



*Committee on Legal Affairs
The Chair*

15.1.2018

Mr Jerzy Buzek
Chair
Committee on Industry, Research and Energy
BRUSSELS

Subject: Opinion on the legal basis of the promotion of the use of energy from renewable sources (recast) (COM(2016)0767 – C8-0500/2016 – 2016/0382(COD))

Dear Mr Chair,

By letter of 8 December 2017 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 15 January 2018.

The legal basis proposed by the Commission is Article 194(2) of the Treaty on the Functioning of the European Union (TFEU). The amendment adopted during the vote in ITRE is aimed at replacing the above legal basis with Article 194 TFEU in conjunction with Article 191(1) TFEU.

I - Background

The Proposal lays down the principles according to which Member States can collectively and continuously ensure that the share of renewable energy in the EU final energy consumption reaches at least 27% by 2030 in a cost-effective manner across the three sectors of electricity (RES-E), heating and cooling (RES-H&C) and transport (RES-T).

According to the 2030 framework for climate and energy endorsed by the European Council in October 2014,¹ the 27% target is binding at EU level and will be fulfilled through

¹ See, "A policy framework for climate and energy in the period from 2020 to 2030" (COM/2014/015 final).

individual Member States' contributions guided by the need to deliver collectively for the EU. In addition, the new framework enables the collective delivery to be done without preventing Member States from setting their own, including more ambitious, national targets. Member States can support renewable energy, subject to State aid rules.

On several occasions, the European Council has encouraged the Commission to review and develop legislation related *inter alia* to renewables to underpin the agreed 2030 target.¹ The European Parliament has also called upon the Commission to present the renewable energy legislation and to increase even further the ambition level to at least 30%.²

EU energy system projections indicate that current Member States and EU policies, if no new policies are put in place, would only lead to, approximately, 24.3% of renewable energy consumption in 2030. This level would be well below the at least 27% EU level binding renewable energy target as agreed by the European Council, and would prevent the Union from collectively delivering on the commitments made in the 2015 Paris Agreement. The continuation of unchanged policies would also seriously risk undermining the realisation of the Union's political ambition for world leadership in renewable energy. In addition, it would forego the benefits of security offered by increasing energy supply from indigenous sources, and reduce consumers' participation in the energy system.

II - Relevant Treaty Articles

The following Article of the Treaty on the Functioning of the European Union, under Title XXI on 'Energy' of Part Three of the TFEU, entitled Union Policies and Internal Actions, is presented as the legal basis in the Commission proposal (emphasis added):

Article 194

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,

¹ European Council conclusions of 19 – 20 March 2015, of 17-18 December 2015, of 17-18 March 2016.

² See, EP resolutions on "A policy framework for climate and energy in the period from 2020 to 2030" and on "the Renewable energy progress report".

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.

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.

III - The proposed legal basis

The ITRE amendment under examination proposes to change the legal basis of the proposal by **deleting the reference to paragraph 2 of Article 194 TFEU, thus referring to Article 194 TFEU in its entirety, and by adding a reference to Article 191 paragraph 1 TFEU under the environmental title XX of the TFEU**. The new provision reads as follows:

Article 191 ***(ex Article 174 TEC)***

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.

2. [...]

3. [...]

4. [...]

Article 192 TFEU is also relevant for the purposes of this analysis and has the following wording (emphasis added):

Article 192 ***(ex Article 175 TEC)***

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the

Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

- town and country planning,

- quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

- land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

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

3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. [...]

5. [...]

IV - Case-Law

It is settled case-law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure".¹ The choice of an incorrect legal basis may

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

therefore justify the annulment of the act in question. In this context, an institution's wish for more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are irrelevant for the identification of the right legal basis.¹

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.² However, where a measure has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases,³ if procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament.⁴

V - Aim and Content of the proposal

Recital 1 of the proposal clarifies the reason for the recasting of 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 and amending and subsequently repealing Directive 2001/77/EC and 2003/30/EC, namely ensuring clarity.

Recitals 2 and 3 reiterate that the promotion of renewable forms of energy is one of the objectives of the Union energy policy that is needed in order to reduce greenhouse emissions, in compliance with the 2015 Paris Agreement, and to promote energy supply security and technological innovation, also contributing to the reduction of the Union's dependence on imported gas and oil.

Accordingly, Article 3 sets out the 2030 target for the share of renewable energy consumed in the Union, i.e. at least 27%, and the modalities for Member States' contribution to cost-effective and flexible greenhouse gas reductions through the establishment of a financial framework facilitating investments in renewable energy projects and through the use of financial instruments and exchanges of best practices between the competent national or regional authorities or bodies.

Article 4 focuses on support schemes for electricity generated from renewable sources and establishes safeguards in their implementation by the Member States aimed at ensuring the undistorted functioning of electricity markets, in line with state aid rules, and in a transparent fashion, promoting investor and consumer clarity and effective monitoring.

Article 7 regulates the calculation of the share of energy from renewable sources, including a decrease in the maximum share of biofuels and bioliquids produced from food or feed crops

¹ Case C-269/97 *Commission v Council* [2000] ECR I-2257, para 44.

² Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

³ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

⁴ Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] ECR I-2867, paras. 17-25; Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

starting from 2012.

Article 16 establishes a permit granting process for renewable energy projects with one designated authority and a maximum time limit for the permit granting process, whereas Article 19 modifies the guarantees of origin system, among others extending it to renewable gas, rendering it mandatory for heating and cooling upon a producer's request, and improving the administrative procedures through the application of the CEN standard.

Articles 21-24 empower i) consumers to self-consume without undue restrictions, ii) energy communities to participate in the market, iii) energy consumers to stop buying heat/cold from a district heating/cooling system at building level if the consumers can achieve a significantly better energy performance by measures taken at building level.

Article 25 establishes an EU-level obligation for fuel suppliers to provide a certain share of low-emission and renewable fuels in order to stimulate decarbonisation and energy diversification to ensure a cost-efficient contribution of the sector to the overall target achievement. Finally, Article 26 reinforces the existing EU sustainability criteria for bioenergy, including by extending their scope to cover biomass and biogas for heating and cooling and electricity generation, whereas Article 27 clarifies the mass balance system and adapts it to cover biogas co-digestion and injection of biomethane in the natural gas grid.

VI - Analysis and determination of the appropriate legal basis

It becomes clear from the above that the proposal is aimed at addressing investment uncertainty, along a path that takes account of medium and long term decarbonisation objectives; ensuring cost-effective deployment and market integration of renewable electricity as well as collective attainment of the EU-wide target for renewable energy in 2030; developing the decarbonisation potential of advanced biofuels and the renewable energy potential in the heating and cooling sector.

Renewable Energy Sources (RES) contribute to climate change mitigation through the reduction of greenhouse gas emissions, achieve sustainable development, protect the environment and improve citizens' health. Moreover, renewable energy is emerging as a driver of inclusive economic growth, creating jobs and reinforcing energy security across Europe. According to the case law of the Court of Justice, the development of renewable energy is one of the objectives that must guide EU energy policy.¹

Since the entry into force of the Lisbon Treaty, Article 194 TFEU is a specific legal basis for energy-policy measures aimed at ensuring the functioning of the energy market, ensuring security of energy supply in the Union, promoting energy efficiency and energy saving and the development of new and renewable forms of energy or promoting the interconnection of energy networks.

ITRE amendment 1 purports to change the legal basis of the proposal by deleting the reference to paragraph 2 of Article 194 TFEU, thus referring to Article 194 TFEU in its entirety, and by adding a reference to Article 191 paragraph 1 TFEU. It reads as follows:

¹ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdedy Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha*, ECLI:EU:C:2017:705, para.38.

Amendment 1
Proposal for a directive
Citation 1

Text proposed by the Commission

Amendment

Having regard to the Treaty on the Functioning of the European Union, and in particular **Article 194(2)** thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular **Articles 194 and 191(1)** thereof,

Firstly, as far as the use to Article 194 TFEU as a whole as a legal basis is concerned, it should be noted that Article 194 TFEU contains in effect, in paragraphs 2 and 3 respectively, two different legal bases for measures of different nature. While paragraph 3 refers to the measures that are primarily of a fiscal nature, paragraph 2 refers to the adoption of measures necessary to achieve the objectives in paragraph 1. Since the proposal falls clearly within the latter category of measures, a specific mention of paragraph 2 of Article 194 TFEU as legal basis is needed.

In addition, Article 194 TFEU provides for different legislative procedures depending on the nature of the measure. Pursuant to Article 194(3) TFEU, a special legislative procedure applies, where Parliament is only consulted and unanimity in Council is required for measures which are primarily of fiscal nature. In contrast, pursuant to Article 194(2) TFEU, the ordinary legislative procedure applies for the adoption of measures necessary to achieve the objectives set out in Article 194(1).

The main purpose of the proposal seems to fall entirely into the objectives of the Union policy on energy laid down in Article 194(1) TFEU. Therefore, in order to indicate the legal basis in a manner that allows for determining both which procedure is applicable to the adoption of the Proposal and the required majority necessary in the Council, it is appropriate to rely to Article 194(2) as the legal basis of the Proposal, instead of Article 194 TFEU as a whole.

As far as the reference to Article 191(1) TFEU is concerned, which is proposed to be added to the legal basis of the proposal, it should be underlined that it is not an operative article. It lays down the objectives of the EU environmental policy, as well as other principles that the Union shall take into account when forming its environmental policy and with regard to cooperation with third countries in the field of environment. This provision does not empower the EU institutions to adopt legislative measures in the field of environment and therefore cannot serve as a legal basis.

If the idea of the amendment was to add an environment legal basis, then Article 192(1) TFEU is such a legal basis since it provides for the ordinary legislative procedure for the achievement of the objectives referred to in Article 191 TFEU. Even so, the addition of a further environmental legal basis to the proposal would have to be justified. Specifically, it would have to be shown that the proposal has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in

relation to the other(s).¹ Considering that Article 194 explicitly links the preservation and improvement of the environment to the development of Union energy policy objectives and taking into account the aim and content of the proposal, it appears that the main and predominant purpose and component of the proposal is the promotion of energy-related objectives. Insofar as also environmental aspects are taken into account, they are clearly secondary to the main aim of promoting energy from renewable sources within the meaning of Article 194(1)(c) TFEU.

VII - Conclusion and recommendation

In light of the foregoing analysis, the changes to the legal basis of the proposal envisaged by the ITRE amendment in question appear to amount, as far as they concern the reference to Article 191 TFEU, to inappropriate references to a non-operative Article of the Treaties that does not constitute a contemporaneous objective based on the content and aim of the proposal. As regards the use of Article 194 TFEU in its entirety, the deletion of the reference to its paragraph (2) should not be accepted, as it removes the reference to the specific type of legislative procedure to be followed for the adoption of the relevant proposal.

At its meeting of 15 January 2018 the Committee on Legal Affairs accordingly decided, by 19 votes to 0 with 0 abstentions,² to recommend that you revert to the original legal basis featuring in the Commission proposal, namely Article 194(2) TFEU, as the only appropriate legal basis considering the aim and content of the said proposal.

Yours sincerely,

Pavel Svoboda

¹ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

² The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada (Vice-Chair), Mady Delvaux (Vice-Chair), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Geoffroy Didier, Pascal Durand, Jytte Guteland, Mary Honeyball, Sylvia-Yvonne Kaufmann, Jens Rohde, Virginie Rozière, József Szájer, Axel Voss, Tiemo Wölken, Francis Zammit Dimech, Tadeusz Zwiefka; Antanas Guoga pursuant to Rule 200(2).