, which, in its traditional form, is the sovereign right to self-governance without interference from outside states or bodies.

<sup>69</sup> *Guimaraes-Purokoski 2009*, p. 15.

<sup>70</sup> Based on community case law, the EU may restrict national regulation regarding property in order to promote the basic freedoms and the prohibition of discrimination, but not in order to e.g. ensure security of energy supply. This is stated in case C-309/96, *Daniele Annibaldi v Sindaco de Comune di Guidonia and Presidente Regione Lazio*, 1997, ECR I-7493.

The introduction of the Energy Title in the Treaties in a way closed the circle in the energy competence and natural resource debate, which has been on the agenda of the EU since the 1970's. According to *Sandoval – Zapater*, the Lisbon Treaty exposes the certain unification of the Member States regarding the retaining of sovereignty over natural resources only as the EU in the last years had started influencing the policy area through institutional flexibility and alternative forums.<sup>71</sup> We can perhaps agree on the proposition that the text of the existing Energy Title is a codification of old ideas, originating as far back as from the 1980's, as many scholars have argued.<sup>72</sup>

The primary environmental EU law emerged in a similar way as the energy provisions, but in a more rapid progress. Environmental awakening happened in the 1970's in Europe. The European environment policy was primarily based on Article 100 TEC and Article 352 TEC (now Articles 115 and 352 TFEU) in a similar process as the pre-Lisbon energy provisions were provided. In 1985 The Court of Justice for the first time recognized 'environmental protection' as one of the Union objectives.<sup>73</sup> The Maastricht Treaty in 1987 brought on provisions specifically designed to protect the environment, after which the old legal bases rarely ever were used for environmental provisions. In 1993 the earlier written Article 2 TEC for the first time actually referred to the term 'environment', and referred to environment as an objective of the Union, and the Treaty of Amsterdam in 1997 further improved the text considerably. The changes to the Environmental Title by the Lisbon Treaty were of merely cosmetic character, the only novelty was the referral to climate change as an environmental problem falling within the scope of EU environmental policy. Another addition to the environmental provisions by the Lisbon Treaty is within the Energy Title and its reference to environmental protection.<sup>74</sup> The connection of the Environmental Title to the referral to promotion of renewable energy in Article 194(1) can be considered a major improvement for environmental protection.

Article 191 TFEU outlines the environmental objectives of the EU.

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<sup>71</sup> *Sandoval – Zapater* in *Morata – Sandoval (eds.)* 2012, p. 109.

<sup>72</sup> See e.g. *Kuhlmann* 2008, *Vedder* 2010.

<sup>73</sup> *Jans – Vedder* 2012, p. 7.

<sup>74</sup> Article 194(1) TFEU.

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- 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.

All of the environmental objectives are applicable to any other fields of EU law, and the objectives are also directly relatable to energy objectives. According to *Jans – Vedder* “Not only measures which result *directly* in the improvement of the environment fall under this objective, but also those which *result* in the improvement of the environment in a more indirect fashion fall within its scope”.<sup>75</sup> Whether this means that any provisions aimed at the environmental objectives could fall under the scope of the Environmental Title is unclear to this day.

The primary legal competence for environmental and environmentally related energy legislation was, before the entry into force of the Lisbon Treaty, the Environment Title with its Article 175 TEC (now Article 192 TFEU) originated in the SEA of 1987. The Article provided a general competence for environmental legislation in the EU. The post-Lisbon competence of environmental matters is of shared character and the procedure for environmental legislation proscribed is the ordinary legislative procedure. Unanimity voting is required in certain fields of issues, according to Article 192(2) TFEU among others ‘measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply’. The interpretation of Article 192(2) TFEU involves considerable problems; of which the problems connected to measures at different levels of significance affecting a Member State’s choice between different energy sources is of crucial meaning for this thesis. The problems related to the interpretation of the relationship between Articles 194(2) and 192(2) TFEU will be discussed in section 4.

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<sup>75</sup> *Jans – Vedder* 2012, p. 33.

### 2.3.2 *The principle of integration*

The integration principle of the EU can be found in Articles 11 and 13 TFEU, and in addition, an environmental integration principle of specialised character regarding the Union's energy policy can be found in Article 194(2) TFEU. The principle of integration consists of an internal and external dimension, of which the external dimension requires the environmental policies to be integrated into all other policies, fundamentally in order to ensure sustainable development. Virtually all public policies are related to the requirement of sustainable development and environment to some degree, and the field of energy is connected to a high extent. In relation to the environmental objectives, the integration principle is one of the most, if not the uttermost important principle in EU law. Secondary legislation must be interpreted in the light of the environmental objectives laid out in the Treaties, even in other fields than environment.<sup>76</sup>

The principle of integration is often referred to as Environmental Policy Integration (EPI), a general concept boosted in the EU by the new Member States of 1995, Finland, Austria and Sweden.<sup>77</sup> EPI was legally codified in the Maastricht Treaty in 1992 in article 6 TEC. The above-mentioned states pressed for the principle of integration to be adapted more strongly into EU legislation, and as a result, a new article strengthening the principle of integration was inserted in the Amsterdam Treaty.<sup>78</sup> The Treaty promoted the integration principle to a 'general principle'. The result was the strengthening of the principle of integration, and in 1998 the Council of Ministers was requested to form strategies for environmental integration and sustainable development.<sup>79</sup> EPI is seen as a way of enforcing the ambiguous concept of sustainable development.

TFEU Article 11 reads: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in

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<sup>76</sup> *Jans – Vedder* 2008, p. 496.

<sup>77</sup> *Adelle – Pallemarts – Chiavari* 2009, p. 13.

<sup>78</sup> Art. 6: " environmental protection requirements must be integrated into the definition and implementation of all the community policies and activities" ... "in particular with a view to promoting sustainable development". Before the text in the Amsterdam Treaty, the principle of integration was in a weaker wording included in the Single European Act in 1987 (article 130r(2)).

<sup>79</sup> *Adelle – Pallemarts – Chiavari* 2009, p. 13.

particular with a view to promoting sustainable development.” On EU level, the principle of integration affects policy-making and adoption of legislation in all fields. On every alteration of the Treaties, the position of the integration principle has been consolidated. According to TFEU art 6: “Environmental protection requirements must be *integrated into the definition and implementation of (all) Community policies* and activities (referred to in Article 3), in particular with a view to promoting sustainable development.” In the case *Greece v. Council*, The ECJ ruled that the principle of integration is a binding obligation in EU law and that the environmental principles and objectives set by the EU must be integrated in to other policies.

The understanding of the principle itself includes numerous uncertainties. Questions remain regarding what the object is, who the addressees are and which the criteria are for incorporating the principle. Doubts regarding the character of guidance and implementation (“*must be integrated*”) have been raised as well; is there a foundation for the EU authorities to restrict activities opposing or ignoring the principle?<sup>80</sup> The question regarding the addressees is whether the principle is binding only on EU level and for Union institutions, or whether it is binding for Member States as well. The principle should nevertheless be interpreted under the apprehension that environmental policies cannot be viewed in isolation, but must be integrated horizontally as well as vertically in all areas with environmental impact.

According to *Jans*, EU law must always be interpreted in the light of the environmental objectives of the TFEU. This he calls the “guidance function” of the integration principle.<sup>81</sup> The clarity of the integration principle is thought to have had its peak during the Amsterdam Treaty,<sup>82</sup> after which alterations to the texts blurred the lines of the clarity. Now, it is not entirely clear what must be integrated and at what level of strength. Can actions be reviewed in light of the principle? Can for example a directive or regulative measure be questioned based on infringement upon the principle?<sup>83</sup> Case law has showed that questioning based on such at least in

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<sup>80</sup> *Veinla* 2008, p. 5.

<sup>81</sup> *Jans* 2011, p. 1541.

<sup>82</sup> *Jans* 2011, p. 1538.

<sup>83</sup> *Jans* 2010, p. 1543.



theory is possible, as seen in the *Bettati* case, in which the lawfulness of Ozone Regulation 3093/94 was questioned in light of the environmental objectives and principles of the EC treaty.<sup>84</sup> In the ruling, the Court noted that the institutions of the Union have a wide freedom of shaping the environmental objectives, and by that infringement can only be based on heavy assessment flaws.<sup>85</sup>

The principle no longer has the status of a general principle, but has become a provision “having general application.”<sup>86</sup> According to *Jans*, the legal significance of this downgrading is marginal. Still, the justifiability of the principle is weakened, which makes the difficult task of the European legislator to balance sometimes conflicting interests even more complex.<sup>87</sup> The balancing of different interests will thus probably be even more tortuous, and featuring the principle of integration superior to other, equal principles, will be as well questionable as difficult.

The language of Article 194, stating that the energy policy shall be developed ‘with regard for the need to preserve and improve the environment’ is softer than what the principle of integration in Article 11 TFEU requires. This, according to *de Cendra de Larragán*, raises the question about how the different fields of environmental protection and energy security can be balanced.<sup>88</sup> *Jans – Vedder’s* comprehension is that at least all of the secondary legislation must be interpreted in the light of the environmental objectives of the Treaty, but uncertainty might remain regarding the other provisions of the Treaties.<sup>89</sup>

## 2.4 EU energy policy

### 2.4.1 A common energy policy?

If you look deeper into the functions of the Union’s energy policy, you will see that the main objectives of the EU energy policy are a) ensuring the functioning of the

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<sup>84</sup> *Bettati v. Safety Hi-Tech Srl*, Case C-341/95 1998, p 17–18.

<sup>85</sup> *Bettati v. Safety Hi-Tech Srl*, Case C-341/95 1998, p 32-35.

<sup>86</sup> TFEU, supra note 4, arts. 7–17, 2008 O.J. C 115, pp. 53–55.

<sup>87</sup> *Jans* 2010, p. 1545.

<sup>88</sup> *De Cendra de Larragán in Peeters – Stallworthy – de Cendra de Larragan (eds.)* 2012, p. 43.

<sup>89</sup> *Jans – Vedder* 2012, p. 27.

energy market, b) ensuring security of energy supply, c) promoting energy efficiency and energy saving and the development of new and renewable energy forms of energy and d) promoting the interconnection of energy networks.<sup>90</sup> The environmental dimension can be found in each of these sub-dimensions, but the most significant might be the promotion of new and renewable energy resources and promotion of energy efficiency and energy saving.

The core areas of environmental actions in regard to energy measures are energy efficiency, the use of renewable energy, energy taxation and emissions trading.<sup>91</sup> Regarding environmental energy provisions there are some restrictions. Under current EU primary law, a member state cannot be forced to give up a specific energy resource. Even environmental measures at national level, which are endangering contribution to arbitrary discrimination, restrictions on trade within the EU or obstacles to functioning of the internal market, are to be removed.<sup>92</sup>

In the TEU, sustainable development is referred to as a political objective.<sup>93</sup> Article 3 TEU states that the Union shall work for ‘the sustainable development of Europe’ as well as the sustainable development of Earth. Focus will hereinafter be placed on this sub-dimension of EU energy law, and an additional objective of the research if analysing *how the Energy Title enables the principle of integration*.

The means of sustainable development in the energy sector are diverse. Many though highlight the importance of renewable energy<sup>94</sup> and for example the CJEU has stated, that “It is”...“clear from Article 194(1)(c) TFEU that the development of renewable energy is one of the objectives that must guide EU energy policy”<sup>95</sup> in the reduction of the detrimental fossil fuels, the key sources of energy used today throughout the

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<sup>90</sup> European Parliament Energy Policy: General Principles p 1. Available at: [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_5.7.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.7.1.pdf) (3.1.2016).

<sup>91</sup> *Talus 2014(a)*, p. 189-198.

<sup>92</sup> Case C-320/03, *Commission v Austria*.

<sup>93</sup> The preamble of the TEU, point 8 states: “D[etermined] to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields”.

<sup>94</sup> See e.g. *Talus 2014(a)*, p. 118.

<sup>95</sup> Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* para 81.

world, which constitute the most detrimental environmental threat to our planet.<sup>96</sup> Fossil fuels, the hydrocarbons, are labelled the most detrimental for the environment, and safety concerns label the nuclear energy production. The EU seems careful as to take a stand in regard to the use of nuclear power as energy source, and the fashion is downsizing of the use of nuclear energy.<sup>97</sup> The EU is about 77% dependent on the controversial hydrocarbons. The Union also imports around 54% of its energy share from outside of the EU<sup>98</sup>, which makes the EU 54% energy dependent.<sup>99</sup>

RE promotion should be seen as one of the most strategic, if not the uttermost strategic option for rapid reduction of GHGs and the reduction of energy dependency. Enabling RE promotion requires appropriate legal framework as well as political will, which, in EU policy and legislative activity, go hand in hand. New legislation will have to be considered since the current Renewable Energy directive (2009/28/EC) (RE-directive) only imposes obligations up to 2020 while more ambitious climate change ambitions must be carried out after the year of 2020. The mandatory targets after 2020 are by the Council elevated to become, at some level, binding targets at EU level<sup>100</sup> and the amount of renewable energy is to be continually increased in the EU. According to the European Council “An EU target of at least 27% is set for the share of renewable energy consumed in the EU in 2030.”<sup>101</sup> It remains, however, to be seen whether the political climate and provisional framework supports the objectives ambitiously enough. It is clear that the competence issues to some extent will affect the future provisions aiming at climate change reactions in the energy sector. According to *Peeters* “the current competence regulation in the TFEU for environmentally related renewable energy measures doesn’t facilitate ambitious decision-making”.<sup>102</sup> Sections 3 and 4 will assess the

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<sup>96</sup> *Talus 2014(b)*, p. 176.

<sup>97</sup> See Energy Roadmap 2050, COM (2011) 885/2 final.

<sup>98</sup> Eurostat: Energy productions and imports. Available at: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy\\_production\\_and\\_imports](http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports) (3.1.2016).

<sup>99</sup> European Commission, ‘Key Figures’, Market Observatory for Energy, Directorate-General for Energy, June 2011, p 11. Based on 2009 figures.

<sup>100</sup> European Council Conclusions of 23/24 October 2014, EUCO 169/14, point 3. This can also be derived from European Commission Green Paper: A 2030 framework for climate and energy policies, COM (2013)169 final, 27 March 2013.

<sup>101</sup> European Council Conclusions of 23/24 October 2014, EUCO 169/14, point 3

<sup>102</sup> The fear is that certain Member States would require the use of Article 192(2) and disagree to the adoption of the measures. *Peeters 2014*, p. 62.

veracity of this statement by examining the primary energy provisions and their scopes.

Provisions regarding the environment are to be based on Article 191 TFEU, with the aims of contribution to the pursuit of preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources and promoting measures at international level dealing with regional or worldwide environmental problems and in particular aiming at combating climate change. The renewable energy sources recognised by the EU are non-fossil sources such as wind, solar, biomass and geothermal power.<sup>103</sup> The renewable energy policy in the European Union is governed mainly by the 2009 RE-directive, adopted as part of the climate and energy package, which outlines the policy framework to achieve a 20 per cent share of renewable energy in the EU's final energy consumption by 2020.

According to the CJEU "it is primarily at the production stage that environmental objectives in terms of the reduction of greenhouse gases can actually be pursued".<sup>104</sup> The wording of the renewable directive states that "[t]he coherence between the objectives of this Directive and the Community's other environmental legislation should be ensured".<sup>105</sup> Firstly, the wording chosen by the legislator enhances the apprehension that renewable energy promotion is an integrated part of the Union's environmental equipment. According to *Sveens*, renewable energy is stuck in the middle between being an environmental and an energy provision through Articles 192(2) and 194(2) TFEU<sup>106</sup>, which is well-founded when analysing the above mentioned Articles and the text of the RE directive. Also the CJEU has pointed out that the overriding cause for the promotion of renewable energy is protection of the environment.<sup>107</sup> Should then measures aimed at the environmental objectives but

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<sup>103</sup> Definition provided in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources "energy from renewable non-fossil sources, namely wind, solar, aero thermal, geothermal, hydrothermal and ocean energy, hydro- power, biomass, landfill gas, sewage treatment plant gas and biogases".

<sup>104</sup> Joined cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits – en Gasmarkt* para 98.

<sup>105</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources para 44.

<sup>106</sup> *Sveens* 2014, p. 170.

<sup>107</sup> See case C-573/12 *Ålands vindkraft AB v Energimyndigheten* paras 93 and 95.

concerning energy be based on the environmental primary provisions? The choice of the correct legal basis will be attended in section 4.3.

#### 2.4.2 *Bold rhetoric, faint actions*

Energy policy and energy law must be considered separately, but these are also inextricable and neither can function without one another. Legal provisions do not function in a void, and especially when it comes to energy matters on EU level, politics play a crucial part. Secondary legislation relies on as well the Treaties as on policies and international commitments and the law is often a result of changing policies, forces and actors.<sup>108</sup> Environmental and energy policies at EU level are results of political processes, described by *Talus* as ‘part dialogue, part bargaining, part law, and part invisible manoeuvring’.<sup>109</sup> This makes the interpretation of EU energy law challenging. According to *Talus*, the policies and objectives influencing the field steer the interpretation of EU energy law towards a broad and policy-guided way of interpretation.<sup>110</sup>

EU is well on tracks in meeting the targets of GHG reductions by 2020 set out in 2009,<sup>111</sup> but the question remains as to what after 2020. The most recent communications from the Commission include the plan for an “Energy Union”,<sup>112</sup> a concept called for by many scholars during the last years. The Energy Union plan signals a mutual approach in combining energy and climate objectives. The bold rhetoric has, although, as of today not been matched by actions. The requirement for the effectuation of the Energy Union would fundamentally require a new form of centralized governance, visualised by the Commission as “an integrated governance and monitoring process, to make sure that energy- related actions at the European,

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<sup>108</sup> Because of this, EU energy law is a “constantly changing area of study: a ‘moving target’”. *Talus 2014(b)*, p. 6-8.

<sup>109</sup> *Talus 2014(b)*, p. 188.

<sup>110</sup> *Talus 2014(b)*, p. 7.

<sup>111</sup> A policy framework for climate and energy in the period from 2020 to 2030, COM (2014) 15 final, p. 2, and an up to date report on assessment of the progress made by Member States: COM (2015) 574 final, pp. 3-4.

<sup>112</sup> A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM (2015) 80 final.

regional, national and local level all contribute to the Energy Union's objective".<sup>113</sup> Nevertheless, the visualisation provides no concrete application objectives. Despite the lack of concrete action, the plan at least signals the approach to the energy policy as a joined-up approach.

In 2015, the Commission also presented a Communication with its proposals for the future of EU energy and climate policy after 2020 when the current legislation (the RE-directive) expires.<sup>114</sup> The fundamental question running up to the proposal was the question regarding the legal abidingness of the proposals. The decision was a legal abidingness for the objectives, the same stance as the Council earlier had taken, but the abidingness proposed is of a different character than the RE-directive. A 40% reduction of GHG:s in comparison with 1990 levels by 2030 was proposed, with varying stands as to the abidingness and the targets by the Member States. The common approach by the Member States is that legally binding targets ease the target consecution, provided that reasonable time periods to achieve the targets are given. An active policy on infringements was also commonly desired, as this increases incentive.<sup>115</sup> The Commission proposed a 27% overall level of renewable energy in the EU by 2030, although without setting out nationally binding targets, "thus leaving greater flexibility for Member States to meet their greenhouse gas reduction targets in the most cost-effective manner in accordance with their specific circumstances, energy mixes and capacities to produce renewable energy". The "targets will be achieved while fully respecting Member States' freedom to determine their energy mix. *Targets will not be translated into nationally binding targets*".<sup>116</sup> This approach is clearly in line with the provisions in the Energy Title, but the effectiveness in relation to the environmental targets might be questioned. The Commission proposes that the Member States policies are to be individually decided based on the best match to their national energy mix, and for the Member States to outline national plans to reach the objectives. The share of renewable

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<sup>113</sup> A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM (2015) 80 final, p. 17.

<sup>114</sup> A policy framework for climate and energy in the period from 2020 to 2030, COM (2014) 15 final.

<sup>115</sup> Consultation on progress towards the 2020 energy efficiency objective and a 2030 energy efficiency policy framework. Available at: <http://ec.europa.eu/energy/en/consultations/consultation-progress-towards-2020-energy-efficiency-objective-and-2030-energy> (3.1.2016).

<sup>116</sup> Italics added by author.

<sup>117</sup> European Council Conclusions of 23/24 October 2014, EUCO 169/14, point 3.

energy is to be delivered “through clear commitments decided by the Member States themselves, supported by strengthened EU level delivery mechanisms and indicators”, but no practical examples of the EU level mechanisms is provided. This arises many questions.

Experience from the current RE-directive has shown that binding targets provide good results, and if it proves that the free allocation of renewables shares does not lead to meeting the targets, providing new, binding legislation retards the process of reaching the objectives. This is the reasoning for providing legally binding targets for each Member State, which has proven functional, as the targets up to 2020 very likely will be met. The providing of binding targets is fruitful from an environmental point of view, but there are also arguments against the use of binding provisions. Even though the environmental objectives are more likely to be fulfilled, the binding targets of renewables have not always ensured “market integration, cost efficiency and undistorted competition”.<sup>118</sup> If viewed from a purely environmental point of view, the use of mandatory targets is although fundamentally positive, and a positive indicator of EPI.

In addition to the possible problems related to the providing of non-binding instruments, a 40% reduction of GHG:s is seen as a retreat from the objectives of the EU up to 2050, since 2030 is already two thirds of the way from 1990 to 2050. The Union’s objective up till 2050 is a reduction of GHG:s by 80-95%. The objective up to 2030, including objectives without binding targets, is among others referred to as “walk now, sprint later”<sup>119</sup> by environmentalists, and more ambitious targets up to 2030 are called for in order to prepare for the long-time target. If there, in addition to this, are no binding targets according to which the CJEU can impose fines on states for non-compliance and the EU is simply binding itself to reach the overall objectives, *which is the higher body that can make the targets binding or impose sanctions for non-compliance?* A possible higher body is the governance body related to the proposed Energy Union. According to the Council, the higher body will “help ensure that the EU meets its energy policy goals, with the necessary flexibility for Member States and fully respecting their freedom to determine their

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<sup>118</sup> COM (2014) 15 final, p. 4.

<sup>119</sup> See e.g. Euractiv.com: EU sets out ‘walk now, sprint later’ 2030 clean energy vision. Available at: <http://www.euractiv.com/energy/eu-sets-walk-sprint-2030-clean-e-news-532960> (3.1.2016).

energy mix”.<sup>120</sup> This statement includes many curiosities. One: the respect for the Member States’ energy rights seems orderly. Two: the organisation of this higher body is inexplicit, as the statement only notices that “the governance system will integrate strategic planning and reporting on the implementation of climate and energy policies” and that “the governance system will be constructed on the basis of existing building blocks in climate and energy policy as well as on the agreed targets for 2030, and will include *planning and reporting obligations*”.<sup>121</sup> No mention of supervision or imposition of obligations is mentioned. One cannot help but wonder if a reference to the caveat in Article 194(2) TFEU has led to the proposed overall target instead of the imposition of national targets. This should however not be the case. The competences for the Union to provide provisions infringing on the rights obtained by the Member States according to the wording of the caveat will be visualized in section 3.

The following sections will analyse the legal provisions of the TFEU in order to visualize the coherence between the objectives and the legal framework provided in the field. In other words - how does the Union’s *legal framework in the field of energy* enable the *attaining of the environmental objectives*?

### **3 The Energy Title – the framework for energy policy and legislation**

#### **3.1 Introduction**

The introduction of the Energy Title instantly resulted in many positive clarifications and minor alternations.<sup>122</sup> One, the codification of the vertical division of powers between the Union and the Member states clarified many competence issues, which existed due to the lack of a codification of the *status quo*. Two, the introduction of a

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<sup>120</sup> Council conclusions on the governance system of the European Union. Press release 869/15, 26.11.2015, available at <http://www.consilium.europa.eu/en/press/press-releases/2015/11/26-conclusions-energy-union-governance/> (3.1.2016).

<sup>121</sup> Italics added by author.

<sup>122</sup> For example *Pielow – Lewendel in Delvaux – Hunt – Talus* 2012 regard the new Energy Title as a grand strengthening of the competences of the European Union. Others, like *Vedder* 2010, are more modest and regard the Energy Title solely to be a codification of the earlier existed status quo.



specific legal basis for energy provisions provided energy provisions with legality. Three, the specification of the energy objectives placed energy in a previous undetermined context. The context now determined is the context of the internal market and the field of environmental policy and provisions. The definition of the context has although left many questions unanswered, inter alia regarding the possible alternations to the vertical division of powers, the legal basis for promotion of renewable energy and the external competence of the EU.

This section will commence by explaining the premises for the vertical division of powers and the hierarchical division of the normative framework of the Union. The technical alternation introduced by the Energy Title will be presented, as well as the legal basis provided for energy provisions within Article 194(2) TFEU. In and after presenting the premises for providing of energy provisions, the section strives to address the question of what the consequences of the codification of the energy provisions might be, and what the changes brought on by the primary provisions are. The section will also initiate the discussion on how the caveat in Article 194(2) will affect the decision-making process in energy-related legislative matters.

## **3.2 The division of powers in the energy sector**

### *3.2.1 The essentials for the vertical division of powers in the energy sector*

The vertical division of powers intends the division of powers between the EU and the Member States. In the vertical division, some fields of power are left with the Member States, as some are granted the EU institutions. According to Article 4(2)(i) TFEU Member States “exercise their competence to the extent that the Union has not exercised its competence” and according to Article 2(2) TFEU, Member States can develop their own policies, taking the principle of loyal cooperation into account. Before the Lisbon Treaty, the limits of the Union competence in energy matters were vaguely determined, if at all. To determine the competence limits before Lisbon, case

law and legislation pursuant to the energy policies were key terms to the real scope of the competence matter at hand.<sup>123</sup>

According to the Lisbon Treaty, as a starting point, all competences belong to the separate states, and the EU can enjoy only explicit competences mentioned in the Treaties.<sup>124</sup> The competences of the Union have increased significantly over the years. The competence for the EU can be either shared or exclusive, and the states can also enjoy exclusive competence, which is the supposition.<sup>125</sup> Secondary provisions given by the Union must be based on explicit or shared competence bases, and the Member States cannot provide provisions in areas where explicit Union provisions exist, nor provide provisions contravening the provisions provided by the Union. In a EU-context the delegation of power to the Union is called *attributed power*.<sup>126</sup> Attribution of power is confirmed in the Treaties, and the Court of Justice of the European Union (CJEU) confirmed the attribution of power in an early stage.<sup>127</sup> In addition to the attribution of powers, the Lisbon Treaty also contains provisions on when the competences should be exercised. Following the subsidiarity principle, the Union cannot act beyond measures necessary to reach the objectives in the Treaties<sup>128</sup>, and the need of a legal basis is a necessary requirement, *sine qua non*.<sup>129</sup> The legal basis can be found expressly in the Treaty text (explicit power) or be implied from Treaty texts or from secondary legislation based on the primary provisions (implicit power).<sup>130</sup> Thereby also secondary legislation can determine the attribution of power, and primary legislation solely does not determine it. An EU-level energy-specific instrument consequently requires 1) a legal basis and 2) compliance with existing (secondary) EU law. The providing of regulation within the field of energy has traditionally been regarded belonging to the sovereignty of the Member States. The Member States function as legislators of the Union through their

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<sup>123</sup> Graig – de Búrca 2011, p. 73.

<sup>124</sup> Article 5 TEU.

<sup>125</sup> Articles 3-6 TFEU.

<sup>126</sup> Guimaraes-Purokoski 2009, p. 19. The attribution of powers concerns both the internal and the external competences of the Union.

<sup>127</sup> Case 6/64 *Costa v. Enel*, judgement of 15.7.1964.

<sup>128</sup> Talus 2015, p. 6.

<sup>129</sup> Guimaraes-Purokoski 2009, p. 22.

<sup>130</sup> Haghghi 2008, p. 464. An example of implicit power practiced by the Union is the former frequent use of the EC Article 308 for energy provisions, according to which the Union could practise its powers for harmonisation purposes in field where a specific legal basis did not exist.

ministers and as members of the Council of the European Union, whereby the Member States cannot be regarded as passive recipients to Union provisions.

Energy is, based on Article 4(1) TFEU one of the 11 areas of shared competences together with e.g. the internal market, social policy, environment, trans-European networks and transport. The presumption in areas of shared competence is that decisions are to be taken at Member State level where the Member States shall '*exercise their competence to the extent that the Union has not exercised its competence*' or if it has '*decided to cease exercising its competence*'.<sup>131</sup> Hence, in reality, the areas of shared competence enjoy various divisions of powers due to the already practised powers by the Union. The precise determination of shared competence within each area can only be achieved by consideration of the detailed rules governing the areas and with consideration of the secondary legislation in the area. According to Article 2(6) TFEU "the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area". The Member States lose their competence if the EU has exercised its power in a certain question. Areas, which are to remain in the explicit competences of the Member States, are better being protected by Articles like the one found in 194(2) TFEU, which in theory restrict the competences of the Union. Provisions regarding the energy sector have primarily been provided before the entry into force of the Lisbon Treaty and the introduction of the Energy Title and the secondary legislation must be of conclusive value, at least to some extent.

One of the most significant alterations introduced by the Lisbon Treaty from an environmental perspective is a definition of the competences of the EU and the division of powers between the Member States and the Union in energy matters.<sup>132</sup> In the EC Treaty, there was no specific legal basis for the energy sector, and energy matters were included in the Treaty, *as they were not specifically excluded from it*.

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<sup>131</sup> De Cendra de Larragán 2011, p. 155-156.

<sup>132</sup> Before the Lisbon Treaty the EU institutions arguably enjoyed extensive competence in energy matters based on the Third Energy Package and the existing body of secondary legislation. Whether the specific energy provisions brought clarity or had any impact on EU the division of powers in the field of energy is debated. For further discussion on the debated alternation of division of powers see e.g. Hancher – Salerno in Biondi – Eeckhout – Ripley 2012, pp. 367-403 and Haralsdottir 2014. Guimaraes-Purokoski regards the Energy Title to be of merely clarifying character, Guimaraes-Purokoski 2009, p. 194.

Different forms of energy were treated as any other objects under the provisions regarding the free movement of goods.<sup>133</sup> With the Lisbon Treaty, specific provisions concerning the energy sector were introduced in a new Title on Union Energy policy, Title XXI, consisting of a single Article. Energy-specific secondary legislation containing sector-specific rules for exploitation of energy resources legislation did exist before the Lisbon Treaty, but the codification of primary law due to the Lisbon Treaty was eligible regarding the complex matters in the field of energy. Before the specific energy provision in the Lisbon Treaty, a large amount of provisions were used as base for energy legislation, whereas the room for action was broad but vaguely determined.

It is clear that environment is taken increasingly into account energy provisions provided in the most recent years by the Union.<sup>134</sup> In addition to the Union policies, international provisions also bind the EU legislator. The principles of subsidiarity, conferral of powers and the principle of proportionality also govern the Union competences.<sup>135</sup>

### *3.2.2 The principles of proportionality and subsidiarity*

Article 5 TEU determines *the principle of proportionality*. The fourth paragraph states, “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”. Every measure is to be evaluated in relation to its effects, and all actions are to be held at a minimum in order to be proportionate in relation to the measure at hand. The EU provisions must be provided in the form that leaves the greatest possible freedom for the Member States’ actions with respect to the national legislations. If possible, provisions prescribing minimum standards are preferable. This is favoured in order to enable the Member States to provide their own, stricter national standards. According to *Jans – Vedder*, for example instruments of non-binding character are to

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<sup>133</sup> For example oil, electricity, natural gas and renewable energy resources were treated as any other products falling under the scope of internal market provisions. *Guimaraes-Purokoski* 2009, p. 189.

<sup>134</sup> Environment was also taken widely into consideration during the years before the entry into force of the Lisbon Treaty, and the legal bases varied between Articles 95, 308 and the environmental legal basis 175 EC. *Guimaraes-Purokoski* 2009, p. 210.

<sup>135</sup> Article 5 TEU.

be preferred before binding measures, if possible.<sup>136</sup> In order to evaluate the possibility for providing of non-binding provisions, former experiences have to be taken into consideration. The legality of measures by the EU can according to case law be contested only if the measures are to be regarded as “manifestly inappropriate” in light of the proportionality principle,<sup>137</sup> so the likeliness of a provisions being faulted in the light of the proportionality principle is highly unlikely.

According to the *subsidiary principle*, within areas that do not fall under the exclusive competence of the Union, the Union shall act only insofar as the objectives of the action cannot be reached sufficiently at national level, and thereby better at Union level. The principle contains as well a negative (not sufficiently achieved by Member States) as a positive criterion (better achieved by the Union), of which both must be met for the action to be justified.<sup>138</sup> Under the principle, the content of any Union action shall not exceed what is necessary to reach the objectives of the Treaties. The declared aim of the principle is to ensure that decisions are, if possible, taken as close to the citizens of the EU as possible. A further going aim of subsidiarity is the protection of national powers and interests, a motif also having shaped the Energy Title. There are two perspectives to subsidiarity: a legal and a political one. Subsidiarity has on one hand been seen as a shield against EU power, and on the other hand as a double-edged sword, which can be used in either direction to fit the political objective pursued.<sup>139</sup> When applied to Article 194(2) TFEU, the subsidiarity principle could work either way. *Constantin* argues that subsidiarity as a legal principle rarely is applied, and the competences between the EU and the Member States are determined by negotiation and balancing.<sup>140</sup> On the other hand, the principle should steer all Union action, and therefore consequently influence all decision-making without specific application. The control of the principle of subsidiarity was although strengthened in the Lisbon Treaty. The weak *ex post*

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<sup>136</sup> *Jans – Vedder* 2012, p. 17. See Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law, which stresses the importance of possibly informal procedures.

<sup>137</sup> See e.g. C-491/01 - *British American Tobacco (Investments) and Imperial Tobacco* of 10 December 2002, para 123.

<sup>138</sup> *Jans – Vedder* 2012, p. 14.

<sup>139</sup> *Constantin* 2008, p. 152.

<sup>140</sup> *Constantin* 2008, p. 153.

control<sup>141</sup> (the afterwards control exercised by the CJEU) has been strengthened with an *ex ante* control system (when negotiating and adopting EU legislation) as well as a reinforced supervisory control.<sup>142</sup>

The Subsidiarity Protocol obliges the Commission to consult widely before the proposition of any legislative acts.<sup>143</sup> A detailed statement concerning the compliance with subsidiarity must be provided, including the responses regarding the legislative proposals from the national parliaments. If one-third of all Member State votes express non-compliance with subsidiarity, the Commission must annul its proposal.<sup>144</sup> The Subsidiarity Protocol also determines the procedure for infringement of subsidiarity under Article 263 TFEU, alleged by a Member State, in which the CJEU has jurisdiction. The more powerful Member States could, according to the strengthened control of subsidiarity, exercise their power in energy questions based on subsidiarity control.

Although it is clear that the global problem of climate change requires global action, the possibility to achieve remarkable measures at national level should not be overlooked. According to *Jans – Vedder*, any action to “prevent cross-border environmental effects” would satisfy the requirements of the subsidiarity principle.<sup>145</sup> In other words, any trans frontier actions would be justified because of the territorial limitations of most state actions. For example the Emissions Trading Scheme (ETS) of the EU covers only about 40% of all direct GHG emissions<sup>146</sup>, which leaves significant responsibility to the Member States in the field of industrial installations. The EU provisions governing Member State mitigation measures often provide options for the Member States as to the national implementation of the provisions. The discretion in national implementation is positive, since the Member States differ

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<sup>141</sup> If a Member State wants to bring a claim to the CJEU, the claim has to go through the national government or to be played out without the national government in the role of non-privileged applicants, charged with a close to impossible burden. See *Rossi in Biondi – Eeckhout - Ripley* 2012, p. 97.

<sup>142</sup> See more: *Constantin* 2008, pp. 164-169.

<sup>143</sup> C 310/207 Protocol on the application of the principles of subsidiarity and proportionality, Article 3. The wide consultation process is referred to as a ‘subsidiarity calculus. *Craig – de Búrca* 2011, p 96.

<sup>144</sup> Article 7 of the protocol.

<sup>145</sup> *Jans – Vedder* 2012, p. 15.

<sup>146</sup> *Peeters – Stallworthy – de Cendra de Larragán (eds.)* 2012, p. 4.

significantly in governance and energy mixes, but the EU usually governs the larger picture.

The energy policy objectives outlined in Article 194(1) TFEU, where the achievement of the policy objectives are to be carried out ‘in a spirit of solidarity’ has been proposed to enhance the subsidiarity principle and to emphasize Unions privileged position in exercising shared competences. Also the emphasis on the solidarity principle was demanded by the Polish Government due to fear of EU intermix in the national energy supply.<sup>147</sup> The reference to the spirit of solidarity ‘between the Member States’ is supposedly merely a historical approach to the matter. Many of the effects of energy provisions have a strong internal market dimension and the physical dimension including infrastructure and investments have an in-depth trans-European dimension, which cannot either be overlooked.<sup>148</sup> When proposing the RE –directive, the Commission concluded that the measures and objectives proposed in the RE-directive can not be reached at Member State level since ‘real progress only began to be made when the European Union adopted legislative instruments containing targets to be reached by a given deadline’.<sup>149</sup> This, if anything, would speak for new binding targets during the next period of mitigation of climate change from 2020 to 2030.

### *3.2.3 The norm hierarchy in the EU*

According to the norm hierarchy in the European Union, the Treaties enjoy a supremacy over the directives, but the directives can also be seen as formal expressions of the EU interest and of certain accepted standards as well as definitions of the many open-ended strands in the Treaties.<sup>150</sup> The constitutional character of the Treaty is emphasized in new rules on responsibilities and competences for the EU. The distinction between the primary and secondary norms is clear on a theoretical level. The primary provisions determine the content of the secondary provisions. Secondary provisions can also merely be provided if a competence has been

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<sup>147</sup> *Pielow – Lewendel* in *Delvaux – Hunt – Talus* 2012, p 268.

<sup>148</sup> COM (2015) 337 final, p. 4.

<sup>149</sup> COM (2008) 19 final, p. 9.

<sup>150</sup> According to *Talus*, the directives are also formal expressions of general principles like subsidiarity, proportionality and the least restrictive regulative method. *Talus 2014(b)*, p. 40.

provided for this in the primary provisions. The competence can also be implicitly derived if it has not been restricted in an area. In reality, the hierarchical relationship between the primary and secondary legislative instruments is not as clear.

In the energy sector, the secondary legislation has been provided first, and has thereby determined the scope for the primary provisions, which were provided afterwards. Primary legislation introduced after secondary could widen, but not substantially shrink the competences of the European Union because competences already had been exercised to a certain extent. Thereby, it is not possible that the Energy Title would have shrunk the scope of Union action. Independently allowed EU action also results in the need of alternations of national legislation infringing on EU legislation in cases of evident contradiction in jeopardizing the Union's objectives. It seems that energy provisions taken by the Union *could* shrink the scope of action for the Member States to a minimum,<sup>151</sup> which is contravened by the wording of Article 194(2) TFEU, but clearly agreed to up to a certain level by Member States due to the acceptance of providing of secondary provisions. The text of Article 194(2) TFEU seems ineffective in this regard, and appears merely as a façade.

According to *Talus*, the secondary legislative body could, in addition, provide certain clarity as to the interpretation of the scope of the implementation of the primary provisions. The existing secondary legislative body can determine the political boundaries for the practice of the primary provisions. *Talus* further argues that the progress attained by the pre-Lisbon secondary legislation does enable a wider interpretation of the primary energy provisions,<sup>152</sup> a plausible argument.

The constitutive Treaties lay the foundations for the European Union. According to the Council, the TFEU was not meant to have a constitutional character,<sup>153</sup> but innovations from the proposed Constitutional Treaty, which was abandoned, were incorporated into TEU and TFEU. It seems, that the innovations of the failed Constitutional Treaty are reflected in the Lisbon Treaty, while avoiding the use of

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<sup>151</sup> *Pielow – Levendel in Delvaux – Hunt – Talus* 2012, p. 269.

<sup>152</sup> *Talus* 2008, p. 641-642.

<sup>153</sup> Council doc 11218/07 paras 1 and 3.



constitutional nomenclature.<sup>154</sup> Since the EU is not a state, the characterization of the Lisbon Treaty as a constitution would be questionable,<sup>155</sup> but the constitutional character justifies a somewhat constitutional approach to interpretation of the Treaty texts, nevertheless not forgetting the political dimension. Constitutional features are inevitably visible in the TFEU. For example the supremacy of the Treaties over Member State law at any level, including national constitutional laws, is considered a constitutional indicator of importance.<sup>156</sup> The reason for highlighting these attributes to the Treaties is the justification of an application of a slightly constitutional approach when analysing the primary provisions.

### **3.3 A framework for an energy policy**

The field of energy has many idiosyncrasies, of which firstly, a distinct socio-political dimension characterizes the energy-field. An energy policy's ultimate objective is securing the energy flow in the area. Secondly, physical idiosyncrasies characterize the field: the transfer of energy material is bound to a functioning network. Thirdly, the energy sector is intensive in research, technology and investments, which is why the sizes and long-term effects on the investments are characteristic for the field.<sup>157</sup> The energy-sector has gradually been differentiated, and can, according to most, no longer be regarded as belonging to any other field of Union politics.<sup>158</sup> Still, energy is interlaced and dependant on many other fields of Union policies, of which most prominently the environmental policy and the free movement of goods. Nevertheless, the somewhat indistinct energy policy has become a distinct and vital part of the Union's internal and external policies, and a field characterized by recent and extensive development.

According to the Commission, the leading environmental objective in the EU is steering the Union as a whole towards scarcer and more sustainable energy

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<sup>154</sup> *Türk in Biondi – Eckhout* 2012, p. 62.

<sup>155</sup> See *von Bogandy – Bast* 2010.

<sup>156</sup> *von Bogandy – Bast* 2010, p. 193.

<sup>157</sup> *Guimaraes-Purokoski* 2009, p. 179-182.

<sup>158</sup> *Guimaraes-Purokoski* 2009, p. 277.

utilisation.<sup>159</sup> The harsh reality is, although, that the energy flow to the area is the most important function of the policy. The leading *environmental* objective in relation to the ultimate function of the *energy policy* is, however, the progress toward sustainability. As energy accounts for over 80% of greenhouse gases in the EU, energy is the main source of climate change and air pollution.<sup>160</sup>

The leading provisions in the Treaties regarding environment are Articles 191 and 192 TFEU and the energy provision, Article 194 TFEU, with its reference to new and renewable energy, as well as the general reference to environment and sustainable development in Article 11. The indication of a ‘high level of protection’ in Article 191 and the implication in Article 11 TFEU of integrating the environmental objectives in all the actions of the EU are suggested to be superior to energy aspects<sup>161</sup>, which would suggest a tension between on one hand Article 191 and on the other Article 194 TFEU. Due to the direct reference in the Energy Title to the environmental provisions, the primary legal framework for the energy provision lies within both the energy and environmental provisions. In addition to the framework provided in the Treaties, secondary legislation in the field of energy is extensive. The key obligations derived from the regulatory secondary framework include the member states having to secure non-discriminatory facilities and distributors in their energy network as well as allowing customers to choose their supplier and have access to the necessary networks.<sup>162</sup> The internal market provisions are a major guideline for the energy provisions.

The Lisbon Treaty has introduced a specific mention of climate change. Article 191(1) TFEU has set out the objectives of EU environmental law to promote ‘measures at international level to deal with regional or worldwide environmental problems, and in particular combating *climate change*’. Even though the acute matter of climate change is emphasized in the Treaty, it can be argued that climate change can be identified in the same category as biodiversity, desertification and other

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<sup>159</sup> See COM (2006) 105 final: Green Paper – A European Strategy for Sustainable, Competitive and Secure Energy.

<sup>160</sup> Com (2007) 1 final: An Energy policy for Europe, p. 3.

<sup>161</sup> *Talus 2014(a)*, p. 186.

<sup>162</sup> *Talus 2014(a)*, p. 68.

environmental problems, instead of being supreme to them.<sup>163</sup> The EU target of 20% renewable energy production by the year 2020, not to mention the more ambitious far-reaching objectives, require versatile and far-reaching measures. The objective of reaching a 80-95% reduction of GHG:s by 2050 compared to 1990 levels has been confirmed by the Council on several occasions. What, according to the Commission, is needed is “drawing together legislation (existing, new and planned), organisational and institutional initiatives, voluntary actions, supporting measures, and awareness and best practice initiatives, using market instruments and research and technology development”.<sup>164</sup>

Considered one of the most important changes to the lives of the Europeans in the energy sector legislation is the increase of renewable energy sources in the total energy consumption. What seems to have been the idea was first to try changing the behaviour of Europeans on a voluntary basis, which, when unsuccessful, was changed to binding instruments. An example of mandatory legislation is the adoption of the RE-directive on promotion of the use of energy from renewable sources, which did set out mandatory objectives for each Member State in order to reach the 20% objective EU-widely. If looking at the national targets in annex 1 in the Directive, the average target increase of renewable energy sources for each member state is around 10%. When looking at especially Finland, with its target of 38%, and Sweden with a target of 49%, it is clear that the targets affect the Member States’ choices between different (types of) energy resources, and at least in some cases, significantly.

Policy issues characterise the energy field in EU governance. Policies are described in declaratory or analytical statements, but not in law. It is argued that the EU organs lack the competence to develop a viable energy policy.<sup>165</sup> In addition to the possible problems in interpretation of Article 194(2) TFEU, also the weak taxation powers provided the Union is problematic from an environmental point of view. Extensive taxation powers would provide the Union with tools to discourage the use of certain energy sources, although not significantly affecting the structure of the Member States’ energy supply.

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<sup>163</sup> See *De Cendra de Larrágan* in *Peeters – Stallworthy – de Cendra de Larrágan (eds.)* 2012, p. 41.

<sup>164</sup> Commission report: European Climate Change Programme, June 2001, p. 45-46.

<sup>165</sup> *Andoura – Hancher – van der Woude* 2010, p. V.

According to *Andoura – Hancher – van der Woude*, who provided a proposal for a European Energy Community or an Energy Union in order to meet the challenges of the energy policy, the existing institutional framework does not cater for a common energy policy.<sup>166</sup> The lack of consistency in the energy policies of the different Member States results in a fragmented EU energy policy. The codification of the possibility of fragmentation in the Lisbon Treaty is seen as a concern above all from a long-term perspective, since it might undermine the possibility for the Union not only to react to the climate change, but also forcing the EU to be dependent on energy import. A consistent energy policy would also strengthen the voice of the EU in international forums.<sup>167</sup> Also the lack of a specific external competence is problematic in this regard. In addition to this, the EU can enter into international agreements merely with ‘third countries and international organisations’, but not with for example companies (e.g. Gazprom), according to Article 21 TEU.

The effect of the introduction of the Energy Title is a need for emphasising certain aspects of energy policy. Firstly, EU energy policy is now confirmedly the coordinated action of equally the Union and the Member States, and the governance of the common energy policy lays on the cooperation between all parties. Since every legislative matter falling under the scope of 194(2) TFEU is subject to a complicated process, where the outcome is unclear, it is fair to say that there really is no coherent EU energy policy.<sup>168</sup> The maintenance of the current level of integration requires common political and legislative tools in order to foster cohesion and solidarity among the Member States, a primarily political objective.<sup>169</sup>

### **3.4 A legal basis – legitimacy for energy provisions**

#### *3.4.1 Introduction of a specific legal basis for energy provisions*

Even though the Lisbon Treaty clarified the status of energy provisions, these are still a fruitful object of research because of the uncertainty of interpretation and a

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<sup>166</sup> See *Andoura – Hancher – van der Woude* 2010, p. II.

<sup>167</sup> *Andoura – Hancher – van der Woude* 2010, p. V-VII.

<sup>168</sup> *Morata – Sandoval (eds.)* 2012, p. 3.

<sup>169</sup> *Andoura – Hancher – van der Woude* 2010, p. VII.

certain tension between the objectives of the energy policy and the environmental objectives. The Energy Title is broadly determined and therefore open to interpretation. By formulating the energy provisions as has been done, the legislator has taken a conscious choice in investing the European institutions and the European Court with a wide discretion as interpreters of the provisions. The problems with the Energy Title that will be discussed in the following sections are the following. The first problematic aspect is the reference in the caveat in Article 194(2) referring to Article 192(2) TFEU regarding the need for unanimity in certain energy-related decisions. Also the overlapping provisions might cause certain problems regarding the choice of a legal basis. The relationship between Article 194(2) and Article 192(2) TFEU is unclear, especially concerning renewable energy legislation, and is therefore a fruitful research objective. The second problematic aspect is the possibility of a total exclusion of competence for the union to provide provisions affecting the Member States' energy rights by use of the primary energy provisions, stated in Article 194 (2)(2) TFEU, which might give rise to problems in relation to the environmental objectives.

According to the Commission, stated in a framework policy for climate and energy in the period from 2020 to 2030 “Articles 191 to 193 of the TFEU confirm and further specify EU competencies in the area of climate change”<sup>170</sup>. Even though EU organ's dictums occasionally are obscure and ill founded, a statement like this could indicate that the Energy Title is carefully crafted and merely the interpretation that is wanting exists due to the lack of case law. Though an infallible interpretation requires a precedent by the CJEU, at least the boundaries within which the interpretation reasonably can vary are an interesting research objective. It is especially interesting to compare the scope of the interpretation possibilities of the Energy Title, the space for measures and the scope the provisions provide for the environmental objectives in order to see whether the principle of integration is visible throughout the Energy Title. The providing of provisions and policy-making has been a slow process, and apparently continues to be so even after the Lisbon Treaty. *Pielow – Lewendel* propound the comprehension that the new Energy Title

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<sup>170</sup> COM (2015) 337 final, p. 4.

could enable a more comprehensive and integrated energy policy.<sup>171</sup> Not least because of the introduction of a legal basis.

The legal basis for regulations regarding the energy sector in the EU is found in Articles 194(2) and 194(3) TFEU in the Treaty on the Functioning of the European Union (TFEU), of which Article 194(3) proscribes processed related to energy taxation, and is not of vital importance for this thesis. Article 194(2) TFEU determines the power of the EU in the field of energy in relation to the Member States, but there is considerable uncertainty regarding the interpretation. The Article includes no mention regarding the external competence of the Union in energy matters, and any mention regarding the external competence in energy matters cannot either be found elsewhere in the Treaty.<sup>172</sup> According to the legal basis found in Article 194(2) TFEU, the institutions of the Union cannot adopt measures in directing the Member States as to production of their energy resources for the benefit of the Union; neither as to adopt measures regarding the choice of energy resources. The divide of competences is specified in the text of Article 194 TFEU:

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

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

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

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<sup>171</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus* 2011, pp. 267-268.

<sup>172</sup> COM (2011) 539 final, On security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders", determines the boundaries of intergovernmental agreements between the Member States and third parts, but only national states, in the field of energy.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

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

Article 194(1) sets out the aims of the energy policy, whereas the legal bases can be found in Articles 194(2) and 194(3) TFEU. The power to pursue the objectives in Article 194(1) is granted the Union in Article 194(2)(1), whereas Article 194(2)(2) imposes restraints to the competences, and Article 194(3) TFEU requires a special legislative procedure for energy-related taxation.

The article sets out the four main aims of the EU policy in energy matters in order to ensure the functioning of the (internal) energy market, as well as pointing out the aims to be executed in a ‘spirit of solidarity’ between the member states. As the Treaty, interestingly enough, does not define what energy constitutes of, the logical result would be to include all types of energy: nuclear, oil, gas and coal as well as renewable sources of energy.<sup>173</sup> Legislation furthering the aims of Article 194(1) TFEU is to be adopted with a qualified majority, but matters of legislation falling within the scope of the caveat in Article 194(2) TFEU are most likely subject to unanimity in the special legislative process, the so-called SLP.<sup>174</sup> The area covered by the Article is merely legislative action taken by the Union.<sup>175</sup> The Article empowers the EU with explicit competence in regard to ‘*establish the (and by this, all<sup>176</sup>) measures necessary to achieve the objectives in paragraph 1*’. The result of the inclusion of the caveat in the Energy Title is that the EU cannot take any measures over a certain level of signification affecting the energy rights of the Member States *within the scope of its energy policy*, and the measures have to be

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<sup>173</sup> The Treaty does neither include any reference to the Euratom Treaty, which makes the stance regarding nuclear energy especially unclear. *Haghighi* 2008, p. 472.

<sup>174</sup> For further reading about the SLP, see *De Sadeleer* 2014 p. 153.

<sup>175</sup> This is determined in Case T-370/11 *Poland v Commission* 7 March 2013, paras 11-17.

<sup>176</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus* 2012, p. 267.

conducted within the *environmental policy area* of the Union. The new enabling clause and legal basis in 194(2) TFEU however without doubt brings the wanted legitimacy to the EU's action in the field of energy, and a clear and welcomed steering of the energy policy into the environmental policy of the Union.<sup>177</sup>

The inclusion of the caveat in Article 194(2) TFEU is most likely the result of the pressure from certain Member States including Great Britain, the Netherlands and Denmark, which possess extensive energy resources.<sup>178</sup> The process of drafting the Lisbon Treaty was not a profoundly transparent process, so the impact of any lobbying is difficult to determine.<sup>179</sup> Article 194 TFEU provides for provisions 'in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment', which clearly steers the policy of energy provisions into the field of environmental law. Based on Article 194 TFEU, the Member States have the full discretion to choose which energy resources to utilize, without any other restrictions than the general principles and the existing secondary legislative body *and*, most prominently, measures taken within the environmental policy of the Union. This again places significance on the secondary provisions, in the field of which the Union already has practiced its competence and thereby restricted the Member State's scope of action.

Article 194(2)(1) TFEU prescribes co-decision and qualified majority voting. Braun has centralized the main points regarding the Article as follows: "On the one hand, paragraph 1 [Art. 194] proposes opportunities [for] the Parliament while paragraph 2 sets limitations. The role of the EP [European Parliament] is to exploit the first paragraph and use it to the best of its abilities".<sup>180</sup> The scope of Article 194 might however be very limited, since possibly no action provided under the Article can affect the Member States' energy rights. When a provision is based on Article 194(2) TFEU, the role of the European Parliament is merely to give an opinion in the matter.<sup>181</sup>

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<sup>177</sup> Pielow – Lewendel in Delvaux – Hunt – Talus 2012, p. 267.

<sup>178</sup> Haghghi 2008, p. 470.

<sup>179</sup> Vedder 2008, p.6.

<sup>180</sup> Braun 2009, p. 7.

<sup>181</sup> Talus 2014(a), p. 40.



The first paragraph of Article 194(2) TFEU stresses the need to preserve the environment whereas the second paragraph proscribes that significant alterations to energy forms introduced by the Union are impossible without unity in the decisive activity. It is apparent that the Member States have sought to retain the energy powers implicitly retained from the beginning of European integration, and according to *Talus*, the purpose of the Energy Title was that it “[...] should a priori not restrict Member State’s choices with respect to energy sources.”<sup>182</sup>

The Energy Title only allows for a EU energy policy ‘in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment’, which a) places energy in an environmental context and b) imposes restrictions on the competence and limits, including the energy policy solely in the internal market setting. The internal market includes the free movement of goods and undistorted conditions of competition, which, according to *Vedder*, applied to the field of energy only allows for an energy policy concerning exports and imports.<sup>183</sup> In addition to the restrictions on the Union provided by Article 194(2) TFEU, the Member States have retained the right to conduct their bilateral energy relations with non-EU countries on their own conditions, while naturally being subject to the general Member State obligations.

The Energy Title can be seen as a compromise between on one hand the desire of the Member States to retain control of their natural resources and in taxation issues and on the other hand a shared Union competence for other energy matters.<sup>184</sup> *Hancher – Salerno* have described the Energy Title as a carefully crafted compromise between the sovereignty of the Member States and shared Union competences.<sup>185</sup> The most prominent result of the introduction of the Energy Title was the inclusion of energy in the formal EU competences, providing legitimacy to legislative measures.

The energy policy objectives now laid out in the Lisbon Treaty are aimed at the harmonisation of the energy policy. The expected result of the codification of energy

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<sup>182</sup> *Talus* notes that due to the existing framework of secondary legislation and the decision-making procedures in the EU the restriction of the Union’s powers in relation to the Member States’ energy rights might not be as simple as it seems from the text of the Treaty. *Talus 2014(b)*, p. 179.

<sup>183</sup> *Vedder* 2010, p. 291. This is yet another significant restriction of the scope of the Energy Title.

<sup>184</sup> *Andoura – Hancher – van der Woude* 2010, p. 76.

<sup>185</sup> *Hancher – Salerno* in *Biondi – Eeckhout – Ripley* 2012, p. 372.

issues is the reduction of fragmentation and the contradictory signals in the field.<sup>186</sup> The harmonisation and possibility of developing a common energy policy are other important aspects to the introduction of the Energy Title. The text of Article 194(2) stating that the objectives in Article 194(1) TFEU are to be pursued “in a spirit of solidarity between the Member States” gives special force to the application of the solidarity principle. The application of the principle calls for joint approach, an idea that originates from European Steel and Coal Community. The inclusion also indicates that energy policy aims cannot be reached sufficiently at national level, and at the same time enables a Member State suffering from energy shortage to apply for and obtain the assistance of other Member States.<sup>187</sup>

Also the pure existence of Article 194 is positive for the development of the energy policy, since the EU no longer has to depend on related competences in accordance to the flexibility clause in order to develop legislation in the field of energy.<sup>188</sup> The Treaty status presents new opportunities for the EU, but the caveat in Article 194(2) TFEU imposes an essential constraint to the Union’s performance. Energy matters are predicted to be more important than ever with the introduction of the Energy Title. The introduction of the Energy Title is seen to mirror the desire to take role as leader by world standards in resolving the global problem of climate change by huge amendments, especially in the energy sector.<sup>189</sup>

In a majority of energy-specific legislation cases a qualified majority would most likely adopt relevant legislature in the field of energy according to the special legislative procedure determined in Article 289(2) TFEU. There are two exceptions in the field of energy where EU competence is especially limited: 1) measures significantly affecting the states’ choice between different energy sources and 2) measures significantly affecting the general structure of their energy supply. Legislation and decisions affecting these fields shall be adopted only by unanimous vote in the Council. The same unanimity structure is, according to Article 192(3),

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<sup>186</sup> *Morata – Sandoval (eds.)* 2012, p. 3.

<sup>187</sup> SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report 2011, pp. 186-187. Available at [http://www.umweltrat.de/SharedDocs/Downloads/EN/02\\_Special\\_Reports/2011\\_10\\_Special\\_Report\\_Pathways\\_renewables.html](http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html) (3.1.2016).

<sup>188</sup> *Sandoval – Zapater* in *Morata – Sandoval (eds.)* 2012, p. 109.

<sup>189</sup> *Pielow – Lewendel* in *Delvaux – Hunt – Talus* 2012, p. 261.

adopted in measures regarding energy taxation. The requirement of unanimity voting is regarded to possibly “be a barrier to ambitious renewable energy measures” and thereby *Peeters* concludes that the prospect for ambitious renewable energy legislation is not promising.<sup>190</sup> The level of ambition and will power among the Member States is conclusive in this. The voting in the Council shows that all Member States were in favour of adoption of the RE directive.<sup>191</sup> Further on, increasingly heavy measures of mitigation might alter the unity.

### 3.4.2 *An external energy policy?*

The Energy Title makes no reference to the external dimension of the EU energy policy. It might, therefore, be in external competences that the energy competences are the most difficult to predict. The external relations are crucial in the energy sector, as the EU is largely dependent on externally imported energy, as well as willing to enter into international agreements in the field.

Before the Lisbon Treaty, external competence in energy matters was frequently based on Article 308 TEC (now Article 352 TFEU). International agreements such as the Energy Charter Treaty<sup>192</sup> were concluded based on that Article. As there now is a specific legal basis for energy matters, but no reference to external competence, the legal basis for external energy action is unclear. The use of Article 352 was allowed as long as Treaty amendments would not limit its application, and a more specific legal basis altered the pre-Lisbon status quo. Since the wording of Article 194 TFEU states that the energy policy shall be conducted ‘in the context of the establishment of the internal market and with regard for the need to preserve and improve the environment’, the EU energy policy is clearly placed in an internal market perspective, possibly vacating no room for external action. External energy actions will possibly have to be conducted under the environmental Article 192 TFEU,<sup>193</sup> which in the latest Treaty alternation included climate change as a regional and worldwide environmental problem to be addressed within the Union’s environmental

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<sup>190</sup> *Peeters* 2014, p. 46.

<sup>191</sup> Council of the European Union, Interinstitutional File: 2008/0016 (COD), Brussels, 6 April 2009.

<sup>192</sup> Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects.

<sup>193</sup> *Jans – Vedder* 2012, p. 86.

policy. On the other hand, as no explicit mention of an external energy policy exists, a consequent supposition is that the external policy should be conducted in a similar manner as before the introduction of the Energy Title. The external powers should according to this interpretation be derived from the legal practice of the European courts, similarly as pre-Lisbon.<sup>194</sup>

## 4 The legal basis for energy provisions

### 4.1 Introduction

This section will process the possible problems related to the interpretation of the primary provisions in the Energy Title. Based on what has been stated above in section 3, the situation for the vertical division of powers seems fairly determined. Thereby, the Lisbon Treaty did not introduce major alternations to the division of powers. What might be the problems are the scope of the caveat in Article 194(2) TFEU and the choice of a legal basis for energy provisions, especially concerning provisions regarding renewable energy. This section aims to chart the technical issues at hand in relation to the correct legal basis for energy provisions, and especially determine the correct legal basis for renewable energy provisions.

The impact of Article 194(2) TFEU upon Union competences is dependent on three different factors. When analysing the caveat in Article 194(2) TFEU, the important consideration is measurement of *the material scope* of the three listed rights, which the Union's energy policy 'shall not affect a Member State's right to determine: 1) the conditions for exploiting its energy resources, 2) the Member States choice between different energy sources and 3) the general structure of its energy supply. The material scope can be measured by three different factors:

- A) the requirement of *effect* by the measure on the rights, demanded for a legal basis in Article 192(2)(c),
- B) the *legal signification* of the caveat,<sup>195</sup>
- C) and the relationship between Articles 194(2) and 192(2)(c).

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<sup>194</sup> *Guimaraes-Purokoski* 2009, p. 197.

<sup>195</sup> *Haralsdottir* 2014, p. 211.

There is an apparent tension between the idea of the common Union approach to energy matters stated in Article 194(1) and the nationalistic approach to the use of energy sources in Article 194(2) TFEU. The observation of the tension must indicate that the rights attained by the Member States in Article 194(2) TFEU are not as absolute as they seem. In addition to the tension between the common Union approach and the nationalistic approach, the EU shall promote the development of new and renewable forms of energy according to Article 194(1) TFEU. Even this has a certain level of signification on the choice of a Member State's energy mix, since promotion of certain energy resources affect resource competition. Also in this, the Energy Title seems to be incompatible, and therefore the effects of the caveat in Article 194(2) TFEU cannot be absolute. The search for the fundamental meaning of the Energy Title involves many segments. According to *Johnston – van der Marel* the energy rights of the Member States, as determined in Article 194(2) TFEU can either be absolute or relative.<sup>196</sup>

In addition to the problems with interpretation of Article 194(2) TFEU, the wording of the Energy Title is considered too specific. The list in Article 194(1) TFEU, a-d, is meant to be exhaustive, according to the general rules of interpretation of EU law. Still, some measures, like promotion of certain technologies, do not fit into the list, whereby a clearer wording is desired. The Energy Title may provide a clearer basis for measures with less radical effect on national energy policies while at the same time lacking a clear internal market foundation.<sup>197</sup> This means that measures that pursue the aims listed in letters a-d, but lie outside the framework of the internal market, do not fit within the scope of Article 194 TFEU.<sup>198</sup> Also the lack of an external competence is problematic, as stated above.

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<sup>196</sup> Both interpretations are possible, and need to be taken into consideration in this text. *Johnston – van den Marel* 2013, p. 183.

<sup>197</sup> *Bjørnebye* 2010, p.144.

<sup>198</sup> *Haralsdottir* 2014, p. 210.

## 4.2 Analysis of Article 194(2) TFEU

### 4.2.1 Requirement of effect

*Johnston & van der Marel* provide the three, in my opinion, most credible ways of interpreting the caveat as follows.<sup>199</sup> The legal basis referred to in the caveat regarding measures affecting the Member States energy rights in Article 192(2) TFEU can be interpreted in, inter alia, the following ways. Firstly, the text in the caveat can be seen as a subject to serious limitations for the EU in the field, and as a result there could be expected no, or minimum harmonisation. The reasoning for this interpretation is the expression “energy rights” used in the Article, which could imply that measures of the Union to no extent could affect Member States’ “energy rights” when provided under the Energy Title. The outcome of this interpretation is rather undesirable, since the EU’s competence would be limited to a minimum in the field of providing energy provisions under the Energy Title. If the interpretation of the caveat is that no measures affecting a Member State’s energy rights can be provided under Article 194(2) TFEU, another legal basis must be used.

The second way of interpreting the Article is that the measures taken by the Union should not *significantly* affect the member states’ ‘energy rights’, and should therefore be subject to some limitations. There is, although, no mention of any threshold in the caveat. This interpretation is based on the referral to Article 192(2) TFEU, which is seen as a comparison but not directly an alternative legal basis. The result of this way of interpretation could lead to some minimum harmonisation under the Energy Title. The third reasonable interpretation is that the measures of the EU should not affect Member States’ energy rights unless *all member states agree*.<sup>200</sup> This interpretation might involve an opt-out or a veto possibility, nevertheless including the possibility of using the Energy Title as a legal basis for energy provisions affecting a Member States energy rights. According to this interpretation the caveat could enable a Member State to opt out on a provision falling under the

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<sup>199</sup> *Johnston – van den Marel* 2013, pp. 181-183. The authors provide five different approaches to the interpretation, of which I above have chosen and simplified the three in my opinion most credible solutions.

<sup>200</sup> For more extensive discussion regarding the technical interpretation of Article 194(2): see *Johnston – van der Marel* (2013) and *Haraldsdottir* (2014).

scope of 194(2) TFEU, but not hinder the providing of the provision provided under the Energy Title.<sup>201</sup>

The third way of interpretation is that provisions could be provided under the Energy Title if *all Member States agree* to provide provision. The measure would therefore be the subject of veto. This interpretation is backed up by the history of the drafting of the Constitutional Treaty, which suggests that unanimity was proposed as the legislative process under the Article.<sup>202</sup>

Other scholars have provided their interpretations as well, but no unity has been reached as to the interpretation, and of the above-suggested three options, any might be applicable. *Guimaraes-Purokoski* regards the capability of the Union to provide energy-specific provisions under the scope of the legal basis in Article 194(2) TFEU minimal, and experiences this inconsequent,<sup>203</sup> with which I agree, if so is the case. Why list such a limited scope for the Energy Title? It seems that there is more to the Energy Title than what is directly visible.

Based on the wording of the caveat, it is clear that the intention of the caveat is the retention of certain matters within the control of the Member States. The use of the word 'right' confirms this. The word is rarely used in the Treaty to describe the positions of Member States.<sup>204</sup> The exercise of powers by the Union is controlled by the general principles of subsidiarity and proportionality, which constitute the basis for the use of the competences. The caveat in Article 194(2) TFEU is a special provision concerning the exercise of Union powers, apparently intended to ascertain that certain matters are handled at national level.<sup>205</sup>

Essentially, there *is* a difference in promoting and restricting the use of energy resources, but is it really necessary to limit the jurisdiction of the EU on TFEU level in a matter which, ultimately, could be of vital importance in endeavour of mitigating climate change? Similar caveats as the one in Article 194(2) TFEU did exist before the Lisbon Treaty in the Environmental Title, and the same reserve clause still exists

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<sup>201</sup> *Fouquet – Nysten – Johnston* 2012, pp. 16-17.

<sup>202</sup> *Johnston – van den Marel* 2013, p. 184.

<sup>203</sup> *Guimaraes-Purokoski* 2009, p. 196.

<sup>204</sup> The other occurrences are found in Article 79(5) and 153(4) TFEU.

<sup>205</sup> *Haralsdottir* 2014, p. 211.

in Article 192(2) TFEU, which might be the correct legal basis for measures significantly affecting a Member State's energy rights.

#### 4.2.2 Level of signification

Whether the Energy Title can be used for providing energy provisions affecting the Member States' energy rights, is dependent on the requirement of the level of signification of the measures. If it is to be determined that any measures affecting the Member States' energy rights cannot be based on Article 194(2) TFEU, another legal basis for these provisions has to be found. When assessing the definition and scope of the term '*significant*', the institutions have to make their conclusion or ultimately will the Court of Justice have to rule. There is a possibility that the institutions within the Union have some discretion as to the determination of the level of significance, but ultimately the determination of the level of significance is an *in casu* assessment left to the discretion of the CJEU. There is an apparent need for clarity in regard to whether, when and to what extent Article 192(1) TFEU can be used as a basis for renewable energy provisions, which affect, but not significantly affect, the Member State's choices between different energy sources.<sup>206</sup> As in relation to Article 192(2) TFEU, the 'significant affect' clearly needs a specification of the level of intensity required. Article 194(2) TFEU is interpreted to either cover *all* measures affecting a Member States' right to determine the issues covered by the Article, or measures of a certain intensity of effect. The determination of whether the interpretation of the text in the caveat of Article 194(2) TFEU, "[s]uch measures shall not affect" should be interpreted 'such measures shall not *significantly* affect', is solely left to be determined by the EU institutions or, ultimately, by CJEU. An interpretation of the caveat including a threshold would significantly widen the scope of the use of Article 194(2) TFEU. Since no such interpretation has had general application or recognition, all other possibilities of interpretation are still open.

One thing that speaks against the widening of the wording of the caveat is the fact that as an exceptional rule limiting the general rule of shared competence in the field,

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<sup>206</sup> Peeters is representing the same opinion. Peeters 2014, p. 45.



the text of the caveat should, according to case law, be interpreted strictly.<sup>207</sup> The most common interpretation in line with this is that Article 194(2) TFEU only is applicable when measures are not affecting the right of a Member State concerning the exploitation, the choice between the different energy sources and the general structure of energy supply. It has been argued that the effect is not only to be concerning the *use of energy resources*, but also the mere *right to choose between different energy resources*.<sup>208</sup>

Then to what extent does the promotion, exclusion or imposition of certain energy resources impact the Member States' energy rights? What is considered a significant impact, and is the level of significance even of any meaning when assessing the applicability of Article 194(2) TFEU? At least in *Peeters*' opinion, "[s]trong political opposition against strengthening the climate package may lead one or more Member States to use the legal argument that new, further going" (*further than the current RE directive*) "climate policies have to be adopted by unanimity in view of Article 192(2) TFEU because they *significantly*<sup>209</sup> affect the Member States choices between different energy sources".<sup>210</sup> This interpretation is credible, but not necessarily correct. Since the Member States in the RE-directive have agreed to a certain attribution of powers, who is to determine the level of signification regarding provisions requiring a higher level of powers than he existing secondary legislative body?

It is clear that the energy requirements by the EU, uppermost set out in the RE-directive, has required significant measures for some Member States. In cases like Latvia and Finland, with requirements in the RE-directive of increase of renewable energy sources from 32.5 to 40 per cent respectively from 28.5 to 38 per cent, the shares of renewable energy increase must, in the author's opinion, be seen as significant and clearly restricting regarding the choice of the Member States' energy mixes. Still, the Commission argued that since '[a]ll Member States already use renewable energy and all have already decided to increase renewable energy's share', the RE-directive 'will not significantly affect Member States' choice between

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<sup>207</sup> An exceptional provision restricting a general rule should be interpreted with an as close reference to the wording as possible. See case C-36/98, paras 46 and 49.

<sup>208</sup> *Fouquet – Nysten – Johnston* 2012, p. 17.

<sup>209</sup> Italics added by author.

<sup>210</sup> *Peeters* 2014, p. 62.

different energy sources or the general structure of their energy supply'.<sup>211</sup> An increase of 10% or more in renewable energy sources in a Member State, did according to the Commission, *not reach the level of significance required in Article 192(2) TFEU*. It will hence be interesting to see what level of signification is required to constitute a significant effect, and the question about the required level of significance remains. One thing that is clear is that the Member States cannot veto against any change of the status quo,<sup>212</sup> which ultimately needs to be specified and clarified. The same applies to the certainty of the need of application of Article 192(2) TFEU as soon as *one* Member State's energy rights have been significantly affected<sup>213</sup>, or the possible need for the application of Article 192(1) TFEU as a legal basis if the measure affects the national energy rights.<sup>214</sup>

The importance of the determination of the level of signification culminates in the need for the clarity of the correct choice of a legal basis for measures affecting and for measures significantly affecting the Member States' energy rights. The absence of a determination of the level of signification required at least seems to grant the Member States significant sovereignty in the matter.<sup>215</sup>

Depending on the interpretation of the text in Article 194(2) TFEU, the correct legal basis for energy provisions affecting a Member States' energy rights can be found either within the Energy Title or outside of it. If the caveat in Article 194(2) TFEU is interpreted to cover a prohibition to affect any of the Member States' energy rights, another legal basis for energy provisions needs to be found. The choice of the correct legal basis will be addressed next, in section 4.3. In order to provide clarity to a complicated pattern of interpretations, appendix 1 illustrates the argumentation within section 4.3. The paradigm displayed in the appendix might well be worth a glance before commencing the reading of the following sections.

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<sup>211</sup> COM (2008) 19 Final, pp. 8-9.

<sup>212</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus* 2012, p. 269.

<sup>213</sup> The effect on one Member State's energy rights is regarded as sufficient, and several or all Member States being affected by the measure is not required. *Fouquet – Nysten – Johnston* 2012, p 14.

<sup>214</sup> Depending on the interpretation of Article 194(2) TFEU.

<sup>215</sup> SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report 2011, p. 181. Available at [http://www.umweltrat.de/SharedDocs/Downloads/EN/02\\_Special\\_Reports/2011\\_10\\_Special\\_Report\\_Pathways\\_renewables.html](http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html) (3.1.2016).

### 4.3 The choice of a legal basis for energy provisions

#### 4.3.1 Interpretation of the caveat in Article 194(2) TFEU

The choice of a legal basis for energy provisions is dependent on the interpretation of the caveat in Article 194(2) TFEU. If it is determined, that provisions affecting a Member State's energy rights up to a certain level can be based on Article 194(2) TFEU, the Energy Title contains the correct legal basis for measures up to a certain threshold. For measures affecting the energy rights above the threshold, an alternative legal basis must be found for measures with a significant effect. If, however, the meaning of the caveat is to restrict all measures affecting a Member States energy rights, the legal basis for energy provisions affecting the Member States' energy rights has to be found elsewhere in the TFEU. Because the objectives set out in the Article also include the promotion of energy efficiency, energy saving and the promotion of new and renewable energy, *Vedder* suggests that the legal basis in the Energy Title also can be used to provide energy provisions specifically aimed at environmental objectives.<sup>216</sup> Then how are we to determine the legal basis, if the boundaries of the energy and environmental primary provisions are undetermined and possibly overlapping?

Because of the wording of Article 194(1) TFEU, which states that the objectives need to be carried out 'with regard for the need to preserve and improve the environment', the decision of the correct legal basis in provisions concerning promotion of the development of new and renewable forms of energy is unclear. In a case where the correct legal basis is uncertain, the *aim* of the measure will probably be conclusive when choosing the correct legal basis. In the *Republic of Poland v Commission* the applicant disputed Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87, which the applicant, among other issues, considered an 'infringement of the second subparagraph of Article 194(2) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU', on the ground that the Commission did not take into account the specificity of each

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<sup>216</sup> *Vedder* 2008, p. 5. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310190](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310190) (3.1.2016).

Member State's energy mix. In the case the Court ruled that "It follows that the right referred to in the second subparagraph of Article 194(2) TFEU is not applicable in the present case, since the contested decision constitutes an action taken by the European Union within the framework of its environment policy".<sup>217</sup> In the case the General Court conducts that Article 194(2) TFEU is not applicable when the provision is adopted in the area of environment and hence the Commission decision and the directive did not breach the competence provided by the TFEU.<sup>218</sup> This means that provisions based on any environmental legal basis can not be disputed based on the caveat in Article 194(2) TFEU, since the caveat establishes *no general prohibition* to significantly interfere with the choice of the Member State's choices of energy resources in the policy section of environment or any other area.

Also measures, which are *aimed* at another sector's objectives, but have effect on the energy market, would have to be based on another provision than Article 194(2) TFEU. Article 194(2) TFEU provides the legal basis for legislation necessary to reach 'the objectives in paragraph 1', which include promotion of 'energy efficiency and energy saving and the development of new and renewable forms of energy'. Based on this, Article 194(2) could arguably be the basis for a range of environmental legislation as well.<sup>219</sup> Article 194(2) provides for no alternative legal basis for provisions falling outside the scope of the caveat in the Article, whereby theoretical speculation is in its place.

#### 4.3.2 Measures that do not affect a Member State's energy rights

If the significance threshold of Article 194(2) TFEU is interpreted to consist of a total prohibition regarding measures affecting a Member State's energy rights, any measures affecting the Member States' rights determined in Article 194(2) TFEU, can not be adopted based on the Energy Title, but have most probably to be conducted under the Environmental Title. Nevertheless, the CJEU has determined that Article 194(2) TFEU "constitutes the legal basis for European Union acts which are 'necessary' to achieve the objectives assigned to that policy by Article 194(1)

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<sup>217</sup> Case T-370/11 *Republic of Poland v Commission* para 17.

<sup>218</sup> *Ibid* para 17.

<sup>219</sup> *Hancher – Salerno in Biondi – Eeckhout – Ripley* 2012, p. 392.

TFEU”<sup>220</sup> What is important to notice is the interaction between Articles 194(2) and 192(2) TFEU, in which Article 194(2) has a direct referral to point (c) of Article 192(2) TFEU. Article 194(2) is applicable without prejudice to Article 192(2)(c), which directly read means that environmental provisions could affect the energy policy, at least to a certain extent. This is also supported by the existing secondary legislative body and most prominently in the RE-directive (2009/28), where a certain degree of attribution of power to the Union has been agreed upon.<sup>221</sup>

It is not clearly stated, what the legal basis for energy measures aimed at reduction of greenhouse gases is. If the reduction of greenhouse gases is only seen as an intended consequence of energy saving and energy efficiency the objectives of Article 194(1) TFEU, the prominent argument is that Article 194 TFEU is the primary and thus correct legal basis, of course depending on the accepted level of significance. If the pattern of argumentation however is one of the measures for energy saving and energy efficiency having the primary objective of reduction of greenhouse gases and the provident use of energy resources, Article 192(2) TFEU would be the primary legal base. The scope for the use of Article 194(2) TFEU would thereby be limited to matters like energy efficiency and energy savings as well as possibly a certain level of promotion of renewable energy. The effect of the promotion of renewable energy on the choice of energy resources is although disputed.<sup>222</sup> The mere technical development of new and renewable forms of energy is however clearly to fall under the scope of Article 194(2) TFEU.

#### *4.3.3 Measures that do affect a Member State’s energy rights*

Measures that do affect a Member State’s energy rights can be divided into two subsections: 1) measures, which significantly affect a Member State’s energy rights and 2) measures, which do affect a Member State’s energy rights, but which do not affect the rights significantly. Measures significantly affecting the energy rights of the Member States should most probably be based on Article 192(2) TFEU, requiring the SLP, whereas measures affecting, but not significantly affecting the national

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<sup>220</sup> Case C-490/10, para. 67.

<sup>221</sup> In Opinion of Advocate General Bot 8.5.2013, in Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, para 103, the AG refers to the contested Directive 2001/77, where attribution of power also was agreed upon concerning the origin of energy, which was to be from renewable energy resources to a certain degree.

<sup>222</sup> See e.g. *Haralsdottir* 2014.

rights should probably be based either on Article 194(4) or on Article 192(1) TFEU, depending on the interpretation of the threshold limit in the caveat. According to Article 192(2) TFEU, measures concerning the conditions for exploitation of the Member State's energy resources are not governed by the Article, and thus do not need to be adopted by unanimous decisions, which indirectly would direct measures of this character to fall under the scope of Article 192(1) TFEU.

If the measure interferes with the Member State's rights according to Article 194(2) TFEU, that legal act might not be possible to adopt under Article 194(2) TFEU. If, however, one were to argue that the measure on hand was one of energy saving and energy efficiency character to be adopted *primarily in order to reduce greenhouse gases and with the purpose of prudent and rational use of natural resources*, the right choice for a legal basis should be Article 192(2) TFEU, which requires unanimity voting in the Council, in itself a possible barrier to renewable energy measures. The choice of the legal basis might depend highly on the primary purpose of the provision, and it is hence not excluded that Articles 192(1) and 192(2) TFEU could be used.<sup>223</sup> If, however, Article 192(2) TFEU is the proper legal basis, ambitious measures may be obstructed by the unanimity requirement. Whether the fundamental aim of the provision could be used to choose a legal basis and thereby bypass the complicated procedure under Article 192(2) TFEU or a similar process proscribed under Article 194(2) TFEU, requiring a unanimous decision by the council, is debated. In favour of this solution is *Vedder*, who however notes that it would be 'an institutional oddity', if a measure of e.g. energy-related taxation could be subject of a different legislative process than an energy measure – if presented as an environmental issue.<sup>224</sup>

One of the problems with the interrelated provisions is also the possible occurrence of spill over effect, as the boundaries for Articles 192 and 194 TFEU are not clear.<sup>225</sup> Since there is no clear reference to Article 192(1) in Article 194 TFEU, it is unclear whether measures primarily aimed at the mitigation of climate change and

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<sup>223</sup> *Peeters* 2014, p. 46.

<sup>224</sup> See *Vedder* 2010, p. 294.

<sup>225</sup> The spill over effect is identified as a core theory of European integration. (See more in *Haas, Ernst*, *Beyond the nation-state: functionalism and international organization*, Stanford University Press 1968.)

concerning renewable energy which do affect, but do not significantly affect the Member States choice can be adopted based on Article 192(1) TFEU, conducted under the ordinary legislative procedure.

What would then speak for the use of Article 192(1) TFEU as the correct legal basis, and in which situations? *Fouquet – Nysten - Johnston* argue that the focus in this question should be on the wording of the Articles on hand. Article 194 mentions only the ‘development’ of new and renewable energy forms of energy, which, according to the specific wording could refer only to technological development, such as technological standards.<sup>226</sup> According to this interpretation Article 194 does not at all refer to increase in diffusion. Whether the wording includes the possibility to promotion of renewable energy at all is questionable, and *Fouquet et al.* argue that this leaves room for the use of Article 192(1) TFEU in the promotion of renewable energy.<sup>227</sup> It has been argued that Article 194(2) TFEU only leaves room for technical development of aspects of renewable energy<sup>228</sup>, whereby the application of Article 194(1) TFEU in the promotion of renewable energy would be plausible.

Article 194(2) TFEU prohibits the EU to adopt measures affecting the Member States’ rights to determine the conditions for exploiting their energy resources, but contrary to the mentioning of the choice between different energy sources and the structure of the Member State’s energy supply, the conditions for exploitation of energy resources is not mentioned in the referred Article 192(2) TFEU. This would supposedly mean that the Council could adopt measures concerning the exploitation of Member States’ energy resources acting unanimously in accordance with a special legislative procedure.

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<sup>226</sup> SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report 2011, p. 180. Available at [http://www.umweltrat.de/SharedDocs/Downloads/EN/02\\_Special\\_Reports/2011\\_10\\_Special\\_Report\\_Pathways\\_renewables.html](http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html) (3.1.2016).

<sup>227</sup> *Fouquet – Nysten – Johnston* 2012, p 12.

<sup>228</sup> SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report 2011, p. 189. Available at [http://www.umweltrat.de/SharedDocs/Downloads/EN/02\\_Special\\_Reports/2011\\_10\\_Special\\_Report\\_Pathways\\_renewables.html](http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html) (3.1.2016).

## 4.4 The use of another legal basis

### 4.4.1 *Lex specialis*

Could energy provisions listed in Article 194 TFEU be based on another legal basis than the Energy Title or the Environmental Title? According to the European courts two other provisions have prevailed and can be considered *lex specialis* in relation to Article 194(2) TFEU. Since Article 194(2) TFEU is applied “without prejudice to the application of other provisions of the Treaties”, certain other provisions continue to apply to the energy sector. The applicable provisions are Article 122 TFEU, which authorizes the Council to adopt appropriate measures in the case of a crisis in the supply of products in the energy sector, and Article 170 TFEU concerning the development of trans-European networks in the energy infrastructure sector. These two provisions can under *lex specialis* be applied even though the measures at hand are aimed at pursuing the objectives stated in 194(1).<sup>229</sup> Especially Article 122 could be momentous if provisions fail to pass the unity requirement of Article 192(2) through Article 194(2) TFEU, and the situation is of *force majeure* character. In order to reach the pressing environmental objectives, could maybe this Article be the solution?

Even in the event of an energy crisis the Union cannot infringe on the rights of the Member States by usurping the functions of national governments.<sup>230</sup> Measures of *preventative* character can, however, be carried out based on Article 122. The determination of preventative measures might be a problem, but the situations considered crisis situations should entail “grave danger to vital interests, if not its very existence, of a Member State”.<sup>231</sup> The situations of applicability are thus ever so few. Article 122 TFEU nevertheless delegates the decision-making power to the Council on Commission proposals and therefore excludes the Parliament from the process, a way of decision-making very different from Article 194(2) TFEU.

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<sup>229</sup> See case C-490/10 *Parliament v Council* para 67.

<sup>230</sup> Declaration N° 35 annexed to the Final Act (OJ 2007/C 306/02 p. 261, Declaration 35).

<sup>231</sup> *Haghighi* 2008, p. 471.



The internal market Article in 114 TFEU has the intention of harmonization of the free movement of goods, persons, service and capital. The Article postulates ordinary legislative procedure, and the current RE- directive is partially based on this Article.<sup>232</sup> Again, the main purpose of the provision should determine the legal basis, and if the energy measure aims at an internal market concern, it could possibly fall within the scope of Article 114.<sup>233</sup> So far, no other provisions have prevailed as superior to Article 194(2).

#### 4.4.2 *The use of a dual legal basis*

‘[B]y way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary an indirect in relation to the other, the measure may be founded on the corresponding legal bases’.<sup>234</sup> The use of multiple legal bases is involuntarily when ‘the act simultaneously pursues a number of objectives or has several components that are indivisibly linked’.<sup>235</sup> If the separate legal bases prescribe the same legal process, there should be no complications in the legislative process, but should the combination of legal bases lead to different and mutually inconsistent procedures, one appropriate legal basis must be chosen.<sup>236</sup> It has also been proposed that the procedural requirements of both Articles must be satisfied,<sup>237</sup> which means that the ‘more demanding’ procedure must be followed, and in addition, any requirements of the less demanding procedure must be included in the procedure.<sup>238</sup>

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<sup>232</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, paras 17-19.

<sup>233</sup> Peeters 2014, p. 48.

<sup>234</sup> Opinion 2/00 of the Court of Justice 6 December 2001. See, to that effect, Case C-300/89, *Commission of the European Communities v Council of the European Communities*, (the *Titanium Dioxide judgement*) paras 13 and 17, and case C-42/97, *Parliament v Council*, para 38.

<sup>235</sup> Case C-94/03, *Commission v Council*, para 47.

<sup>236</sup> Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* 10 December 2002. The judgement states that “[i]f examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component”... “[e]xceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases”, para 94.

<sup>237</sup> Hartley 2010, p. 119.

<sup>238</sup> Jans – Vedder 2012, p. 78.

In the context of renewable energy promotion, Article 194(2) TFEU interacts both with Article 192 and 107(3) TFEU, as well as possibly many others. For example Article 107(3) TFEU allocates state aid<sup>239</sup>, and support schemes are considered requisite in order to enhance renewable energy promotion within the EU.<sup>240</sup> Combinations of Articles 192(1) and 114 TFEU are also supposedly possible. Whether an interaction between Articles 194(2) and 107(3) TFEU is possible is to be seen.

#### 4.4.3 *The legal basis – an intended choice?*

The logical question based on the above presented: can the legal basis actually be an intended choice steered by the fundamental aim of the measure? Of what use is the caveat in 194(2) TFEU if the attribution of powers to the Union due to secondary provisions already significantly have infringed upon the Member States' energy rights and the rest of all energy measures can be aimed as environmental or other provisions? Can the aim of the measure really overrule the underlying intention and effects in order to dodge the caveat in Article 194(2) TFEU? The CJEU partially contradicts the disguising of provisions by arguing that “[a]ccording to settled case-law, the choice of the legal basis for a European Union measure must rest on *objective factors which are amenable to judicial review*,<sup>241</sup> including in particular the purpose and the content of that measure.”<sup>242</sup> According to *Jans – Vedder*, this means that the legislator is not free to choose a legal basis, but is obliged to test the ‘centre of gravity’ of the measure.<sup>243</sup> As stated, if a secondary provision is not based on the energy provision, it cannot either be contested in the light of this. The conclusion would be that the effect of the provision should be carefully considered and legally based according to the purpose *and* effect.

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<sup>239</sup> State aid is by the European Commission specified as “aid to facilitate the development of certain economic activities or of certain economic areas, where such state aid does not adversely affect trading conditions to an extent contributory to the common interest” and considered that “[w]ell-designed public support measures can make a key contribution to achieving the EU’s energy and climate objectives for 2020”. European Commission Press Release, State Aid: Commission consults on draft rules for State support in energy and environmental field, IP/13/1282, Brussels 18 December 2013, p 1.

<sup>240</sup> *Sveens* 2014, p. 176.

<sup>241</sup> Italics added by author.

<sup>242</sup> Case 45/86 *Commission v. Council*, ruling of 26 March 1987 ECR 1439, para 2.

<sup>243</sup> *Jans – Vedder* 2012, p. 77.

The European legislator should carefully consider the principle of proportionality in order to avoid provisions with disconnected aim and effect, in order to observe the Treaties. Evaluation pursuant to the principle of proportionality according to the case law of the CJEU is based on a tripartite test. First, one has to evaluate, whether the measure is appropriate to reach the objectives of the measure (the test of sustainability). Secondly, one has to assess whether the measure is the least restrictive alternative (the least restrictive alternative) and thirdly, one has to evaluate whether the disadvantages are proportionate in relation to the objective (proportionality *stricto sensu*).<sup>244</sup> A measure can, however, be regarded adverse to the principle of proportionality only if it is obviously inappropriate in relation to its objective.<sup>245</sup> In the considered *Republic of Poland v Commission* case, the proportionality of the measure could be disputed, if presented in a slightly different manner, but I doubt that the allocation of emission allowances would constitute “significant” effect on a Member State’s energy mix. Emission allowances after all leave a versatile choice of energy sources, which for the example the RE-directive does not. Concerning the RE-directive, among others *Talus* argues that the Directive seems to have been adopted on a incorrect legal basis, since it was adopted with a majority instead of unanimity, when adopted based on TEC 175(1), now 192(1) TFEU.<sup>246</sup> All Member States were although in favour of adopting the directive, whereby the legal basis only can be faulted hypothetically. The directive was furthermore adopted by unanimity.<sup>247</sup>

Even though the environmental objectives demand a decrease in fossil fuels, the provisions regulating future energy matters might be provided with more general objectives for the Member States, based on environmental provisions. As stated earlier in the text, the integration principle has a steering attribute, according to which environmental objectives must be taken into consideration when providing secondary legislation, which would speak for the possible use of the environmental primary provisions as legal bases for environmentally aimed energy provisions.

An important question is whether adoption of a measure based on an improper legal

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<sup>244</sup> The balancing and weighing according to the tripartite test appears e.g. in joined cases C-27/00 and C-122/00, ruling of 12 March 2002, *Omega Air*, point 62.

<sup>245</sup> *Guimaraes-Purokoski* 2009, p. 56.

<sup>246</sup> *Talus* (2014(a)), p. 181.

<sup>247</sup> Council of the European Union, Interinstitutional File: 2008/0016 (COD), Brussels, 6 April 2009.

basis can cause annulment of the measure. According to the CJEU, a measure might be annulled for being adopted on the wrong legal basis if this affects “the rules of the Treaty on the forming of the Council’s decisions” or “the division of powers between the institutions”<sup>248</sup>. The latter could surely be a reason for complaint if the energy provision is provided on the wrong legal basis. If a wrongfully based measure would interfere with for example the voting procedure or the division of powers between the institutions within the Union, the measure could be annulled,<sup>249</sup> and the same should be applicable if a measure interferes with powers granted the Member States. Due to a possibility of the interference with the required legislative process for a certain type of measure possibly leading to annulment, an eschew of the special legislative process in energy matters, required in 192(2)(c) TFEU, could prove unplayable.

Hence, to imply that the legal basis is an intended choice is inaccurate. The aim of the measure is the ultimate element, upon which the choice of the legal basis must be based. The predominant purpose of the measure is the guiding line to be followed.

#### *4.4.4 Passerelle clause*

The second paragraph of Article 192(2) TFEU states:

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

According to the provision, the Council may unanimously decide that another process of decision-making applies to the issue falling under Article 192(2) TFEU. The article includes requirement for unanimity voting for certain sectors, which are regarded as sensitive to alterations. These are ‘provisions primarily of fiscal nature’, ‘measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of these resources, and land use, with the exception of waste management’ as well as, finally, ‘measures

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<sup>248</sup> Case 8-73, *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH*, para 4.

<sup>249</sup> *Hartley* 2010, p. 119.

significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply'. Another possible solution to the possible problem of the unanimity requirement, could it be the *passerelle* clause?

A *passerelle* clause empowers the European Council to surpass the special legislative procedure by applying the ordinary legislative procedure by implying the introduction of qualified majority voting instead of unanimity, thereby placing the Parliament on an equal level.<sup>250</sup> The use of a *passerelle* clause is only applicable if no opposition from national parliaments is raised. Due to the extremely resolute wording of TFEU 192(2) TFEU, the possibility of application of the *passerelle* clause is indefinite, and calls for closer analysis of the boundaries of the possibly applicable exception. The use of “a ‘passerelle’ that enables the Council unanimously to decide that another decision-making procedure applies (Article 192(2), last paragraph TFEU)” has been considered by *Jans – Vedder*, who are in favour of the use of *passerelle* clauses also in relation to Article 194(2) TFEU.<sup>251</sup>

## 5 Final words

The energy powers are gradually shifting to the Union at an increasing level due to the extensive and continually growing secondary legislative body. It is visible from the drafting stages of the Lisbon Treaty that the Member States of the Union sought to retain the powers concerning the basic energy rights, which not yet had been obtained by the Union by the providing of secondary legislation. The placement of the Energy Title in the field of the internal market was expected, although the wording did result in the possibility of causing problems from the point of view of the vertical division of powers in external energy matters. The exclusion of an external energy competence might therefore be the greatest problem in the vertical division of powers of the EU. The steering of the field of energy into the scope of the environmental sphere of the Union's policies is a positive and ample clarification of one of the fundamental aims of the Union.

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<sup>250</sup> *De Sadeleer* 2014 p. 153.

<sup>251</sup> *Vedder* 2010, p. 294.

One of the central objectives of the European Union as to the energy policy – and maybe the most prominent challenge – is the objective of ‘speaking with one voice’. As argued by *Talus*, the secondary body of legislation existing before the introduction of the Energy Title does clearly broaden the scope of the primary energy provisions<sup>252</sup>, which the CJEU might adduce in case of an appeal regarding the legal basis of an energy provision. The premises for the EU primary energy provisions should however fundamentally be the same as the environmental cogitation overall – the pursuit of sustainable development.

The correct interpretation of the scope of the caveat in Article 194(2) TFEU is still uncertain. If the scope of the caveat is largely determined by the extent of the existing secondary legislative body, a threshold might well be used in the interpretation of Article 194(2) TFEU. In that case, the correct legal basis for energy provisions slightly affecting the Member States’ energy rights is found Article 194(2), and the correct legal basis is found Article 194(2) TFEU for energy provisions significantly affecting the energy rights. Either the institutions or the CJEU could possibly rule that the wording of Article 194(2) TFEU, “[s]uch measures shall not affect” should be interpreted ‘such measures shall not *significantly* affect’, which would considerably widen the scope of using Article 194(2) TFEU as a legal basis. If no minimum threshold is determined for the level of significance of the effect on the Member States energy rights under Article 194(2) TFEU, it seems that the scope for the use of the Energy Title as a legal basis is minimal. It is thereby possible that the EU cannot provide provisions affecting 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 under the Energy Title. Presented and based under the Environmental Title, measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply could then be adopted by the special legislative procedure. Also measures affecting but not significantly affecting the Member States’ energy rights could be adopted by the ordinary legislative procedure based on the environmental provisions, whereas any provisions affecting

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<sup>252</sup> *Talus* 2008, p. 641-642.

the energy rights could not at all be based on the Energy Title. This interpretation would substantially limit the applicability of the Energy Title and result in the Energy Title having a rather limited applicability as a legal basis overall.

Then why introduce the Energy Title? Regardless of any interpretation of the caveat, the importance of the introduction of the Energy Title will not be reduced. The apprehension of most scholars that the introduction of the Energy Title merely was a clarification to the *status quo* is probably correct. No significant alternations to the division of powers were introduced. The direct reference in the Energy Title to the Environmental Title steers energy matters clearly into an environmental context, and the specification of the SLP to quite likely in any case concern matters significantly affecting a Member State's energy rights could promote the national powers of the Member States. As a conclusion, it seems that the EU has no competence in measures of non-environmental character that affect the Member States' energy rights, which can only be positive for the environment and sustainable development.

As the legislative body of energy provisions of the Union grows, the scope of the energy rights of the Member States diminishes. The inclusion of the caveat in Article 194(2) TFEU is therefore justified as the most extensive possible shield against Union powers, as the Member States are reluctant to shift the fundamental energy competences to the Union. A gradual shift of the power to the Union in energy matters is justified from the point of view of the climate objectives, and the reluctance of the Member States to fully do so displays possible problematic aspects from an environmental point of view and from the point of view of satisfying the requirements of the integration principle. It is although likely that small steps in measures from the EU will gradually reduce the Member States' energy rights and thereby the scope of action for the separate states to a minimum.<sup>253</sup> The caveat in Article 194(2) in relation to Article 192(2)(c) TFEU is designed to work in a duplex way. If the institutions manage to determine certain frameworks for the level of significance of impact on the Member States' energy rights, the determination of the scope in the CJEU might never need to occur. If, however, the Union institutions

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<sup>253</sup> *Pielow – Lewendel in Delvaux – Hunt – Talus* 2012, p. 269. The expression used by the authors is that the scope of actions for the Member States would be "close to zero", which possibly is exaggerated.

propose measures that have a significant impact on certain Member States energy rights, the provisions might fail in the SPL or lose their significance due to an opt-out clause. If provisions based on Article 192(1) TFEU come out as too restricting on a certain Member State's energy rights after having entered into force, the inaccurate legal basis can be a ground for appeal, when at latest the level of significance of EU energy measures would be determined. The possible inclusion of an undetermined level of signification would however show a certain will from the Member States to contribute to the mitigation of climate changes by energy measures aimed at the environmental objectives. On the other hand, there have been cases at the CJEU where the legal basis has been faulted because of the infringement on Member States' energy rights, which increases the possibility for similar processes in the future.

Even a broad interpretation of the Energy Title or an expansion of powers for the Union in energy policy does not necessarily guarantee the full-scale application of the principle of integration. Further development of environmental, climate- and energy policies should, in my opinion, be performed within a common framework, which would allow catering for all the complexities in these sectors. The separation and separate consideration of these sectors is indecorous. Steps of better integration of the areas are necessary for sufficient progress. Whatever the final interpretation of the scope of Article 194(2) TFEU is, the legislative process falling under the scope will be somewhat difficult. The determination of the legal basis for renewable energy matters is yet to be conducted, but it appears to require an *in casu* evaluation, since the TFEU does not provide a direct answer. This will, however, be determined within the institutional work or in case law and does surely not constitute a problem, although it did provide a basis for interesting contemplation.

It is also worth to remark that a characteristic of EU energy policy is flexibility. As to the alternations to the scope of energy competences introduced by the Energy Title, the conclusion is that the introduction solely includes a codification of pre-Lisbon *status quo*. The only widening of competences visible is the possibility to promotion of technical development of renewable energy sources within the scope of Article 194(2) TFEU. The significance of the introduction of the Energy Title is



uppermost of political value,<sup>254</sup> and a great step towards providing the basis for a common energy policy. One thing that can explain many of the exaggerated concerns about Article 194(2) TFEU might be that the interpretation could have been taken out of context. The interpretation of the caveat includes so much more than the mere text of the Article. The political side, which has been featured slightly also in this text, will most likely play a crucial part in the determination of the today undetermined issues. As also *Guimaraes-Purokoski* has stated, the possibility that the legal basis in the Energy Title is designated to have a rather limited applicability is a non-consistent solution.<sup>255</sup>

Neither the one extremity proposed above in 4.2.2, concerning the caveat in Article 194(2) TFEU being merely a façade, nor the other extremity proposed where the caveat is seen as a spoke in the Union's wheels, seems plausible. So, can the Energy Title halt the decision-making process? The answer is no, providing of energy provisions of all forms is a matter of political will, and the boundaries of the scope have to be determined in time, and for all I know, might already have been determined within the European institutions, not showing outwards. The providing of energy provisions will be a balancing and weighing between different objectives and the European legislator's predominant purpose will most likely be an environmental one, according to all the signs.

As a result, and as processed widely in the text, the Energy Title in itself is not the problem for forming a serious energy policy and promoting renewable energy. The possibilities for the external energy policy will clarify in time, and so will the accurate legal basis for energy provisions of all forms. If anything, it is the special legislative process in Article 192(2) TFEU or some kind of opt-out clause that can retard the providing of ambitious environmentally aimed energy provisions. The most prominent problem with the introduction of the Energy Title might well be the *plausible overlaps in the horizontal competence of the Union* and the *determination of the correct legal basis* instead of the expected results of proving problems in the

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<sup>254</sup> SRU, German Advisory Council on the Environment, Pathways towards a 100% renewable electricity system, Special Report 2011, p 186. Available at: [http://www.umweltrat.de/SharedDocs/Downloads/EN/02\\_Special\\_Reports/2011\\_10\\_Special\\_Report\\_Pathways\\_renewables.html](http://www.umweltrat.de/SharedDocs/Downloads/EN/02_Special_Reports/2011_10_Special_Report_Pathways_renewables.html) (3.1.2016).

<sup>255</sup> *Guimaraes-Purokoski* 2009, p 196.

vertical division of powers. The results of the research were surprising since most focus regarding the introduction of the Energy Title has been on the determination of the possible alternation the vertical division of powers.

An underlying undertaking of the text was to investigate the realisation of the principle of integration in the Energy Title. A direct answer is difficult to provide because of the many aspects to the energy provisions, but overall the conclusion is that the integration principle is well materialised in the Treaty energy provisions,<sup>256</sup> and the implementation is only depending on political will. The fact that the Energy Title likely steers the majority of secondary energy provisions to be provided within the scope of the environmental provisions and the aim to provide the provisions with a legal basis in the Energy Title ‘with regard for the need to preserve and improve the environment’ visualises this.

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<sup>256</sup> Dupont – Primova in Tosun Jale – Solorio, Israel (eds.) 2011 and Dupont – Oberthür 2012 argue that the post-Lisbon competences in energy policy do not provide sufficient tools for EPI, but this is disputable. The tools are sufficient, but the political will is vital, and measuring of the political will is difficult. This is observed by Dupont – Primova 2011, p. 4 and 5-6, but not sufficiently taken into account in the measurement of CPI (climate policy integration).

## Appendix

Paradigm of possible interpretations of the caveat in Article 194(2) TFEU.

