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DOTTORATO DI RICERCA IN
"DIRITTO DELL'UNIONE EUROPEA
E ORDINAMENTI NAZIONALI"

CICLO XXXI

COORDINATORE Prof. Giovanni De Cristofaro

The difficult relationship between energy and environment: a EU constitutional analysis.

Renewable energy as a case study.

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Dottoranda

Dott.ssa Mariavittoria Zaccaria

Tutori

Prof. Paolo Borghi

Prof.ssa Silvia Manservisi

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I. INTRODUCTION

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1 Introductory background

On 12 September 2018 the President of the European Commission, in its letter of intent on the State of the Union, has indicated "*the Energy Union with its forward-looking climate policy*" as one of the ten priorities of the European Union. In this priority, two of the main policies areas of the European Union are enshrined: energy policy and environmental policy.

While modern economies widely rely on energy for their functioning, energy consumption is also one of the most important threats to the future of the planet. It is generally accepted that climate change is mainly the result of hydrocarbon consumption, but there are wide divergencies in national attitudes with respect to environmentally safe responses to this issue (e.g. the decision of Member States to use nuclear energy as a response). On its side, the European Union is trying to find shared common values and to include them in its policy documents and legislation, but the actual situation is still far from finding a common culture, consequently creating complications and regulatory inefficiencies. One sure thing in this sector is that one size does not fit all, but defining sizes is a growing issue.

The legal foundations of EU action in the energy sector play a major role in the debate about integrating environmental concerns in many of the energy sectors as one of the major objectives of the Union. Until the adoption of the Lisbon Treaty the European Union had no formal competence to legislate on energy matters. As a result, an EU energy policy did not exist, but there were a number of environmental policies in the energy sector, which were all adopted by virtue of the environmental competence of the European Union. For example, in order to reach the EU-wide target of 20 per cent renewable energy production by 2020, Directive 2009/28/EC on the promotion of the use of energy from renewable energy sources was adopted because the European Community enjoyed of competence in the environmental sector. This directive imposes national binding targets on the share of renewables, which contribute to the

achievement of the overall EU target, consequently affecting the national energy strategies of Member States and imposing on them important efforts both in economic and structural terms. Its provisions thus have mainly an energy content, which only indirectly achieve environmental objectives.

The Lisbon Treaty introduced Article 194 TFEU that confers upon the Union the competence to act in the field of energy. As a consequence, the European Union is now entitled to aim at the specific energy objectives of (i) ensuring the functioning of the energy market; (ii) ensuring security of energy supply in the Union; (iii) promoting energy efficiency and energy saving and the development of new and renewable forms of energy; and (iv) promoting the interconnection of energy networks through *ad hoc* measures. Nonetheless, the pursuit of these objectives may – and often is – still linked to the pursuit of environmental objectives, which may be contradictory or need careful coordination. For example, achieving a good level of security of energy supply throughout Europe can be a challenge for the simultaneous development of other more environment-related objectives, such as the development of energy from renewable sources. In fact, renewable energy, although it is cleaner, ensures much lower performances in terms of continuous supply to the grid and this could thus encourage the choice of more traditional sources of energy. The challenge for the European institutions is thus to explore actions that allow the simultaneous pursuit of both objectives.

Another issue for the development of the European energy policy is that for long time energy has been seen as a highly politicized sector, for the functioning of which national political systems were held responsible. On one side, energy industries were large monopolies or oligopolies, to which national governments were giving substantial financial support. On the other side, the exploitation of natural resources and the choice between different energy sources was perceived as an exclusively national matter, determined on the basis of national market and geographical structure, together with the political perceptions of people. For these reasons, a political consensus on important energy matters could difficultly be found throughout the Union. Nonetheless, the European institutions managed to adopt some important pieces of legislation that allowed – *inter alia* – the liberalization of the energy markets and the development of renewable energies and energy efficiency. This was however

also due to the competence of the Union in the Internal Market and in the protection of the environment.

Article 194 TFEU seems however to introduce new limitations to the action of the Union, in favour of the Member States, while formally conferring competence upon it. The second paragraph of the Article provides that "[measures taken under Article 194 TFEU] *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)*". Article 192.2(c) TFEU provides that "*measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply*" must be approved at unanimity in the Council. As such, it seems that the new energy title should *a priori* not restrict the Member States' choices with regard to energy sources. However, measures significantly affecting such choices can be adopted pursuant to Article 192.2(c) TFEU, which is under the environmental title of the Treaty.

It is thus clear that problems of coordination between the two provisions may in practice arise, especially when the European institutions intend to adopt measures that should normally fall under the energy competence, but also have environmental objectives. In fact, the scope of the competence conferred by the two provisions is different (stricter for energy and wider for environmental protection), the different objectives together with the different legislative procedures provided may determine difficulties in the choice of the correct applicable legal basis.

2 Research question and methodology

The present thesis thus intends to respond to the following main research question:

> *How coherent is the EU constitutional framework for energy and environmental policies and how does it influence the development of EU energy policies having environmental aspects?*

In order to answer this question a top-down approach will be followed. Indeed, the usual approach to energy law – both at national and EU level – is very sectorial: books and articles normally cover specific issues, analyse directives, trying to provide answers to very specific legal problems. Authors move from secondary legislation to

(possibly) primary sources in order to explain the legal issues that affect this sector. This work will instead proceed to the opposite: it will move from the provisions of the Treaties by searching their rationale and trying to find possible solutions to their inconsistencies and it will then move to secondary legislation and to the European Commission practice, in order to assess whether and – if so – how the content of EU secondary legislation is affected by the constitutional provisions.

The analysis will particularly focus on two aspects: (i) the innovation that has been brought by the adoption of the Lisbon Treaty as compared to the previous constitutional framework and (ii) the impact that the Treaty framework has on renewable energy policies. With regard to the first aspect, it is evident that the introduction of the energy competence was aimed at bringing new, disruptive changes in the allocation of competences between the European Union and the Member States, but it is not clear whether such changes have been actually brought and whether they have actually improved and enlarged the scope of Union's action. With regard to the second aspect, renewable energies are one of the areas in which the interaction between energy and environment are most evident. As a result, they have been considered a good test for the efficacy of the EU legislation and policy. Moreover, in the context of a general update of EU secondary legislation on energy, the Commission has adopted a recast of the Renewable Energy Directive, which is the first to be adopted under the new Treaty framework and which includes relevant differences from the previous regime.

The scope of the present work, however, is limited to the internal dimension of the European energy competence and policy. Although the external dimension of the energy policy is an extremely interesting and challenging topic, the temporal and special constraints of this thesis have required a delimitation of the scope of the analysis, so as not to underestimate a topic that deserves being analysed in much more detail[1].

[1] For some hints, see: Jan Wouters et al, 'The European Union's External Relations after the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* (2008, European Community Studies Association of Austria Publication Series) Vol 11, 173; M Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Craig and De Búrca (eds), *The Evolution of European Law*, 2nd edn (Oxford University Press, forthcoming 2011) 371–461.

3 Structure of the thesis

This doctoral thesis is organized into six chapters.

This first chapter explains the background, rationale and structure of the work. The second chapter then moves to the substantive issues of the relationship between energy and environment in the European constitutional framework. After a short historical *excursus* on the origins and development of European energy law, it sets the scene for the following discussion, briefly analysing the relevant Treaty provisions for the EU energy policy and showing the main issue that may arise from them.

The third chapter analyses the competence of the European Union in the field of energy. The chapter focuses on the analysis of the "competence question" in the European Union and how it has evolved in the various amendments of the Treaty. It then explains how the question of competence is relevant for the energy sector and how it has been addressed in the occasion of the negotiations of the Treaty adopting a Constitution for Europe and, later, of the Lisbon Treaty. In particular, it tries to assess the nature of the European energy competence in the TFEU as a third element between shared and support competences.

The fourth chapter covers the issues that could arise in the choice of the legal basis when a measure having both energy and environmental objectives must be adopted. The chapter also tries to give solutions to this problem by proposing the use of general principles of EU law as possible ways out to constitutional *empasses*. In particular, solidarity, the principle of environmental integration and proportionality will be analysed as possible answers.

The fifth chapter examines the proposed case study: renewable energy sources. It moves from an analysis of the general policy of the European Commission in the field of climate change, it then analyses the Directive 2009/28/EC on the promotion of energy produced from renewable sources and it finally assess the new proposed directive on renewable energies, with also a focus on the connected negotiations. The aim of the chapter is to show the connections between the Treaty framework and secondary legislation and how they influence each other.

Finally, the sixth chapter gives some conclusive remarks.

II. THE LEGAL BASIS FOR ENERGY MEASURES.

Summary: 1 Introduction - 2 The long way from the ECSC Treaty to Article 194 TFEU – 3 The European constitutional framework for the energy policy after the introduction of Article 194 TFEU – 4 Conclusion

1 Introduction

In the history of the European Community (now, Union), energy has always played an important role. Despite such importance, there have however been many difficulties in finding its place in the European regulatory framework. This has been mainly due to the strong national interests that lay behind energy matters, but also to the variety of regulatory issues that it raises: proof of it can be found in the present wording of Article 194TFEU, according to which competition, internal market and protection of the environment must be taken into consideration in the development of the European energy policy.

As a consequence, the regulation of energy has been left, initially, to the Member States, which maintained their sovereignty over issues of such an importance, while the Community had the sole task of gathering data on energy consumption, production and the construction of new projects. The role of the Community has slowly increased, but it has only been in the late '80s that the European legislation has actually moved towards the liberalization of the energy market and the integration of environmental and energy policies.

However, striking a balance among the really different interests laying behind energy regulation has immediately proven a difficult task. Legislation on energy was not a uniform body, also due to the lack of a specific legal basis in the Treaties. As a consequence, pieces of legislation on the matter were mainly adopted either under the internal market legal basis (Article 95 TCE) or under the environmental one (Article 175 TCE).

In particular, the strong European commitments towards the fight to climate change, the signature of the Kyoto Protocol in 1992 and the constant and increasing development of renewable energy led the European Institutions to the adoption of pieces of legislation relating to energy that were – also – aimed at the protection of the environment. In the lack of a specific legal basis, such instruments were adopted under Article 175 TCE (now 192 TFEU), making the environmental aim of legislation prevail over the energy one. However, in some sensitive areas of energy regulation, mainly concerning renewable energies, it became clear, as time passed by and technologies were becoming more and more advanced,

that regulating the development of renewable energies was no more just a question of protecting the environment and fighting against climate change, but it was increasingly a question of structural development of grids, security of supply etc.: issues that are far more energy-related than environment-related. Accordingly, the necessity for a dedicated legal basis became progressively more intense, although it was only with the proposed Constitutional Treaty that a draft energy chapter came to reality.

Despite the Constitutional Treaty ended up in dead letter, the Lisbon Treaty adopted the innovations introduced by the Constitutional Treaty in article 194 TFEU, with some minor changes. As it will be further seen in the present chapter, despite the formal creation of an energy chapter in the Treaties several doubts and concerns still rise over the effective regulatory structure for energy.

In order to understand the present regulatory framework for energy and evaluate its effectiveness, it is thus necessary to go through the historical steps that have led to the introduction of Article 194 TFEU. Accordingly, the present chapter will first introduce an overview of the evolution of the regulation of energy in Europe; it will then analyse the present set-up of competences, with particular regard to renewable energies and, thus, also to the environmental legal base; lastly, as conclusive remarks, it will put forward the main issues arising from such set-up.

2 The long way from the ECSC Treaty to article 194 TFEU

2.1 The origins of the European energy policy

At the beginning of its history, European energy law was a matter for national governments. The importance played by energy in the creation of the economic structure of national states and its centrality as a service for citizens make it a contentious subject, regarding which national political interests may play a decisive role, even in the production of concerned legislation. Such issues are even more evident when it comes to regulating the energy sector at European level. Indeed, it is the founding structure of the EU that requires Member States to partially limit their powers in favour of the European Union. It is thus clear that in this delicate sector relevant political contrasts may raise, both between Member States and between the Union and the Member States[2].

[2] Rafael Leal-Arcas and Andrew Filis, 'Conceptualizing EU Energy Security through an EU Constitutional Law Perspective' (2013) 36 Fordham International Law Journal 1225-1301, 1226.

Nonetheless, the strategic importance of energy in the creation of an integrated European Community was immediately recognized by the founding Member[3], which put it at the centre of the first agreements signed in view of the creation of what is now the European Union.

In this sense, the qualification of energy as a "*driver of integration*"[4] is quite accurate, because it is hardly possible to explain the origins of the European Union (EU) without taking into consideration how the first steps of the European Community were moved around coal (European Coal Organisation (ECO) in 1946 and the Organisation for European Economic Co-operation (OEEC) in 1948).

More significantly, in 1951 the Paris Treaty was signed and the European Coal and Steel Community (ECSC) created a common market for coal. After the devastations following the Second World War, Europe needed energy for reconstruction and coal represented around 80 per cent of energy use at the time. Energy was thus considered an instrument of economic growth, but also of peace building[5]. Nonetheless, the activity of the High Authority of the ECSC was quite limited, it being confined to the promotion of coal trade according to free market principles. Indeed, its powers were limited as well: when a coal surplus was registered in Europe, its attempts to enforce the free market against Germany and France that had introduced barriers to imports were useless. This could be read as a sign that formal recognitions of the necessity of acting together in the energy policy were not enough in order to create an actual common energy policy.

In 1957, the Euratom (European Atomic Energy Community) Treaty was signed and placed beside the ECSC Treaty[6]: it was imagined in order to guarantee that sufficient energy was streamed and produced as to ensure the European economic growth and the development of the European energy sector. Accordingly, the proposed outcome for the Euratom Treaty was

[3] Belgium, France, Germany, Italy, Luxembourg and The Netherlands.
[4] Israel Sandoval and Francesc Morata, 'Introduction: the re-evolution of energy policy in Europe' in Israel Sandoval and Francesc Morata (eds), *European Energy Policy An Environmental Approach* (Edward Elgar Publishing 2012).
[5] Janne Haaland Matláry, 'The Development of Energy Policy in the European Union' in Janne Haaland Matláry (ed), *Energy Policy in the European Union* (Macmillan Education UK 1997).
[6] Together with the Euratom Treaty, also the EEC (European Economic Community) Treaty was signed: its primary objective was the establishment of a common market, the approximation of economic policies of the Member States and the harmonious development of economic activities throughout the Community. Accordingly, barriers to trade were abolished, a common custom policy was set up, norms ensuring undistorted competition were introduced. For a far wider analysis see: Martin Holland, *European Integration: From Community to Union* (Pinter Pub Ltd 1994).

the creation of the necessary conditions for "*the development of a powerful nuclear industry which will provide extensive energy resources*"[7].

The two Treaties, however, did not give the expected effects: on one side, the replacement of carbon with oil deprived the ECSC of its scope, while on the other side, the implementation of the Euratom Treaty was slowed down by the political interests of some Member States, such as France, which opposed to the mutualisation of sources of supply of fossil materials. As a consequence, at the beginning of the '60s, the only effective instrument for the regulation of energy was the EEC Treaty and, in particular, the provisions on the functioning of the common market[8]. Given the lack in the EEC Treaty of a specific provision on energy, many questions were raised on how to coordinate national policies, especially since issues were growing on the functioning of the internal market for energy and the creation of equal conditions in terms of competition between Member States[9]. As a consequence, the Commission made some proposals in the sense of the creation of a more coordinated European energy policy, but they were all strongly opposed by the Council, which was instead pushing for keeping energy policies at national level.

As a consequence, in the following years the Community's performance in this field kept being inadequate with respect to the growing number of transnational issues[10]. The Commission itself stressed the "*inadequacy and inconsistency of the action taken*"[11], due – in particular – to the inconsistency in the policies of Member States, with relevant effects on the economy not only of single Member States, but also of the Community as a whole. In fact, also partially due to the intrinsic characterization as "natural monopoly[12]" of the energy market, the Community's energy sector (apart from oil and coal) was still completely left in

[7] Preamble, Consolidated version of the Treaty establishing the European Atomic Energy Community, OJ C 327, 26.10.2012, p. 1–107.
[8] Michel Derdevet, 'L'énergie dans le Traité de Lisbonne: un premier pas vers une communauté européenne de l'énergie?' in Aurélien Raccah (ed), *Le Traité de Lisbonne: de nouvelles compétences pour l'Union européenne?* (L'Harmattan 2012), 157.
[9] See in this sense, René Gendarme, 'Reflexions sur la politique énergetique européenne' (1962) 13 Revue Économique 505-520.
[10] Terence Dainith and Leigh Hancher, 'The management of diversity: Community Law as an instrument of energy and other sectorial policies' (1984) 4 Yearbook of European Law 123-167.
[11] The Development of an Energy Strategy for the Community. Communication from the Commission to the Council. Mandate of 30 May 1980. COM (81) 540 final, 2 October 1981. Bulletin of the European Communities, Supplement 4/81, pp. 7-20.
[12] In such cases, trying to increase competition by encouraging new entrants into the market creates a potential efficiency loss to society if the new entrant is forced to highly increase the infrastructure. Consequently, it may be more efficient to allow only one firm to supply to the market because allowing competition would mean a wasteful duplication of resources. On this see: Fernando Cordero Martinez, 'The EU Energy Market Regulation Puzzle: Is There Still a Way Out? - The Case for a Fourth Energy Package Along Completely Different Lines' (2014) Renewable Energy Law and Policy Review 121-129.

the hands of national regulators and characterized by state-owned energy monopolies, with little or no cross-border trade in gas and electricity[13].

Nonetheless, the lack of a coordinated energy policy had also positive effects. Indeed, the institutional flexibility stemming from the text of the Treaties allowed the Community to start incorporating environmental issues in its scattered energy policies. In the 1970s environmental concerns were growing and the Community did not hesitate to focus on the ecological impact of the energy chain. Both the Commission's action[14] and the Council's resolutions reflected the increasing environmental awareness. On the other side, the oil crisis of the 1970s required the Community action to focus on energy security as one of its paramount policy goals. As a consequence, the necessity of formulating and developing coordinated policies in order to tackle the energy problems became increasingly relevant.

Importantly, in 1975, the Council adopted the "*Resolution on Energy and the Environment*"[15], in which it acknowledged the opportunity of taking into account environmental concerns in the production and consumption of energy, in order to avoid further harms to the environment, and announced some proposals relating to thermal discharges, sulphur dioxides and nitrogen oxides. This was the first step towards the integration of environmental and energy policy and was then followed by a number of acts going in this direction.

2.2 The market liberalization and the environmental integration

The decade following the Council resolution of 1975 was however still marked by a certain difficulty for the Community to get the Member States accept the need for transferring more powers to the Community in the energy sector or at least to produce more centralized policies.

In particular, some commentators were referring to a certain "structural stiffness" of the national legislations on energy supply in the Member States, which increased the difficulty for an integrated approach[16]. As a consequence, the provisions in the Treaties that theoretically empowered the Community to take action were remaining a dead letter, because neither the Commission nor corporate claimants were able to enforce them. Most

[13] Kim Talus, *EU energy law and policy a critical account* (Oxford university press 2013), 16.
[14] See as an example: Preliminary report on the problems of pollution and nuisances originating from energy production (with a special emphasis on SO2, particulate matter, NOx and thermal discharges). SEC (74) 1150 final. 3 April 1974.
[15] Council Resolution of 3 March 1975 on energy and the environment [1975] OJ C 168, 25.7.1975, p. 2–3.
[16] Terence Daintith and Leigh Hancher, *Energy Strategy in Europe: The Legal Framework* (Walter de Gruyter & Co 1986), 148-149.

energy companies were still in a position of national monopoly and were not interested in expanding out of the national territory.

The year 1986 marked an important step forward in the process of creation of an Internal Energy Market and of the integration of energy and environmental policies. The exigency of creating an efficient market – and thus treating energy truly as a good[17] – together with that of protecting the environment were slowly becoming a matter perceived also by the national governments.

At the time some, commentators found the reasons for the liberalization of the European energy markets in the progressive loss of purpose and political legitimacy of national energy monopolies[18]. National governments had understood that energy could be run through competitive markets and consumers became aware that monopolistic companies were actually charging them prices much higher than those that could have been set in a competitive environment.

Moreover, in 1986 the Single European Act (SEA) was adopted. According to the new Article 95, the Commission was entitled to propose directives designed to approximate domestic laws. Moreover, the qualified majority in the Council – instead of unanimity – was required for the adoption of such harmonization measures. Clearly, the Commission had now much more leeway from the Member States, not being constrained by the tight limits of the unanimity vote. Since the action for the dismantlement of national monopolies and creation of open national markets could well fit in the internal market policies of the European Community[19], the energy policy was formally included in the overall internal market action[20]. The point of the Commission was indeed that an internal market could not exist without the inclusion of energy.

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[17] Energy had been recognized as a "good" by the ECJ in 1964: Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66. In this decision, the Court ruled that pursuant to the provisions of the Treaty on the free movement of goods, Member States are not allowed to introduce measures that are capable of restricting such freedom. In the case at stake, the Court ruled that Italy shall not introduce new monopolies in the energy sector, as long as they create a new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed. Such interpretation was particularly important for the future developments of energy policy in the European Community, since it became the basis for the creation of the Internal Energy Market, were energy – as a good – could move freely among Member States. For further details on this, see: L.G. Radicati Di Brozolo, 'Profili di diritto comunitario del mercato dell'energia elettrica' (1995) Rivista italiana di diritto pubblico comunitario 431; L. Razzitti, 'Principi ed evoluzione della normativa e della politica comunitaria in tema di energia elettrica' (1996) Rassegna giuridica dell'energia elettrica 597.

[18] Talus, *EU energy law and policy a critical account* (n. 13), 19.

[19] Completing the Internal Market. White paper from the Commission to the European Council COM(1985) 0310 FINAL.

[20] The Internal Energy Market (Commission working document), COM (1988) 238. This document has been defined as the "manifesto" in which the Commission showed the need for an integrated market and analytically assessed the fields in which EC law could apply (internal market, competition and State aid). In this sense, the

As a result, despite the lack of a formal introduction of an energy chapter in the Treaty and on the basis of purely Internal Market rules, the Commission was able reply to the concerns of the European population – eager for lower energy prices – and introduced a new package of directives aiming at liberalization. Accordingly, important pieces of legislation such as the Price Transparency Directive[21], the Electricity[22] and Gas Transit [23] Directives and the Hydrocarbon Directive[24] were adopted. However, it was not without difficulties: despite supporting the general idea of an Internal Energy Market, Member States had still strong reservations on the parts that could affect their domestic energy sectors, fearing of losing national control over energy policies[25].

In particular, Member States tried to keep their prerogatives and the monopolies of state-owned energy companies by qualifying their activities as Services of General Economic Interest (SGEI)[26], consequently trying to exempt them from the application of EC provisions on competition. In fact, although SGEIs are usually subject to competition rules[27], pursuant to Article 90.2 EEC (now, 106.2 TFEU) an undertaking entrusted with SGEIs can be exempted from the application of competition rules, as long as such rules obstruct the

lack of a specific Community competence was not perceived as an issue, given that the energy market was interpreted as part of the wider internal market as framed by the SEA. (Marilù Marletta, 'Il Trattato di Lisbona e l'energia' in Nicoletta Parisi and others (eds), *Scritti in onore di Ugo Draetta* (Editoriale Scientifica 2011), 396).

[21] Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users [1990] OJ L 185, 17.7.1990.

[22] Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids [1990] OJ L 313, 13.11.1990, p. 30–33.

[23] Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids [1990] OJ L 147, 12.6.1991, p. 37–40.

[24] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons [1994] OJ L 164, 30.6.1994, p. 3–8.

[25] Matláry, 'The Development of Energy Policy in the European Union' (n. 5), 20 ff.

[26] In the Treaty there is not a definition of Services of General Economic Interest, however the Commission has intervened several times on the point, defining them as "*market services which the Member States subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communications*", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - White Paper on services of general interest, COM(2004)0374 final. Also the ECJ has clarified the concept. See old school leading cases such as: Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, Case 10/71 *Ministère public luxembourgeois v Madeleine Muller* [1971] ECR 723. For further analysis on this point, see: Marco Carta, 'La liberalizzazione dei servizi di interesse economico generale nell'Unione: il mercato interno dell'energia elettrica' (2003) 4 Il Diritto dell'Unione Europea 784.

[27] As a general rule under Article 90.1 EEC (106.1 TFEU) the existence of a monopoly or the grant of special or exclusive rights does not infringe competition rules *per se*, as far as it does not resort in the abuse of dominant position by the undertaking granted of those rights and to the violation of general Treaty norms on competition. See: Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, par. 16-22, Case C-320/91P *Procureur du Roi v Paul Corbeau* [1993] ECR I-2533, Case C-451/03 *Servizi ausiliari dottori commercialisti Srl vs Calafiori* [2006] ECR I-2941, par. 23. The ECJ's approach has now changed: a right granted under article 106.1 TFEU is considered *prima facie* contrary to competition rules, unless objectively justified. See: Case C-475/99 *Ambulanz Glockner v Landkreis Südwestplatz* [2001] ECR I-8089.

performance of the particular tasks assigned to it. National companies would have then continued their activities as monopolies being exempted from the application of the liberalization directives just adopted at Community level. The Commission thus decided to bring action before the European Court of Justice against nine out of twelve Member States for failure to fulfil their obligations under the Treaty rules on internal market and competition[28]. In all cases the Court supported the arguments of the Member States, on the basis that hindering the imports or exports of energy was ancillary and necessary for the supply of energy services, qualified as SGEIs, and thus justified. However, it stressed that the supply of power should be considered a good under the Internal Market rules and thus that Article 30 to 37 EEC had to be applied.

The academic literature, however, did not show particular concerns with regard to the abovementioned judgements, which were instead interpreted as the proof that energy monopolies were coming to the end of their life. The ongoing change in the relation between energy consumption and economic growth – made of smaller units, instead of giant plants – were rendering the idea of massive investment plans obsolete[29].

The adoption of the SEA marked a step forward also in the integration of the energy and environmental issues. In particular, Article 130R introduced a formal legal basis for environmental action: it conferred upon the Community an express power to enact environmental legislation to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; and to ensure a prudent and rational utilisation of natural resources. Moreover, a first formulation of the principle of integration was inserted in the Treaty, providing that "*environmental protection requirements shall be a component of the Community's other policies*". According to Article 130S such legislation had to be adopted by unanimity vote in the Council. However, the declaration from the Member States annexed to Article 130R also stated that "*the Conference confirms that the Community's activities in the sphere of the environment may not interfere with national policies regarding the exploitation of energy resources*".

Such declaration, together with the formulation of Article 130R pushed some commentators to contend that it was too narrow to be useful for the purpose of protecting the environmental aspects of energy production. Its application could only serve to strictly environmental

[28] Case C-158/94 *Commission v Italy* [1997] ECR I-5789Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699, Case C-159/94 *Commission v French Republic* [1997] ECR I-5815 and Case C-160/94 *Commission v Kingdom of Spain* [1997] ECR I-5851.
[29] Walt Patterson, *Transforming electricity: the coming generation of change* (Nature 1999).

issues, while for other aspects of energy regulation, Article 100A – the general legal basis for harmonization measures – would be more adequate, also considering that majority voting was required[30].

To the contrary, some others[31] submitted that, despite the formally stricter procedure and scope, the provision under Article 130R was actually a safer option for those Member States who were reluctant to conceding regulatory space to the Community in the field of energy (a particularly sensitive issue), since falling under Article 130R would have meant (i) having a veto right on the measure proposed; (ii) taking into account regional conditions, thus avoiding forms of complete harmonisation; (iii) adopting minimum standards, thus allowing much larger margin of manoeuvre to the Member States for national measures. This in fact was probably also the scope of the declaration annexed to the Treaty.

As a consequence, despite having one more instrument for policy coordination, the Commission was now compelled to much more difficult choices when proposing the legal basis for its measures. While the interrelation between energy and the environment was perceived as a central issue, the problem of striking a balance between the need for a Community action - due to the highly transboundary nature of environmental protection - as opposed to the strong national interests laying behind energy issues was posed to the Community legislator[32].

In the following years, the Commission's action on energy did not achieve remarkable results. However, climate change became an important topic at international level and it favoured also the development of policy actions at the European level, which took into account the links existing between the protection of the environment and energy. In October 1990, the Joint Council of Energy and the Environment adopted the first EU target for stabilizing carbon dioxide emissions, consequently paving the way for a more concrete interlink between energy and the environment. Accordingly, in this period the environmental policy was institutionalized as a possible path for intervening in the energy field.

In view of the Rio Conference[33] that was held in 1992, the Commission launched a 'Climate Package', including proposals for measures on renewable electricity (RES-E), energy

[30] John Usher, 'The development of Community powers after the Single European Act' in Robin White and Bernard Smythe (eds), *Current Issues in European and International Law* (Sweet & Maxwell 1990).
[31] Leigh Hancher, 'Energy and the environment: striking a balance?' (1989) 26 Common Market Law Review 475-512, 499 ff..
[32] Mauro Politi, 'Energia nel diritto comunitario' (1991) IV Digesto delle discipline pubblicistiche 1-11.
[33] The commitments of the Council before the Rio Conference can be seen in its conclusions of 26 May 1992, where it generally supported the measures to be adopted both in the Rio Declaration and in the Agenda 21.Council of the European Communities. Press Releases. Presidency: Portugal January-June 1992. Meetings

efficiency and energy savings, and a tax on energy consuming products[34]. Although the initial proposal was significantly diluted by the Council, it fostered the development of the first Community strategy to fight climate change, the emergence of a EU climate policy and the development of environmental integration issues.

During the negotiations of the Treaty on the European Union, signed in Maastricht in 1992, the Commission proposed for the first time a draft text for a legal basis on energy to be introduced in the Treaty[35]. While the Commission's aim was to foster security of supply and the concrete realization of the internal energy market, the negotiators did not agree on this proposal and no additional provision was added to the Treaty.

Nonetheless, in Article 3 EC a specific reference to energy was made: it was recognised as one of the areas of activity of the European Community, but no reference was made to the measures that could be actually adopted in this area. Thereby, it seemed that the European Community did not enjoy of an actual competence.

Such interpretation was also supported by the Declaration no. 1 on civil protection, energy and tourism annexed to the TEU, which provided that "*The Commission declares that Community action in those spheres* [namely, energy, civil protection and tourism] *will be pursued on the basis of the present provisions of the Treaties establishing the European Communities*".

As a consequence, from then onwards the Commission focused more on the adoption of sector specific instruments: some of them were based on the internal market legal basis, some others on the environmental one. Everything that fell outside these two sectors was decided on the basis of Article 235EC. However, resistances from the Member States were still present and sometimes were reflected in failures to implement EU law at national level. In such cases the Commission kept on relying on its enforcement powers together with the *ex-post* control exercised by the Court[36].

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and press releases May 1992, while the Rio Declaration and the Agenda 21 can be found respectively at UN, 'Rio Declaration on Environment and Development' Rio de Janeiro, 3-14 June 1992) <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> accessed 15 July 2017 and United Nations, 'United Nations Conference on Environment & Development - AGENDA 21' Rio de Janerio, Brazil, 3 to 14 June 1992) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 15 July 2017.

[34] Jon Birger Skjærseth, 'The Climate Policy of the EC: too Hot to Handle?' (1994) 32 Journal of Common Market Studies 25-45.

[35] Intergovernmental Conferences: Contributions by the Commission. Bulletin of the European Communities, Supplement 2/91, 141ff.

[36] Talus, *EU energy law and policy a critical account* (n. 13), 65.

As an example, in the directives on the internal electricity market the Commission did not try to centralize the regulatory powers at the Community level, but instead it tried to regulate through a tight cooperation with national authorities, in which its role was coordinating and supporting the activities at national level. Such choice had been highly conditioned by the lack of an explicit competence in the Treaties with regard to the energy sector. Nonetheless, Member States used the leeway given to them by the Commission: they did not open the national energy markets and they exploited the asymmetries between the various markets in order to favour their national companies. In this sense, it has been said that the energy sector was at the time characterized by policy mechanisms closer to those of public international law, rather than Community law[37].

Moreover, further recognition was given to the environmental integration principle: "*Environmental protection requirements must be integrated into the definition and implementation of other Community policies*[38]", although it was only with the Treaty of Amsterdam that the environmental principle was recognised as a general principle of EU law and it was moved into Article 6 EC.

Although not formally recognised as a general principle of EU law, the integration principle played a major role in the creation of interconnected energy policies, in which not only internal market aspects were addressed, but also the environmental protection ones. In such context, in 1995 the Commission adopted a White Paper on "An Energy Policy for the European Union"[39]. The Commission pointed out the growing globalisation of markets, including not only energy in general, but also those energy markets that had not been exploited yet. For this reason, the Commission stressed the importance of looking at those aspects of the markets that were characterized by a strong connection between energy and the environment. Moreover, the responsibility of the Community in this field was growing and it needed to determine a clear governance structure, allocating powers to the Community, the Member States and local authorities, while respecting the principle of subsidiarity. Moreover, the Commission recognised several deficiencies in the legal framework: the *acquis communautaire* was insufficient, there being considerable gaps in the Community's range of instruments in the energy sector and outdated and that the

[37] Francesco Munari, 'Il nuovo diritto dell'energia: il contesto comunitario e il ruolo degli organi europei' (2006) 4 Il Diritto dell'Unione Europea 881-900, 886.
[38] Article 130r, paragraph 2 of the Treaty on European Union.
[39] White Paper: An Energy Policy for the European Union, COM (95) 682 finalSee also the following resolution from the Council: Council Resolution of 8 July 1996 on the White Paper 'An energy policy for the European Union' [1996] OJ C 224, 1.8.1996, p. 1–2.

construction of an authentic dialogue was difficult outside certain consultative committees specifically instituted for such purpose. However, the Commission underlined how – while waiting for possible reforms in the Treaties – all constitutional instruments available for the development of a European energy policy should be used[40].

The development of renewable energies was also acquiring growing importance. In 1996, the Green Paper "*Energy for the future: renewable sources of energy*" was published by the Commission, with the aim of starting a public debate on the role of renewables for a sustainable growth focused on the fight to climate change and on securing energy supply[41]. The Council[42] also underlined the necessity for the Member States and the European Community to use precise instruments in order to set indicative objectives for raising the share of renewables by 2010: the harmonization of provisions on renewables, new and adequate measures on the development of the energy market and provisions on aids to investments.

The adoption of the Amsterdam Treaty institutionalized the principle of environmental integration as a general principle and objective of EU law in Article 6 EC. The general applicability of the integration principle and the existence exclusively of the environmental legal basis were coupled with a strong development of the climate change policies by the Community, which called for measures on both energy and the environment. As a consequence, in the lack of a chapter on energy, the Commission was obliged to found its new climate change policies on the basis of Article 175 (previous Article 130r EEC).

Moreover, the ratification of the Kyoto Protocol[43] in 2002 accelerated even further the adoption of measures on greenhouse gas emissions and the energy taxation. The Commission pushed forward once again the debate on the necessity of creating a new energy policy of global character: it adopted the Green Paper entitled "*A European strategy for sustainable, competitive and secure energy*"[44], in which it put forward important proposals

[40] Marilù Marletta, *Energia. Integrazione europea e cooperazione internazionale* (Giappichelli 2011), 21-22.
[41] Communication from the Commission - Eenergy for the Future: Renewable Sources of Energy - Green paper for a Community Strategy, COM(1996) 0576 FINAL.
[42] Energy for the Future: Renewable Sources of Energy 80 Council Resolution nº 8522/97 of 10 June 1997 81 PE 221/398.
[43] 2002/358/EC: Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder [2002] OJ L 130, 15.5.2002, p. 1–3.
[44] Commission Green Paper of 8 March 2006: "A European strategy for sustainable, competitive and secure energy", COM(2006) 105 final. In this document the Commission draws a comprehensive picture of the European energy policy and of the instruments that the Union is entitled to use in order to regulate such complex scenario.

for implementing a European energy policy. Nonetheless, the Commission had that far managed to build a quite thorough legislative framework for the energy sector[45].

2.3 The creation of the energy chapter in the Treaty

In 2001 the Convention on the Future of Europe[46] raised the question on the necessity of creating a specific legal basis for energy. In fact, one of the aims of the Constitutional Treaty, which should have been adopted as a result of the Convention, was to ensure a clear division of competences between the European Union and national governments.

In the draft documents produced by the Convention, energy was classified as an "area of shared competence" between the Community and Member Stares, together with internal market, environment and consumer protection. Article III-252 (then renamed in Article III-256) – the specific (draft) Article dealing with energy – provided:

"*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 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)."

It was the first time in which the Union was formally recognized "energy" as a shared competence. As noted above, in the previous regulatory contexts the Community used to

[45] Martha M. Roggenkamp and others, *Energy Law in Europe. National, EU and International Regulation* (Oxford University Press 2007).

[46] The Laeken European Council of December 2001 adopted the so-called Laeken Declaration, which approved the opening of the issues left open post-Nice and established a Convention on the Future of Europe. It was composed of the representatives of the national governments, of the national parliaments, of the EP and of the Commission. In the latest stage of the Convention, articles of the proposed Constitution for Europe were discussed: despite it was not the initial proposed aim of the Convention, the actual objective then became the production of a coherent document in the form of a Constitutional Treaty. The draft Treaty was approved by the Convention in June 2003 and submitted to the European Council in July. Afterwards, it took almost a year of negotiations within the IGC in order to get the definitive text of the Treaty approved. For further analysis of the negotiation process see: Paul Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) 10 European Public Law 653-676.

(read, was forced to) act under other legal basis, adopting measures that had also consequences on the regulation of energy, but the primary scope of which was officially either the functioning of the internal market or the protection of the environment. As a consequence, the reaction to this new text was immediately controversial: while the Member States were fearing that it would mean conceding too broad powers to the Community over their national resources[47], some commentators held that it was a limitation on the Commission's powers to propose measures aimed at the market liberalization.

Many held that the final text resulted in a perfect compromise between national sovereignty over natural resources and taxation and a shared competence for the rest. In fact, Community measures relating to energy didn't have to affect Member States' rights to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of its energy supply. Moreover, unanimity was required for measures relating to the environmental policy or having a fiscal nature. Accordingly, the Union would have probably not been able to oblige a Member State to use the result of its own energy production for the benefit of the Union, but it would have been able to adopt measures on security of supply for emergency reasons[48].

As a matter of fact, however, the Constitutional Treaty did not see the light. Two years later a second round of negotiations started. This time, however, the results of the referenda in France and in The Netherlands influenced the attitude of the Member States and national delegations tried to avoid to enter discussions on themes that could possibly hurt national sovereignty sensible nerves[49]. As a consequence, in the adoption of the text of Article 194 TFEU, the Intergovernmental Conference that was negotiating the Lisbon Treaty

[47] During the negotiations for the adoption of the Treaty establishing a Constitution for Europe, the Intergovernmental Conference held strong debates on the content of Article I-16 (Areas of shared competence) and Article III-157 (Energy) and both of them were removed and reinserted several times, due to the strong opposing opinions of Member States and, in particular, of The Netherlands and the UK. The fluctuating acceptance of the proposed text from the heads of State of the Member States can be seen in the minutes of the meetings of the IGC, in which in little more than one month delegations agreed, then delated, then agreed again on the proposed text: Conference of the Representatives of the Governments of the Member States, IGC 2003 - Meeting of Focal Points (Dublin, 4 May 2004) working document, CIG 73/04, Brussels, 29 April 2004, Conference of the Representatives of the Governments of the Member States, IGC 2003 - Presidency proposals following the meeting of "focal points" on 4 May 2004, CIG 76/04, Brussels, 13 May 2004 and Conference of the Representatives of the Governments of the Member States, IGC 2003 - Presidency proposal following the Ministerial meeting on 24 May 2004, CIG 79/04, Brussels, 10 June 2004Leigh Hancher and Francesco Maria Salerno, 'Energy Policy after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU law after Lisbon* (Oxford Scholarship 2012).

[48] Leigh Hancher and Francesco Maria Salerno, 'Energy Policy after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU law after Lisbon* (EU law after Lisbon, Oxford Scholarship 2012), 372.

[49] Helmut Schmitt von Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy' (2011) 1 European Energy Journal 33-46, 36.

substantially reinserted the proposal that had been done for the Constitutional Treaty, with some minor amendments.

Nonetheless, the difficulty historical background of the European energy policy was somehow reflected also in the new provision. The new provision identifies the legal framework in which the European competence can be exercised: the number of objectives listed for this policy by the provision is wide and the competence shall be exercised in a spirit of solidarity between Member States and considering the protection of the environment. In this sense, it can be read as an expression of the will of Member States to allow a more central governance of the energy sector: the existence of a specific competence could allow the Union to deviate from the previous sectoral approach in view of more coherent action. However, the provision shows also some clear limits: EU measures cannot touch upon Member States' energy rights, as to underline that there are some national prerogatives on which the Union cannot intervene[50].

3 The European constitutional framework for the energy policy after the introduction of Article 194 TFEU.

Given the unclear drafting of Article 194 TFEU, it is important to put it in its context and, in particular, to link it with the other relevant provisions of the Treaty. Indeed, before its introduction, one of the main issues was the unclear division of competences between the Union and the Member States and the need for the European legislator to use other legal basis for the development of the European energy policy. As the Lisbon Treaty has come into force, such difficulties should be overcome, and a coherent legal framework should be in place. The present paragraph will thus analyse the European constitutional framework following the adoption of the Lisbon Treaty in order to pose the basis for the following discussion on its effectiveness.

3.1 Article 4 TFEU: energy as a shared competence

According to Article 4.2 TFEU in the field of "energy" the Union and the Member States enjoy shared competences. From the definition of shared competence provided by Article 3

[50] Marletta, 'Il Trattato di Lisbona e l'energia' (n. 20), 403. The Author also suggests that the limits inserted in Article 194 TFEU could be read as a limit for the Member States to adopt actions that are not such as to compromise the achievement of the energy objectives set at Treaty level. In this sense, the reference to the principle of solidarity, together with the general obligation of mutual cooperation would play an important role in designing national energy policy. It remains to be seen how far these obligations could go and which are the actual powers the Union could exercise as to enforce the respect of the Union's objective, as long as the Member States have clearly shown that there is a limit beyond which union cannot go in the regulation of the energy sector.

TFEU we learn that in this field both the Union and the Member States can adopt legally binding acts, but once the Union has exercised its competence, the Member States are precluded from exercising theirs, unless the Union ceases to exercise its own competence (Article 3 TFEU)[51].

The exercise of competence conferred upon the Union shall respect the principles of subsidiarity and proportionality. According to the principle of subsidiarity, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level. Accordingly, regulation shall be adopted at the level in which it can reach its *optimus* and – in any case – at the closest level possible to the citizens. As a consequence, any proposed measure at European level needs to clearly justify the reason why that specific objective is better reached at the Union level and the reasons why Member States would not be able to achieve the same results[52].

On the other side, the principle of proportionality determines the way the Union's action shall take place. According to Article 5.4 TFEU "*the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the Treaties*". Accordingly, (i) the means shall be appropriate for the aim of the measure (i.e. the Commission shall

[51] What described is the so-called "Pre-emption principle", according to which – and on the basis of the general principle of conferral – the legislative competence generally remains on the Member States, but, in the area of shared competences, Member State action is "pre-empted" where the Union has exercised its competence, consequently diminishing the amount of powers held by the Member States. Such principle can be qualified in four ways: (i) Member States lose their power only to the extent that the Union has exercised its competence; (ii) the pre-emption applies only to the extent that the Union has exercised its competence; (iii) whenever the Union ceases to exercise its competence, such competence reverts to the Member States; (iv) Member States can continue to exercise their competence in specific issues not directly addressed by the Union. For further clarification on the point, see: Stephen Weatherhill, 'Beyond Preemption? Shared competence and constitutional change in the European Community.' in David O'Keefe and Patrick Twomey (eds), *Legal issues of the Maastricht Treaty* (Chancery Law 1994). For a general overview on the competences of the European Union, see: .

[52] Article 5 of Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality. The Protocol also confers to national parliaments an important role of control (Article 6): the Commission must send all the legislative proposals to the national parliaments at the same time as to the European Institutions. Any and every national parliament is then entitled to object that the proposal is contrary to the principle of subsidiarity with a reasoned opinion; the proposing institution must take into account the national opinion and, in case the objections correspond to one third or the simple majority (in case of ordinary legislative procedure) of all votes allocated to national parliaments, the proposal shall be reviewed. In case the Commission decides not to amend the proposal, a reasoned opinion must be provided, which is in any case subject to the approval of the EP. It is thus evident how national parliament are entitled to an important political control over the Union action, which shows to be particularly relevant in delicate subjects such as energy. The role of the principle of subsidiarity before the adoption of the Lisbon Treaty has been well analyzed in: Gareth Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 Common Market Law Review 63-84, Udo Di Fabio, 'Some remarks on the allocation of competences between the European Union and its Member States' (2002) 39 Common Market Law Review 1289-1301, and also (on themes more relevant to the present research): Koen Lenaerts, 'The principle of subsidiarity and the environment in the European Union: Keeping the balance of federalism' (1993) 17 Fordham International Law Journal 846.

correctly choose among directive, regulation or decision); (ii) the action shall be necessary for reaching the objective (in the present case, the objectives set out in Article 194 TFEU) and (iii) the measure shall be proportionate with respect to its aim (proportionality *stricto sensu*)[53].

From the above it is clear that the empowerment given by the Lisbon Treaty to the Union in the energy sector is really wide, but it does not deprive the Member States of the power of determining their national energy regulations and in any case to control the Union action either.

3.2 Article 194.1 TFEU: The objectives

The competence given, in wide terms, in Article 4 TFEU is better detailed in Chapter XXI of the TFEU, which is dedicated to energy and is composed exclusively of Article 194 TFEU.

In its first paragraph, Article 194 TFEU outlines the main objectives of the energy policy of the European Union, namely: (a) ensuring the functioning of the energy market, (b) ensuring security of energy supply in the Union, (c) promoting energy efficiency and energy saving and the development of new and renewable forms of energy and (d) promoting the interconnection of energy networks.

As opposed to other Treaty provisions[54], this article does not specify the fields in which the Union is entitled to intervene, but it only sets the measures through which the Union can reach its objectives. As a consequence, the Union's margins of operation are formally quite wide[55]. The broad spectrum of objectives provided by Article 194 TFEU reflects the legislative activity of the Union before the adoption of the Lisbon Treaty. In fact, despite the absence of an Energy Chapter in the EC Treaty, the Union had been able to implement a thorough regulatory system in the field of energy, touching almost all its sectors[56]. However, since the previous system did not allow a consistent intervention of the Union and the legislation adopted mainly on the basis of (then) Articles 95 and 175 EC was fragmented, the new legal basis was introduced in order channel EU interventions in the field and allow

[53] This is the test elaborated by the ECJ when assessing both EU and Member State action falling within the sphere of EU law. See Tor Inge Harbo, 'The function of the proportionality principle in EU law' (2010) 16 European Law Journal 158-185.
[54] See for example Article 153 TFEU on Social Policy.
[55] Marilù Marletta, 'Articolo 194' in Antonio Tizzano (ed), *Trattati dell'Unione europea* (Giuffrè Editore 2014), 1652.
[56] Jasmin Battista, 'Articolo 194' in Carlo Curti Gialdino (ed), *Codice dell'Unione europea operativo TUE e TFUE commentati articolo per articolo* (Edizioni Simone 2012).

the creation of a uniform legislative framework in the pursuit of the objectives established in the Treaties.

In this sense, the EU Court has ruled that Article 194 TFEU is "*the legal basis for European Union acts which are 'necessary' to achieve the objectives assigned to that policy by Article 194(1) TFEU*. Accordingly, any measure having as main objective one of those listed in Article 194.1 TFEU shall be adopted according to Article 194.2 TFEU [57].

Moreover, despite its really sectoral nature, Article 194 TFEU contains a number of references to important principles and values of EU law. The objectives set out in the first paragraph shall be chased "in a spirit of solidarity between the Member States" and they shall contribute to "the establishment and functioning of the internal market" and to "the need to preserve and improve the environment". Accordingly, the EU energy policy needs to be developed on one side, in an environmental perspective, but on the other side, it also appears to be limited to the internal market[58].

The reference to "solidarity between Member States" was an innovation brought by the Lisbon Treaty[59]. Indeed, it is now enshrined in Article 2 TEU as one of the founding values of the European Union and – differently from the previous Treaties – it is invoked in several provisions[60]. Its relevance to the energy sector has been highlighted as well, not only in Article 194 TFEU but also in Article 122 TFEU. According to the latter, the European Institutions shall operate in a spirit of solidarity between the Member States in case of particular economic crises "*notably in the field of energy*". Member States are thus now

[57] Case C-490/10 *European Parliament vs Council* [2012] [ECLI] EUC-2012 525: the present judgment is the only ECJ decision assessing the new Article 194 TFEU as a legal basis for energy measures. The EP pleaded that the incorrect legal basis had been chosen for Regulation 617/2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union, in so far as it was erroneously adopted on the basis of Article 337 TFEU, while it should have been adopted under Article 194(2) TFEU. The ECJ annulled the Regulation, holding that the contested regulation fell under Article 194 TFEU, and not Article 337 TFEU, since it constitutes a necessary means for the achievement of the objectives set out in Article 194(1) TFEU. Consequently, that regulation should have been adopted on the basis of Article 194(2) TFEU. The reasoning of the Court was that Article 194 TFEU "*constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives […]. It follows that, to determine whether the legal basis for a European Union act having the aim, as in the present case, of the collection of information in the energy sector is Article 337 TFEU or Article 194(2) TFEU, it must be examined whether that act, as regards its aim and content, may be considered necessary to achieve the objectives specifically assigned to the European Union policy on energy by Article 194(1) TFEU."* (p. 67-68).

[58] Hans Vedder, 'Analysis: The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental LAw 285, 291.

[59] In particular it was Polony and the Baltic States to push for the insertion of a reference to solidarity in the enegy chapter, as a response to the energy crisis of 2006. See, Leonie Reins, *Regulating Shale Gas, The Challenge of Coherent Environmental and Energy Regulation* (Edward Elgar Publishing 2017), 50.

[60] Ines Hartwig and Phedon Nicolaides, 'Elusive Solidarity in an Enlarged European Union' (2003) 3 Eipascope 19 and Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213.

compelled to cooperate in case of shortages of energy supply, in consideration of the growing internal interdependence and external dependence.

In fact, the Treaties do not give a definition of solidarity and its interpretation is open. In particular, its actual applicability to the energy sector is arguable although relevant. In accordance with the general spirit of the Treaties, it should be interpreted in the sense that the Member States are now legally bound to cooperate on energy matters, mutually committing towards the realization of certain objectives, but also fairly sharing the relative burdens among them[61]. However, the *caveat* contained in Article 194.2 TFEU and Declaration 35[62] annexed to the Treaties seem to impose strong limits to its operation. In theory, solidarity should play as a mitigating factor to the exclusivity of Member States' energy rights, but it actually appears to be more a (political) empty nut shell[63], inserted in order to ensure a way out for Member States in case of an energy crisis, rather than the basis for a cooperative European energy policy.

The reference to the internal market and to the protection of the environment shows acknowledgment for the main areas in which the European energy policy can develop and actually developed before the adoption of the Lisbon Treaty, but it offers a sounder basis for such policy. In particular, such reference sets the broader objective of the energy policy. Moreover, it seems that the specificity of the energy sector allows it to be considered as a *lex specialis*[64] with respect to the general internal market provision contained in Article 114 TFEU (former Article 95 EC), which had previously been used for the realization of the energy policy in the internal market, consequently prevailing.

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[61] Current events in the energy sector in Europe have shown how this value, although formally really important for the functioning of the Union, is actually interpreted at will by Member States. Indeed, during past crises and supply shortages of both electricity and gas have shown not only existing solidarity mechanisms within the EU but also the strength of the system as a whole, pushing the Union and Member States to adopt effective measures to prevent and manage interruptions in supply; at the same time, however, the Member States are confronting each other for access to energy resources outside EU borders, sometimes at the expense of cooperation and at the risk of confrontation where the development of new gas corridors is concerned. Thus, decisions are taken without consulting neighbors countries, consequently affecting their energy networks and policies. In light of recent developments, it is not clear how far the European Union and its Member States are actually ready to move forward from the notion of national energy independence to a true energy interdependence. On the point, see: Sami Andoura, *Energy solidarity in Europe: from independence to interdependence* (Notre Europe Jacques Delors Institute 2013).

[62] See further in paragraph II.3.3

[63] Reins, *Regulating Shale Gas, The Challenge of Coherent Environmental and Energy Regulation*, 51.

[64] Gabriele Britz, 'Klimaschutzmaßnahmen der EU und der Mitgliedstaaten im Spannungsfeld von Klimaschutz und Binnenmarkt' in Helmuth Schulze-Fielitz and Thorsten Müller (eds), Europäisches Klimaschutzrecht (Nomos 2009); Uwe Heemeyer, Kompetenzordnung eines zukünftigen europäischen Verfassungsvertrags (LIT Verlag Münster 2004), 228 f., Dörte Fouquet, Jana Viktoria Nysten and Angus Johnston, *Potential areas of conflict of a harmonised RES support scheme with European Union Law*, 2012), 23.

The relation between energy and environment is indeed more complex. The tight connection between the two has developed through the history of European energy and environmental policies and important pieces of legislation such as the Renewable Energy Directive[65] have been adopted under the environmental chapter, when the energy one was not yet available. In particular, the reference to "*the need to preserve and improve the environment*" seems to be a sector-specific reference to the environmental integration principle contained in Article 11 TFEU. Accordingly, it requires the Union to always include environmental considerations in any energy measure[66]. However, the explicit insertion in the provision seems to require levels of environmental considerations higher than those that stem from Article 11 TFEU and that apply to any European measure: in Article 194 TFEU, the requirements for the European action do not limit to the "protection" of the environment, but they also refer to its "improvement". Moreover, one of the objectives of Article 194 TFEU is the "*promot*[ion of] *energy efficiency and energy saving and the development of new and renewable forms of energy*", which clearly presupposes high levels of environmental considerations[67].

3.3 Article 194.2 TFEU: The division of competences

The second paragraph of Article 194 TFEU contains the proper attribution of competence to the Union, according to which the European Parliament and the Council "*shall establish the measures necessary to achieve the objectives in paragraph 1*". Such wording refers comprehensively to the four aforementioned objectives of the energy policy and should accordingly formally set the existence of a truly European energy policy. Moreover, it should

[65] 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 Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.

[66] Kristín Haraldsdóttir, 'The limits of EU competence to regulate conditions for exploitation of energy resources: analysis of Article 194(2) TFEU' (2014) 23 European Energy and Environmental Law Review 208

[67] Energy policy is an exception in the application of the environmental integration principle. With the adoption of the Lisbon Treaty it has become "less visible" than before. In fact, while the EC Treaty required exclusively the integration of environmental protection in other policies, the Lisbon Treaty now also requires to integrate consumer protection, employment, animal welfare and discrimination concerns. Moreover, while the integration principle is in place, it has not been followed through explicitly in other policies of the Union. The argument that environmental protection can be better achieved if it is part of other key policy areas, rather than an isolated provision, is generally accepted. However, Treaty provisions on these other policies, for example agriculture, industry, transport, tourism, do not contain any specific reference to the objectives of environmental protection or sustainable development. As a striking example, "environmental protection" still does not appear explicitly in Article 36, which provides for qualifications to the principle of free movement. See: Maria Lee, 'The environmental implications of the Lisbon Treaty' (2008) 10 Environmental Law Review 131-138.

clarify the legal reference for any Union action in the field, consequently avoiding the dance through other Treaty provision that had been seen under former Treaties[68].

The competence set out in Article 194 para. 2 TFEU finds a twofold limitation: (i) it shall be exercised "*without prejudice to the application of other provisions of the Treaties*"; (ii) the measures consequently adopted "*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*".

The first limitation might still raise the question whether and to what extent the Union shall still resort to Articles 114 and 192 TFEU to regulate the energy sector as it was before the adoption of the Lisbon Treaty. However, by analysing also other provisions of the Treaty, it can be seen that the same wording is generally used for policy coordination purposes and in order to give constitutional relevance to the *lex specialis derogat generale* rule[69]. In consideration of the sectoral objectives laid out in the provision, it should thus in principle prevail over the other legal bases that have historically been used for the energy sector (i.e. Articles 114 and 192 TFEU) [70]. The same reasoning should in principle apply also in relation to Article 192, although the second *caveat* provided in Article 194.2 TFEU raises more concerns on the point, as it will be further discussed.

More likely, the provision should be interpreted in light of the first paragraph of the same article, i.e. of the broad objectives set for the European energy policy. They indeed pave the way (more than former rules did) to the realization of a more comprehensive integrated energy policy of the Union, of which Article 194 TFEU constitutes the natural basis[71].

The second *caveat* contained in Article 194.2 TFEU is intended to limit the possibilities of intervention of the Union, on one side and to keep some prerogatives on the Member States.

The *caveat* seems to impose quite strong limitations to the powers of the Union, if read in conjunction with Declaration 35 and Article 345 TFEU. The first clarifies that Article 194 TFEU "*does not affect the right of the Member States to take the necessary measures to*

[68] As a note to the reader, the use of the conditional tense is here intentional. It will be further argued that, in reality, the new provision clarifies only in part the actual competences of the Union in the field. It must however be kept in mind that the ECJ, in case C-490/10 mentioned at note 57, has clearly held that Article 194 TFEU is the only legal basis for energy related measures.

[69] Mark Bell, 'The new Article 13 EC Treaty: a sound basis for European anti-discrimination law' (1999) 6 Maastricht Journal of European and Comparative Law 5.

[70] Angus Johnston and Eva Van der Marel, 'Ad lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU' (2013) 5 European Energy and Environmental Law Review 181, 185.

[71] Johann-Christian Pielow and Britta Janina Lendewel, 'The EU energy policy after the Lisbon Treaty' in André Dorsman and others (eds), *Financial Aspects in Energy: a European Perspective* (Springer 2011), 153

ensure their energy supply under the conditions provided for in Article 347[72]". The second provides that "*the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*", where the notion of "property ownership" also includes natural resources[73]. Moreover, the international customary law principle of permanent sovereignty over natural resources[74] also apply. Accordingly, other states as well as supranational organizations, such as the European Union, cannot interfere with the right of any State to organize, allocate and exploit its natural resources.

Some authors have held that it represents a "*carefully crafted compromise between national sovereignty over national resources […] and a shared Union competence for the rest*[75]", but it seems more likely that the provision has the potential for strongly limiting the marge of action of the Union in the field, consequently putting in perspective the objectives of its first paragraph. In particular, it is not immediately evident how this wording could coordinate with the "spirit of solidarity" and the creation of a common energy policy in general.

As a consequence, it is important to correctly qualify the rights listed in Article 194.2 TFEU and to understand whether they are absolute or relative. The first energy right relates to the "*conditions for exploiting energy resources*" and, not containing any specifications, it is meant to refer to all types of energy sources exploitable for the production of energy.

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[72] Under Article 347 TFEU "*Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.*" Despite its limited legal relevance, the Declaration entails a strong political sign of how Member States are concerned over energy supply.

[73] Marletta, 'Articolo 194' (n. 55), 1658. In any case, the ECJ has ruled that "*Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty*". As a consequence, the right of Member States to decide on matters such those at issue is never absolute, but it must always comply with the other obligations of the Treaty. In the case of energy, it could mean that Member States are not entitled to adopt conditions for the exploitation of energy resources that do not conform to rules on non-discrimination or the four freedoms. See: Case C-105/12 *Staat der Nederlanden v Essent NV* [2013] [ECLI] EU C-2013 677, p. 36 and Case C-271/09 *European Commission v Republic of Poland* [2011] [ECLI] EU C-2011 855, p. 44 and the jurisprudence cited therein

[74] According to the fundamental principle of international law, within its territory, each nation-state has a complete, supreme, and independent political and legal control over persons, businesses, entities, activities as well as over its natural resources and environment. The principle of permanent sovereignty over natural resources stems from such really broad principle. In particular, it has been used so far as a tool for the creation of national independence, consequently being considered a strong support to economic nationalism. It is thus not only a principle of international law, but also a right of all States. The notion of natural resources is really vast, but it includes for sure energy together with ground, sea etc. from which energy can be produced. See: Nico Schrijver, *Sovereignty over natural resources: balancing rights and duties* (Cambridge University Press 1997), Yogesh Tyagi, 'Permanent sovereignty over natural resources' (2015) 4 Cambridge Journal of International and Competition Law 588 and Valentina Zambrano, *Il principio di sovranità permanenente dei popoli sulle risorse naturali tra vecchie e nuove violazioni* (Giuffrè Editore 2009)

[75] Sami Andoura, Leigh Hancher and Marc Van der Woude, *Towards a European Energy Community: A Policy Proposal* (Notre Europe 2010), 12.

Accordingly, states should reserve the right to control the exploitation, development and disposition of natural resources within their territory[76]. Although, Member States widely differ each other in reason of different distribution of wealth as much as of natural resources, they all adopt national laws that regulate how such natural resources shall be exploited[77].

At a European level, the question arising is thus whether and to what extent the EU is entitled to adopt measures limiting the right of Member States of regulating such issues exclusively at a national level. A narrow interpretation would suggest that only measures imposing to Member States to/not to exploit certain natural resources would fall under the first energy right of Article 194.2 TFEU and would consequently be banned. However, in the lack of any connotation to such first energy right, it is preferable to hold that any measure, not only allowing/prohibiting the exploitation, but also imposing any conditions to such activities would be impossible under the norm at issue[78].

The second energy right concerns the "*choice between different energy sources*", i.e. the possibility for Member States to choose which types of energy sources shall be further developed within their territory. As it has been seen for the first energy right, also in this case the differences between Member States can play an important role. Depending on the conformation of its territory, but also on the legislation adopted on the exploitation of certain natural resources, a State may be keener on prioritizing a specific energy source in spite of another. As a consequence, at European level issues on competition between different energy sources may arise. For example, Article 194.1(c) provides that the Union shall promote the development of new and renewable forms of energy: the question that comes up is then to what extent the Union is entitled to adopt measures that favour certain resources above others under Article 194.2. In this sense, in *Poland v Commission*[79], the Republic of Poland raised such question in relation to Decision 2011/278/EU determining transitional Union-wide

[76] In reality, Member States have already conceded to the Union far-reaching powers over certain resources, such as animals or natural habitats (see: Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20, 26.1.2010, p. 7–25 and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, 22.7.1992, p. 7–50d), however such powers are far more limited when it comes to quantitative management of resources or land use and planning.

[77] The spectrum of possible norms is wide: they can be property law rules, such as those regulating ownership of individual resources or the disposition of property rights, administrative rules specifically relating to exploitation of certain resources, or land or environmental rules.

[78] As an example, a EU measure imposing any conditions to the exploitation of energy resources pursuant to a resource-specific law, such as mining law, would be excluded. The same could apply for a measure imposing specific requirements to be fulfilled in land use, planning or nature protection. See: Haraldsdóttir, 'The limits of EU competence to regulate conditions for exploitation of energy resources: analysis of Article 194(2) TFEU'(n. 66), 217.

[79] Case T-370/11 *Republic of Poland v European Commission* [2013] EU:T:2013:113.

rules for harmonized free allocation of emission allowances, holding that in adopting rules to define the emission benchmarks for certain products from installations included in the greenhouse gas emission trading scheme, the Commission would favour natural gas in respect to other energy sources. The Tribunal did not rule on the compatibility of the norm with Article 194.2, because the Decision had been adopted under Article 192 TFEU, thus the second energy right could not extend its scope to environmental measures and Poland had not contested the choice of the legal basis. However, the decision is suggestive of an attitude that could be held by other Member States.

The third energy right relates to the possibility for Member States to determine "*the general structure of energy supply*". It entitles Member States to decide how to build up their energy mix, i.e. the proportions according to which certain energy sources are more exploited than others. The present right is a consequence of the second, thus here the same considerations held above can apply.

The above shows that a limitation to the interpretation of such energy rights could be preferable, otherwise the consequence would be making Article 194 TFEU a void provision[80]. As a consequence, a series of interpretations of the significance of this limitation have been elaborated. The most relevant two are (i) the possibility for Member States to "opt-out" to energy measures adopted under Article 194 TFEU and that risk affecting one of the three energy rights, (ii) the introduction of a *de minimis* threshold, according to which only measures significantly affecting the Member States' energy rights fall under the *caveat* of Article 194.2 TFEU.

In the "opt-out" interpretation, some Authors have held that, provided the relative nature of Member States' energy rights, Article 194.2 TFEU "*operates, more than a (absolute) blockade of EU energy policy, only as a (relative) 'escape clause'*"[81]. Accordingly, EU measures aiming at harmonization in the energy field shall include a provision entitling Member States to "opt-out" from the harmonization. The provision should however operate under the condition that the measure affects the Member State's energy rights. Although Member States would in any case have to comply with the other Treaty provisions, it is apparent that the level of harmonization that a European measure would be able to achieve could depend (i) on the number of Member States that would opt-out, but also (ii) on the extension of the opting-out clause framed in the measure. Consequently, although it may

[80] In reality, a strictly literal interpretation of the provision stands in favor of an absolute right, given that no nuances are given to the wording.
[81] Pielow and Lendewel, 'The EU energy policy after the Lisbon Treaty' (n. 71), 154

seem a flexible and somehow useful instrument, the opt-out clause is also very risky for the Union, because it would limit the predictability of the success of the measure and it would make it extremely difficult for the Commission to draft measures that will surely not affect any Member State's energy rights[82].

The *de minimis* interpretation has been proposed as an analogy to what provided for in Article 192.2(c) TFEU, according to which measures "*significantly affecting Member State's choice between different energy sources and the general structure of its energy supply*" shall be adopted according to a special legislative procedure. Accordingly, we should assume that the caveat in Article 194.2 TFEU also refers to measure "significantly" affecting the energy rights, while those "only affecting" would not find any limitation under this legal basis either.

However, no explicit threshold is inserted in Article 194.2 TFEU, but on the contrary the provision shall apply "without prejudice to Article 192.2(c)", which may also suggest that only under Article 192 TFEU a threshold can apply, while under Article 194.2 TFEU the rights of Member States are absolute.

In the attempt of limiting the applicability of the *caveat*, some commentators[83] suggested that the CJEU has applied a *de minimis* threshold although it was not expressed in the Treaty. In *Trailers*[84] and *Jetskis*[85] the Court applied a *de minimis* threshold in order to verify the compatibility of a national measure with Article 34 TFEU. In particular, the test was necessary in order to assess the magnitude of a measure's impact on market access[86]. The point raised by Johnston is the need for a more practical approach to the *caveat* in Article 194 TFEU, given its potential for substantially limiting any EU actions in the energy field.

It holds in any case true that the present formulation of the *caveat* contained in Article 194.2 TFEU is anything but clear. As a consequence, the system of competences, which should

[82] An analogy could be drawn between an hypothetic opt-out clause and the safeguard clause contained in Article 193 TFEU, according to which Member States can adopt or maintain protective measures stricter than the EU ones. However, since measures adopted according to Article 192 TFEU are usually "minimum harmonization" measures and Member States can only go beyond, a minimum level of environmental protection would be in any case ensured. On the contrary, the opt-out clause works in the way that the Member State can be simply exempted by the European rule, consequently compromising its harmonising effects. See: Johnston and Van der Marel, 'Ad lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU' (n. **Error! Bookmark not defined.**), 192.
[83] Ibid, 183-184.
[84] Case C-110/05 *Commission v Italian Republic ("Trailers")* [2009] ECR I-519.
[85] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos ("Jetskis")* [2009] ECR I-4273.
[86] Ibid, p.18.

have been clarified by the introduction of Article 194 TFEU is still an open point, on which further discussion is needed.

The analysis is further complicated – as it will be mentioned below[87] – by the fact that Article 194.2 TFEU also explicitly refers to Article 192.2(c) TFEU. Such reference creates a direct connection to the environmental chapter, which however, as seen above, provides for a different legislative procedure and includes a significance threshold, despite referring to the same energy rights as those contained in Article 194.2 TFEU.

3.4 The decision-making process

According to Article 194.2 TFEU, EU measures aimed at reaching the objectives set out in Article 194.1 TFEU shall be adopted according to the ordinary legislative procedure.

For measures primarily of a fiscal nature, Article 194.3 TFEU requires a special legislative procedure, requiring a unanimous decision by the Council after consultation of the European Parliament. By way of consistent interpretation with Article 192(2)(a) TFEU, the term "primarily of a fiscal nature" has to be understood in a narrow sense, so to include only taxes, but not charges, fees, contributions or other duties[88].

3.5 The other relevant Treaty provisions

As it has been seen above, Article 194 TFEU still refers to other Treaty provisions that could thus work as legal bases for the regulation of energy within the European Union. Accordingly, it seems necessary to shortly outline the main interactions created within the Treaty, in order to have a complete picture of what energy regulation could be in reason of the adoption of such new provision.

3.5.1 Article 114 TFEU

Article 114 TFEU provides the legal basis for approximation measures within the internal market. Such approximation can come in different forms, ranging from full harmonization, where national modifications are excluded, to optional or minimum harmonization, establishing minimum standards, which allow more stringent national measures.

By stating "*save where otherwise provided in the Treaties*", the first paragraph of Article 114 TFEU clearly puts the provision in a position of subsidiarity with respect to other provisions of the Treaty. As Article 194 TFEU operates as a *lex specialis* in this context,

[87] See paragraph II.3.5 below.
[88] Dörte Fouquet, Jana Viktoria Nysten and Angus Johnston, *Potential areas of conflict of a harmonised RES support scheme with European Union Law* (European IEE-project beyond 2020, 2012), 28.

Article 114 TFEU cannot be anymore used as a legal basis for harmonization measures within the internal energy market.

More complex is the question whether this provision can be used in case a measure cannot be adopted under Article 194 TFEU since it affects Member States' energy rights according to Article 194.2 TFEU. Such option would amount to a circumvention of the *caveat* of Article 194.2 TFEU and it would somehow jeopardize the intention of Member States of maintaining their sovereignty over certain aspects of the energy policy.

Some commentators have consequently held that, also in this case, Article 114 TFEU is no more an option for the regulation of the energy sector[89]. Some others have instead stipulated that the deference contained in Article 114 TFEU to other Treaty provisions is applicable only to the first three paragraphs of the Article, while paragraphs 4 and 5[90] should not be included. These two provide the possibility for Member States to derogate from harmonization measures. Accordingly, they would remain applicable even in the case that a harmonization measure has been adopted on the basis of a more specific provision (in this case Article 194 TFEU). The argument here is that, while in general Article 194.2 TFEU is more specific than Article 114 TFEU, the derogations of the latter are in reality more specific than the *caveat* contained in Article 194.2 TFEU, since they clearly describe what rights are reserved to Member States. Moreover, paragraphs 4 and 5 provide for specific procedural obligations for Member States to derogate[91].

It seems however that such reasoning is quite complicated and it would bring to applying the *lex specialis* rule only to selected paragraphs of Article 114 TFEU, which is quite risky. Moreover, the complexity of the reasoning would not add much to what is already resulting from the interaction between Article 194 and 192 TFEU and to the general proportionality

[89] Schmitt von Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy' (n. 49), 42.

[90] Paragraphs 4 and 5 respectively provide that: "*If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*" and "*Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*"

[91] Johnston and Van der Marel, 'Ad lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU' (n. **Error! Bookmark not defined.**), 185-187.

test applied by the Court to internal market measures, that can be justified on the ground of environmental protection and public health.

3.5.2 Article 192 TFEU

Article 192 TFEU is the legal basis for measures in the field of environmental protection[92]. The Union, following the ordinary legislative procedure, can adopt measures intended to reach the objectives set out in Article 191 TFEU: (i) the preservation, protection and improvement of the quality of the environment, (ii) the protection of human health, (iii) the prudent and rational utilisation of natural resources and (iv) the promotion of measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

By way of derogation to what mentioned in the first paragraph, Article 192.2 TFEU provides that in particular situations – listed in letters a) to c) – a special legislative procedure, requiring unanimity in the Council, should apply.

As mentioned above, Article 194.2 TFEU applies without prejudice to Article 192.2(c), which relates to: "*measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply*". The way how these two provisions should coordinate is not clear. In fact, it may seem that measures affecting the Member States' energy rights are allowed under the environmental legal basis, but they are not if they only (or mainly) pursue an energy-related objective[93]. This view would thus suggest a predominance of the environmental objectives over the energy ones with regard to the possibility for the Union to interfere in national energy decisions. Moreover, it is also unclear whether and how it would be possible to pursue energy-related objectives under Article 192 TFEU or this is instead prohibited by the existence of a more specific legal basis. The EU environmental policy should in fact pursue "*the prudent and rational utilisation of natural resources*", which could in theory also cover some energy measures, e.g. in the field of renewables.

It is clear then that resolving this question of interpretation is important, because it could potentially involve all those policies that share energy and environmental objectives, such as the production of energy from renewable sources, energy efficiency, emission trading systems and so on. Moreover, some questions may also arise with regard to the first

[92] For an overview of the provision, see: Stefano Amadeo, 'Articolo 192 TFUE' in Tizzano A (ed) *Trattati dell'Unione europa* (Giuffrè 2013), 1638 ff.
[93] Marjan Peeters, 'Governing towards renewable energy in the EU: competences, instruments, and procedures' (2014) 21 Maastricht Journal of European and Comparative Law 39, 45.

paragraph of Article 192 TFEU. This shares the same objectives as the second paragraph, but no threshold with regard to the significance of a given action on the Member States' energy rights is identified. It could thus be asked whether a measure not (or not significantly) affecting the Member States' rights could be adopted pursuant to Article 192.1 TFEU.

Some commentators have interpreted the reference to Article 192.2(c) by Article 194 TFEU as simply procedural: measures affecting Member States' energy rights must be adopted in accordance with the special legislative procedure[94]. However, some doubts can be raised in this regard. Article 194.3 TFEU already provides a procedural exception: measures concerning energy taxes shall be adopted in accordance with the special legislative procedure. Accordingly, measures affecting Member States' rights should logically fall under the same procedural exception, but this is not the case. Moreover, considering the differences in wording reported above, it is not even sure that the two provisions refer to exactly the same energy rights. It is thus much more likely that the provision is a substantial one and that the concerns further analysed below apply[95].

There are three main points that must be analysed when reading the two provisions in conjunction: (i) Article 192 TFEU relates exclusively to "*measures significantly affecting...*", while, as it has been seen above, Article 194.2 TFEU does not introduce any kind of significance threshold; (ii) the environmental chapter only refers to "*a Member State's choice between different energy sources and the general structure of its energy supply",* while Article 194 TFEU also refers to the "*conditions for exploiting energy resources*"; (iii) the first provision requires unanimity vote in Council, while under Article 194 TFEU the ordinary legislative procedure shall apply.

As per the first issue, as mentioned above, it seems that measures having an energy aim affecting the Member States' energy rights cannot be adopted[96], while under the environmental scope, measures "significantly affecting" the Member States' rights can be

[94] Hancher and Salerno, 'Energy Policy after Lisbon', note 48 above and Hans Vedder, 'The formalities and substance of EU external environmental competence: stuck between climate change and competitiveness' in Elisa Morgera (ed), *The external environmental policy in the EU: EU and international law* (Cambridge University Press 2012).

[95] The analysis is in any case not completely peregrine and may be based on the historical background of the provision. The initially proposed Article III-152 of the Constitutional Treaty contained a different wording of the *caveat*, according to which measures affecting Member States' right would have been adopted following to the procedure under [the present] Article 192.2(c). However, it was just from the first negotiations of the text that the reference to the legislative procedure was eliminated and replaced by the present wording, as evidence of the intention of Member States of further limiting the competences of the Union under the energy chapter.

[96] Applying an exclusively textual reading of the norm and without applying any of the theories described in paragraph II.3.3 above.

adopted, but need to reach unanimity in Council, according to the special legislative procedure. From this reading, it remains however unclear (i) whether environmental measures only "affecting" Member States' rights can be adopted under Article 192.1 TFEU, (ii) which is the fate for measures having both environmental and energy aims.

The only help coming from the ECJ so far can be found in *Poland v Commission*, where it has held that "*there is no reason to suppose that the second subparagraph of Article 194(2) TFEU establishes a general prohibition to assign that right that is applicable in European Union policy in the area of the environment*"[97]. Accordingly, it seems that under the environmental clause full room is given to the Union to legislate, but no further explanation is given for the case of a dual aim of the measure.

As per the second issue, the same considerations made above seem to apply. In the lack of any clear wording in the provision, it could be argued that article 192.1 TFEU could be the legal basis and the ordinary legislative procedure would then apply.

Lastly, with regard to the different legislative procedure, it has been argued that the lack of a special decision-making procedure in Article 194 TFEU involves an absolute limit of EU competence and an indication of the exclusive competence of the Member States in those areas[98]. However, as already mentioned, the idea of an absolute reserve of competence of Member States is quite risky and not desirable for systematic reasons. Firstly, an absolute competence limit without any threshold would be incompatible with Article 192.2(c) TFEU. The *caveat* "*without prejudice to the application of other provisions of the Treaties*" indicates that the competence limit only applies to the extent to which Member States' competences have not yet been transferred under other Treaty provisions. Thus, it needs to be interpreted in line with Article 192.2(c) TFEU, which again applies the threshold of the significant effect. Moreover, it should be also considered that under Article 192.2(c) TFEU, the EU may intervene on two of the three energy rights when the measure has also/exclusively an environmental objective: the truly European energy policy would thus be excluded from the field of action of the EU and it could also lead to a manipulation of the objectives of the provision in order to have the measure adopted (in this case the Commission would make the environmental objective prevail) or not adopted (in this case Member States would be interested in making the energy objective prevail), with the consequence of choosing one or the other legal basis.

[97] Case T-370/11, *Republic of Poland v European Commission* (n. 79), p. 17.
[98] Ulrich Ehricke and Daniel Hackländer, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrages von Lissabon' (2008) 4 Zeitschrift für Europarechtliche Studien 579, 599.

This preliminary analysis of the interaction between Articles 194 and 192 TFEU, although simply based on the texts provided by the Treaties, already shows how any further conclusions may have great significance for future EU measures to promote the use of energy efficiency, energy savings or energy generated through renewable sources, which are crucial for environmental climate change objectives and thus require a strict cooperation between the energy and the environmental objectives.

4 Conclusion

The analysis of the historical background and of the present constitutional framework for the regulation of energy at European level have shown the complexity of the issues that it could involve have not so far allowed a coherent and straightforward legal setup.

In particular, the evolution of the energy sector has determined on the one side the recognition by the Member States of the need of a supranational regulation, which could be able to guarantee a substantial level playing field among them, on the other side, it has also determined the broadening of the notion of "energy sector" itself, determining the inclusion and coordination with other policy sectors. These considerations have been two of the reasons why the Union was moved to introducing a specific legal basis for energy within the Lisbon Treaty. However, the old problems relating to the sovereignty concerns of the Member States and the issues stemming from the coordination of the energy policy with the environmental policy have not been overcome, and the traces of it can be found – as it has been seen – in the present text of Article 194 TFEU, to the point that many have doubted on the actual innovation brought by such new legal basis.

Issues on the effective division of competences between Union and Member States are still present and they are coupled with a difficult interpretation on how the possible legal bases applicable to the regulation of the energy sector should coordinate each other. This is particularly evident in cases where the energy objectives are coupled with environmental objectives: should the environmental aim always prevail or is there any room for energy provisions to be authentically and exclusively based on article 194 TFEU? Sectors such as the production of energy from renewable sources have started their development in the European framework as "environmental", but with the progress made in the technologies used and in the extension of their use, they are becoming energy issues also having environmental protection results.

III. THE COMPETENCE OF THE EUROPEAN UNION IN THE ENERGY SECTOR.

Summary: 1 Introduction – 2 The nature of the European competence – 3 The creation of an energy competence: the Laeken Declaration and the Constitutional Treaty – 4 Energy in the post-Lisbon competence system: is anything clear? – 5 Conclusion

1 Introduction

The question of competence is essential in the relationship between the Union and the Member States. Nonetheless, it has always been difficult to specify exactly what such division is and how it works within the Union. The various amendments of the Treaties have tried to clarify it by giving definitions and categorizing competences with the aim of better regulating the relationship between the Union and the Member States. As an international organization, the Union should in principle receive its competences by way of attribution from the Member States, but in fact its powers have kept growing over time, sometimes also covering areas in which competence had not been formally conferred upon it. As a consequence, a "competence problem" was the result of the common belief that "*the shift in power upward towards the EU is the result primarily of some unwarranted arrogation of power by the EU to the detriment of States' rights*"[99].

Taking into consideration such concerns, the Community (then, Union) has gone through important constitutional changes in order to ensure the possibility for it to work properly, while allowing the Member States to keep their national prerogatives safe. The most relevant step in this direction was taken with the Laeken Declaration of 2001[100], where the European Council called for a clarification of the notion of competence and its attribution to the European Union. Many of the instances presented in that occasion were then inserted in the aborted Constitutional Treaty and finally adopted in the Lisbon Treaty. Although the Lisbon Treaty specifically refers to the principle of conferral and clearly lists the competences attributed to the Union by way of categorization in relation to the width of possible European action, it still allows wide margins of doubt and interpretation on the attribution of competences in many fields of European action.

The European energy competence developed along with such changes in the European constitutional structure and it represents a good example of this difficult evolution.

[99] Paul Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press 2013), 156.
[100] European Council, Laeken Declaration on the future of Europe, 14-15 December 2001.

Moreover, its sensitivity for the Member States, coupled with its growing transnational relevance, requires even more attention in the correct allocation of competences. Nonetheless, its creation and evolution show an incomplete process, from which some of the Lisbon's inefficiencies arise.

The present chapter will first assess the nature of the European competence, assessing the importance of the principle of conferral and the limits of European action also with regard to the objectives the Member States have posed to the Union. It will then analyse the process of clarification of the notion of competence following the Laeken Declaration and in the aborted Constitutional Treaty, with particular regard to the energy field; in fact, it is in this context that the idea of explicitly attributing to the European Union a competence in the field of energy raised for the first time. Lastly, it will review the Lisbon framework of competences with particular regard to energy, in order to assess the actual extent of EU competences in this field.

2 The nature of the European competence

2.1 The principle of speciality and the competence of international organizations

As any other international organization, the European Union sees its action limited to those powers that have been attributed to it by its Member States. It is accordingly necessary to shed some light on the nature of the European competence as compared to that of any other international organization.

The first and fundamental characteristic of international organizations that differentiates them from states is the lack of original sovereignty. Their powers do not derive directly from their only existence as subjects of international law, accordingly they do not have the "*Kompetenz-Kompetenz*", i.e. the power of a state to determine by itself its own competence[101]. While a state usually originates from a factual situation, to which the law attributes legal relevance, on the contrary an international institution derives its existence from a treaty, thus from the agreement of a number of states that has legal relevance. It is thus only in the text of the international agreement that the conferment of powers upon the organization by other subjects – states or other international organizations – can be found and are exhaustively determined. Notwithstanding, the function of the treaty is not different

[101] Francesca Ippolito, *Fondamento, attuazione e controllo del principio di sussidiarietà nel diritto della Comunità e dell'Unione europea* (Giuffrè Editore 2007), 62; Gunnar Beck, 'The problem of Kompetenz-Kompetenz: a conflict between right and right in which there is no praetor' (2005) 30 European Law Review 42-67.

from that of a national constitution: they both set the fundamental principles and the objectives of the state and of the institution.

The above explains the basic principle of the law of international organizations according to which the powers of international organizations are limited to those attributed to them by states. Such principle is the so-called "Principle of attributed competences" or "Principle of conferral"[102]. Its corollary is the "Principle of speciality", according to which the powers of the international organizations are limited to whatever is necessary to perform the functions defined in the founding treaties. The two principles, although really similar, differ for the fact that the powers determined in the treaty can be not the same as those stemming from the functions of the organization.

Moreover, while the purpose of the state is integral ("*finalité intégrée*"), thus it pursues an objective, but it identifies itself with such objective to the point that it no longer needs it to justify its existence and its decisions; on the contrary the purpose of an international organization is functional ("*finalité functionnelle*"), thus the very existence of the organization is based on the decision of its members, which believe that its creation is the best instrument they have to reach certain objectives, which they consider desirable and unachievable by means of individual action[103]. As a consequence, the purpose for which an international organization is created is the reason for its constitution and then the objectives of its work are the reason for the support of its members.

Under the abovementioned theory of "functionality of international organizations", their competence determines the object of their function, in other words, the field of their activity and the conditions under which such activity can take place.

Empowerment is thus only a consequence of the performance of functions[104], therefore the organization is in principle entitled to take any actions necessary for pursuing its functions. It is the instrument through which the states decide to achieve their international aims, but it also becomes a living entity, the powers of which cannot be exhaustively predicted in advance[105]. It is special in the sense that its objectives characterize it more than its powers.

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[102] This is how it is referred to in the Treaty of the European Union (article 5 TEU).

[103] Michel Virally, 'La notion de fonction dans la théorie de l'organization internationale' in Charles E. Rousseau (ed), *Mélanges offerts à Charles Rousseau* (Editions A. Pedone 1974), 282.

[104] This is the opposite of what happens in the State's theory, where the function is the consequence of the existence of power. States use their powers in order exercise their functions.

[105] The same arguments have been used in the application of implied powers within federal states, even before that it became an issue within international organizations. In this sense, in *M'Culloch v. The State of Maryland et.al.*, in 1819 the Supreme U.S. Court stated: "It was impossible for the framers of the Constitution to specify prospectively all these means, both because it would have involved an immense variety of details, and because

The limits of the competence of international organizations have been the subject of several decisions and opinions of the International Court of Justice. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons*, the ICJ confirmed that the competence of international organizations is governed by the principle of speciality "*that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them*[106]." Accordingly, the organization can only act when the states have entrusted it with the power to act.

Moreover, the Court also recognised that such empowerment is normally contained in the constitutive act of the organization, thus it should be explicit. However, an implicit empowerment can also be possible, but its preliminary condition is its necessity for the fulfilment of the duties of the organization: "*The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.*"[107] In general, the extent of such implied powers has been extensively interpreted by the Court, since they would promote the efficiency and effectiveness of the organization[108]. However, in the *Legality of Nuclear Weapons* Opinion the Court applied this criterion in a restrictive way and it concluded that no implied power could be recognized to the World Health Organization with regards to the assessment of the legality of the use of nuclear weapons, since it was not necessary for the completion of its tasks, i.e. the protection of human health.

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it would have been impossible for them to foresee the infinite variety of circumstances in such an unexampled state of political society as ours, forever changing and forever improving" (see Henry Wheaton, *Reports of cases argued and adjudged in the Supreme Court of the United States*, vol 4 (John Conrad and Company 1835), 385).

[106] Advisory Opinion of 8 July 1996 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* [1996] ICJ Reports 66[25].

[107] Ibid.

[108] Advisory Opinion of 11 April 1949 *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 182-183: "*Under international law, the Organization must be deemed to have those powers, which though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties*" [emphasis added]; see also Advisory Opinion of 20 July 1962 *Certain Expenses of the United Nations* [1962] ICJ Reports, 168 and Advisory Opinion of 13 July 1954 *Effect of Award of Compensation Made by the United Administrative Tribunal Opinion* [1954] ICJ Reports, 57.

As underlined by several commentators[109], in this case the Court did not give any substantial reason for such narrow interpretation. Nonetheless, the potential effects of the theory of implied powers on the system of competences of international organizations have always been recognized by it and for this reason it has put some limits to its application in several occasions. In particular, the following limits should apply:

1. The recourse to implied powers must be essential or necessary for the organization to perform its functions, as mentioned by the ICJ in its *Reparations for Injuries* Opinion[110];
2. Certain explicit powers in the area concerned must exist. It is debated whether when an explicit power already exists the organization can in any case have some implied powers in the same field[111]. A narrow view may hinder the application of the speciality principle and of the functionality theory: if a power exists but it is not wide enough to reach a certain objective of the organization or it does not allow the organization to be fully effective in its functions, an implied power shall be then admissible in any case;
3. The use of implicit powers should not violate fundamental rules and principles of international law: in the *Namibia* Opinion[112] the Court held that the UN member states' obligation not to enter into treaty relationships with South Africa was limited by certain general conventions such as those having a humanitarian character, thus superseding the objectives of the resolution in question;
4. Implied powers should not change the distribution of functions within an organization. The Court applied such limitation in the *Certain Expenses* case, since

[109] Dapo Akande, 'The competence of international organizations and the advisory jurisdiction of the International Court of Justice' (1998) 9 European Journal of International Law 437-467; N.D. White, 'The World Court, the WHO, and the UN System' in N.M. Blokker and H.G. Schermers (eds), *Proliferation of International Organizations - Legal Issues* (2001), 100-104.
[110] Advisory Opinion of 11 April 1949, *Reparations for Injuries Suffered in the Service of the United Nations*.
[111] The Court has not expressed an opinion on the point yet; however, narrow views have been expressed by some of its judges (see the opinion of Judge Moreno Quintana in Advisory Opinion of 20 July 1962, *Certain Expenses* (n. 108), 245). In favor of broader readings, see: A. I. L. Campbell, 'The limits of the powers of international organisations' (1983) 32 International and Comparative Law Quarterly 523-533, 528; T.D. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter' (1995) 26 Netherlands Yearbook of International Law 33-138, 71.
[112] Advisory Opinion of 21 June 1970 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970] ICJ Reports. In this sense, Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter' (n. 111), 71: "*the Council's general powers do not provide it with a blank cheque to take measures which would violate fundamental principles and rules of international law, even if these are not specifically referred in Chapter I or other provisions of the Charter*".

one of the core questions was the scope of the powers of the General Assembly in the area of the maintenance of international peace and security.

With regard to implied powers, it has been held that they are "*ancillary and subordinate means of accomplishing the permanent purposes for which the organization was founded* [,] *the use of the concept of "implicit powers" does not therefore consist in violating the texts and in diverting the organization from the assignment which has been given to it, but on the contrary is the result of the continuous and renewed assignment, and the fact that the organization is a real and practical instrument, not a hypothetical and artificial structure*"[113]. They thus seem to be a necessary instrument for the effective functioning of the international organization and they do not expand the conferred powers.

Nonetheless, the speciality of international organizations may put such interpretation into question, in particular when it is connected to an actual extension of the powers originally allocated to the member states. While it may be straightforward that the states recognize the organization as necessary for the completion of their aims and they are committed to the functionality of such entity, the excessive extension of its operative field can become a problem for the states, who want to keep full control over certain areas of competence.

Indeed, the delimitation of competences does not only work horizontally, in order to set the competences attributed to the different international organizations operating in the system, but it also works vertically, by determining what needs to be the object of international cooperation and what should remain at the level of the states. In the latter case, competences can be determined either by way of political behaviours of the states within the organization, or by way of recognizing some domestic jurisdiction to the member states[114].

Clearly, guaranteeing that the organization would not use powers other than those conferred upon it is particularly relevant for "general" or "political" organizations, because in such cases powers and objectives of the organization are defined broadly. Consequently, many of the constitutive agreements of these organizations introduced guarantees to ensure that the powers would not be interpreted in a way as to intrude in the national affairs of the member states. Such guarantees can be usually found in "domestic jurisdiction clauses", under which the sphere of what belongs to the member states is determined[115].

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[113] Charles M. Chaumont, 'La signification du principe de spécialité des organizations internationales', *Mélanges offerts à Henri Rolin* (Éditions A. Pedone 1964), 59 [translated by the author].
[114] Virally, 'La notion de fonction dans la théorie de l'organization internationale' (n. 103), 294-296.
[115] See for example, Article 2.7 of the Charter of the United Nations: "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction*

Two different remarks can be made with regard to domestic jurisdiction clauses. On one side, they have a "psychological" function on the member states, in the sense that they are instruments to cast out any possible doubts of states about the possibility for the organizations to overcome the intentions of their founders. Accordingly, these clauses do not really play a role as legal instrument in the delimitation of powers, but they can be useful in order to allow the member states to confer on the organization powers that they would be otherwise reluctant to confer upon it. However, such clauses have also been questioned as regards their effectiveness[116]. Assessing whether or not a certain field of intervention falls within exclusively domestic powers is generally not an issue, to the contrary it is very important to assess whether such intervention might hinder the national sovereignty and thus whether the organization might have abused its powers by acting outside its scope. Indeed, the definition *in concreto* of domestic jurisdiction is becoming increasingly difficult, because the competences and objectives of international organizations often overlap with domains that are naturally reserved to national policies. Accordingly, the criterion adopted to define such domains must be variable. The above explains why the creation and development of international organizations is the result of the constant tension between the exigencies of their functions and the resistances of some (or all) of their members aiming at the protection of their own interests and using their sovereignty as a justification[117].

Consequently, the objectives of the organization become the main – and probably only – factor for determining which actions should be considered *ultra vires*. Hence, it has been correctly stated that "*the definition of the objectives of the organization forms the only constitutional limit on the scope of operational activities*"[118]. Objectives and competences can be thus seen as quite identical and they form a single type of provision, normally included in the founding charters of international organizations.

2.2 Can the European Union be still considered an international organization in relation to its competences?

When looking at the structure of the European Union, it is possible to notice that the reasoning showed above applies as well. The ECSC and the EEC were indeed created as international entities through international agreements between the Member States. They

of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[116] Chaumont, 'La signification du principe de spécialité des organizations internationales' (n. 113), 61-62.

[117] Virally, 'La notion de fonction dans la théorie de l'organization internationale' (n. 103), 295-296.

[118] Henry G. Schermers and Niels M. Blokker, *International Institutional Law. Unity in diversity.* (4th edn, Martinus Nijhoff Publishers 2003), 764.

were governed by international law and their organs – different from the Member States – were established in order to pursue the objectives included in the founding treaties. However, the European integration process has played a major role in leading the Communities farther from the classical international organization, towards a new and peculiar structure, different both from states and international organizations. Accordingly, the question that now arises is whether and to what extent the characteristics of international organisations are still valid for the European Union and what is their possible impact on the allocation of competences.

For a long time in the history of the European integration process the question of competence has been disregarded. As the European Community had been construed in order to attain the objectives contained in the Treaties, its functional characteristics were still predominant in the allocation of powers. The institutions could act in order to attain the objectives provided for in the Treaties. In fact, the conferral of competences upon the Community was interpreted as a "*permanent limitation of* [Member States'] *sovereign rights*"[119], following *"the acceptance by a group of States of values which are common to them and which therefore give them an objective and an idea of order to which the participants are ready to subordinate their national interests and their national hierarchy of values*" [120]. Nonetheless, the principle of conferral was not explicitly mentioned in the Treaties and the competences of the Community were simply assumed on the basis of the policies and objectives provided for in the Treaties. Moreover, the Court adopted an extensive interpretation of the Treaties, in order to allow the achievement of all the objectives inserted in the Treaties. The result was thus a constant expansion of the Community competence and the final raise of the question of imposing limits to Community competence[121].

In the context of international organizations competences are allocated as a set of limits to the organization's powers, but these powers find their limits in the function of the entity, i.e. the achievement of its objectives. Lacking a formal delimitation of powers and following the steady enlargement of its objectives, the European Community had been initially interpreted as a functional entity. However, while the Community competences were allocated on the basis of the objectives associated to each policy area, the increased number of such objectives limited the speciality of the Community as an international organization and

[119] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 264
[120] Pierre Pescatore, *The law of integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities.* (Sijthoof 1974), 50.
[121] Loïc Azoulai, 'Introduction: the question of competence' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014), 6.

moved it towards a system of governance closer to a state than to a super-national organization.

This dynamic has been thoroughly analysed by the "(Neo-) Functionalist theory"[122]. According to this theory, the growing competence given to the European institutions is due to the strong transnational activity existing in the European context. Such activity, despite possible interventions by the Member States, is as important as to push national governments to allocate more powers on the supranational authorities, as to have more functional and fluid transnational exchanges. Accordingly, the "functional" quality of the European Community is no more limited to a list of defined functions as it is for classical international organizations, but it is evolving and expanding over time, depending on the necessities of the market and the society in general. Such phenomenon is the consequence of the process of integration that characterized the European history, but at the same time it raises the question on how we can still read the objectives of the European Union through the lenses of "functionality" or "speciality".

It has been held that, while starting "*as a kind of pilot project of limited economic integration with a view to securing greater peace and prosperity for the Member States, the EU has evolved into something much larger, more complex and more ambitious*[123]". This is reflected in the objectives that the Community has posed itself through several amendments of the Treaties.

Recalling them briefly could thus be useful for the purposes of the present work. The ECSC had as main objective the economic expansion of the Member States, through the creation of a common market. However, the seeds of the integration process could be already found in those texts, since reference to a "community among peoples" [124] and to a "destiny henceforth shared"[125] were made. Similarly, the Treaty establishing the EEC created an organization for specific purposes (economic integration through the common market), but also enlarged its scope to new fields of common action, enhancing the integration project[126].

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[122] Wayne Sandholtz and Alec Stone Sweet, 'Neo-functionalism and Supranational Governance' in Erik Jones, Anand Menon and Stephen Weatherhill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012). For an analysis of the relationship between conferred and implicit powers on the basis of the functionalist approach, see: Joseph Weiler, *Il sistema comunitario europeo. Struttura giuridica e processo politico* (Il Mulino 1985), 118 ff.

[123] Grainne de Búrca, 'Europe's *raison d'être*' in Dimitry Kochenov and Fabian Amntenbrink (eds), *The European Union's shaping of the International Legal Order* (Cambridge University Press 2014), 21.

[124] Fifth recital of the preamble, ECSC Treaty.

[125] Ibid.

[126] The first recital of the Preamble of the EEC Treaty suggests the idea of "*an even closer union among the European peoples*".

With the amendments brought by Nice and Maastricht Treaties, the provisions containing tasks and activities of the Community have been extended significantly. The Nice Treaty referred not only to the market integration, but also to monetary union, sustainability, social aspects, gender equality, solidarity and environmental protection[127]. The Maastricht Treaty added the objectives of the European Union as well. In particular, these included – among others – "economic and social progress and a high level of employment", the introduction of a citizenship of the Union and the maintenance of "an area of freedom security and justice"[128]. Moreover, the wide range of objectives contained in the Treaty did (and do) not constitute the latest steps in the integration process. Indeed, the TEU expresses the resolution to "*continue the process of creating an ever-closer union among the peoples of Europe*" and shows "*further steps to be taken in order to advance European integration*[129]".

The latest revision of the Treaties brought by the Lisbon Treaty has probably marked an important step towards the creation of an entity which is no more just an international organization.

Despite still remaining based on a set of treaties instead of one constitutional document, Article 1 TEU now provides that the Union is not just simply established, but that the Member States confer competences upon it in order "*to attain objectives they have in common*". While this reference to specific objectives seems to recall the principle of speciality, the actual structure of the Treaty reminds us that the EU has in fact lost its speciality. The principle of conferral is the basis for the empowerment of the Union, which can act within the number of competences listed in the Treaty in order to attain the objectives thereby specified. Moreover, in the new Treaties, and for the first time, the values of the Union stand before its objectives and the latter have not been cut down, but instead they have been enlarged, ranging a really large set of objectives, which is more proper of a state rather than an international organization. Accordingly, if the Union should be regarded as a functional entity, such functions are now several and not confined to a single area anymore. Therefore, there are good reasons for speaking of constitutional principles of the EU when referring to the objectives contained in Article 3TEU[130].

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[127] Article 2 EC Treaty.
[128] Article 2 TEU. As a note, such interventions in the text of the Treaties coupled with the progressive loss of the mainly economic purposes of the Community, which was no more a merely "Economic Community" but a "European Community".
[129] Recital 13 of the Preamble of the TEU (Nice version).
[130] Karl-Peter Sommermann, 'Article 3 [The Objectives of the European Union]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU)* (Springer-Verlag Berlin Heidelberg 2013), 159.

Hence, the objectives of the Union have not only expanded, but they also have taken another role in the European constitutional framework. Through the Treaty revisions, objectives and competences have evolved in two different categories of EU law. While objectives still constitute a valuable mean of interpretation of the Treaties and sometimes they also help in the determination of the out-boundaries of competences, they are no more a source of competence in itself. Accordingly, they do not create powers anymore, but they give a sense of purpose to the action taken according to the Treaties.

In the Lisbon framework, the best evidence of such change is given by Article 3.6 TEU, according to which "*the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties*"[131]. Moreover, under Article 5 TEU "*The limits of the Union competences are governed by the principle of conferral. […] Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain within the Member States*". The interplay between objectives and competences is thus evident.

The respect of the objectives of the Union is today a constitutional obligation. In several occasions, the ECJ[132] has confirmed that the objectives are a fundamental interpretative tool in the application of EU law, including in cases where the choice of the legal basis is disputed[133]. However, the objectives are no more the instrument for creating or delimiting powers within the Union. They are now subject to the competences listed in the Treaties. Accordingly, the principle *ius ad finem dat ius ad media* does not apply. Objectives can only be pursued to the extent and in the forms contained in the specific rules allocating competences to the Union. Once a competence has been given by the Treaties, the role of the objectives of the Union is to guide the interpretation of that competence as to make it fit in the general system created by the Treaties themselves.

The limitation of the relationship between objectives and competences through the principle of conferral is now also evident in the interpretation of the flexibility clause under Article 352 TFEU (ex 308 TCE). According to this provision, if a certain action becomes necessary "*within the framework of the policies defined in the Treaties, to attain one of the objectives*

[131] Emphasis added.
[132] See e.g. Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvent Corporation v Commission* [1974] ECR 224, para 32; Case 53/81 *Levin* [1982] ECR 1035, para 15; Case 15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijzen* [1982] ECR 1409, para 33.
[133] Case C-130/10 *Parliament v Council* [2012] OJ C295/2, paras 61-65.

set out in the Treaties, and the Treaties have not provided the necessary powers", such powers can be created through a special procedure.

This provision has been largely used in the past in order to create competences that had not been expressly provided for in the Treaties. Provided that in the Treaties a list of competences was not present and that the action of the Community was thus based on its objectives and the legal bases, the flexibility clause was used not only for the creation of new Community powers, but also for the extension of the existing ones, in view of the pursuit of a specific objective[134]. Similarly to the doctrine of implied powers in international organizations, the provision revealed the residual functionality of the European system. Accordingly, any activity for which the Community had not been attributed any competence could be brought within the objectives of the Treaties, consequently over-expanding the range of action and of competence of the Union[135]. For this reason, fearing an uncontrollable expansion of Community competences under the flexibility clause, some commentators[136] tried to limit its applicability to exceptional circumstances, namely when an additional transfer of power to the Community was necessary or indispensable[137].

Such broad interpretation of the flexibility clause was soon repealed by the Court of Justice, which moved towards a more constitutionally oriented interpretation. In Opinion 2/94, the ECJ stressed how the clause "*is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty*"[138]. In this regard, some commentators[139] suggested reading such interpretation on the basis of the distinction between *jurisdiction* and *competence* of the Community. While the jurisdiction is defined by the Community's objectives, the competences instead determine the *quantum* of legal entitlements in the pursuit of those objectives. Accordingly, the flexibility clause would bridge the gap between the scope of the jurisdiction and the scope of powers, by providing a competence in all those areas in which an express power is not given. It would then bring

[134] Robert Schutze, 'Organized change towards an "Ever Closer Union": Article 308 EC and the limits to the Community's legislative competence' (2003) 22 Yearbook of European Law 79-115, 98.
[135] Joseph H.H. Weiler, 'The transformation of Europe' (1991) 100 Yale Law Journal 2403-2483, 2446.
[136] G. Marenco, 'Les conditions d'application de l'article 235 du Traité CEE' (1970) 13 Revue du Marché Commun 147-157, 147.
[137] For a more thorough analysis of the use of the flexibility clause in the beginning of the history of the European Community, see: Giancarlo Olmi, 'La place de l'article 235 CEE dans le système des attributions de compétence à la Communauté' (1979) 2 Mélanges Dehousse 273-294
[138] *Opinion 2/94* [1996] ECR I-1759, para 29.
[139] Schutze, 'Organized change towards an "Ever Closer Union": Article 308 EC and the limits to the Community's legislative competence' (n. 134), 105-106.

to unity competence and jurisdiction: wherever a matter falls within the scope of the Treaties, then the Union would have competence.

Indeed, the role of Article 352 TFEU is not opening up the list competences within the treaty framework, but simply giving to the Union an additional regulatory instrument. Differently from international organizations, the power is here immanent in the Treaty itself, since the Member States have given the Union the power to act within the scope of the Treaties and in the system of competences they created[140].

In this sense, Declaration 42 annexed to the Treaties clearly states that Article 352 TFEU "*being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union*".

Hence, the Treaties are the boundaries for the flexibility clause to operate. Moreover, since the Lisbon Treaty has been amended in the sense that the powers of the Union are not conferred by the Treaty, but by *the Member States* directly, there is no possibility that the action of the Union would go beyond what the States have decided, clearly maintaining their will to "*rein in the powers of the EU institutions*"[141].

2.3 The relationship between objectives and competences in the European constitutional framework.

As it has been seen above, the peculiar nature of the system of competences in the European Union has determined an important shift in the relationship between competences and objectives. "*Objectives are no longer the main source for delimiting the powers and the legal instruments of the Union*"[142], they are now subject to conferred competences listed in the Treaty and guide in their interpretation within the system.

Among the Treaty's objectives a distinction must be made, between general objectives and sectoral objectives. The former are listed in Article 3 TEU and Articles 8 to 13 TFEU[143].

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[140] Angelo Rinella, 'Osservazioni in ordine alla ripartizione delle competenze tra Comunità europea e Stati membri alla luce del principio di sussidiarietà' (1994) XIV Quaderni costituzionali 431-450, 435.
[141] Lucia Serena Rossi, 'Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU After Lisbon* (Oxford University Press 2012), 105.
[142] Azoulai, 'Introduction: the question of competence' (n. 121), 11.
[143] Namely: the promotion of equality (Article 8 TFEU), social protection and education (Article 9 TFEU), fight against discrimination (Article 10 TFEU), protection of the environment and promotion of sustainable development (Article 11 TFEU), consumer protection (Article 12 TFEU), animals protection (Article 13 TFEU).

According to Article 7 TFEU, the Union shall take into consideration and seek these general objectives in the elaboration of its policies and activities in the pursuit of the coherence of the system. The latter are instead indicated in the provisions dedicated to the specific policies of the Union, which constitute the legal basis for its activities.

Coming to the general objectives of the Union it is necessary to further distinguish them from the principles of the European Union[144]: founding principles are defined as those provisions of primary law that found the normative role of the Union and empower it to action; differently, objectives regulate the way the Union shall act and its limits[145]. Accordingly, they have both a technical and political function within the system.

Article 5.2 TUE[146] explicitly refers to the objectives of the Union for the implementation of the competences conferred upon it. Such reference is not merely declaratory, but it refers to the actual implementation of Union policies, since the objectives laid down in Article 3 TEU are binding for all EU institutions, consequently they have to follow the orientation given by the objectives of Article 3 TEU and the specific Treaty provisions concretising these objectives.

According to the ECJ, this is the heart of the integration process, since "*the pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, [...] which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the raison d'être of the EU itself.*"[147]

Accordingly, the role of the objectives is working together with the principle of conferral, but also reducing the rigidity that the latter gives to the system through the sectoralization of competences[148]. Indeed, in the process of implementation of objectives, the European institutions enjoy a margin of appreciation which refers equally to the concretisation of the scope of the general objectives and to the decision about the steps to be taken for the

[144] Armin Von Bogdandy, 'Founding principles of EU law: a theoretical and doctrinal sketch' (2010) 16 European Law Journal 95-111, 107.
[145] Against, see: Sommermann, 'Article 3 [The Objectives of the European Union]' (n. 130), 159.
[146] Article 5.2 TUE: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."
[147] Opinion 2/13 *Opinion of the Court (Full Court) of 18 December 2014* [2014] ECLI:EU:C:2014:2454, para. 172.
[148] Valérie Michel, '2004: Le défi de la répartition des compétences' (2003) 1-2 Cahiers de Droit Européen 17-86, 31-32.

realisation of said objectives[149]. Accordingly, if the EU legislation does not take into due account the relevant goals or manifestly contravenes the objectives set out in Art. 3 TEU the ECJ may state a violation of Union law.

In this sense, a very important role is played by the so-called integration clauses under Articles 8 to 13 TFEU, which set objectives that approximate different domains of action of the Union and allow the migration of principles from one policy to another[150]. For this reason, their concrete application is particularly relevant in the choice of the legal basis of a measure and in the prevention/resolution of conflicts of legal bases.

In addition, a possible outcome of the application of the integration clauses is widening the scope of a given sectoral policy. However, this should never be interpreted as creating new competences for the Union, but more correctly as a concrete mean of implementation of an integrated system complying with the original will of Member States. As already mentioned, the wording of Articles 3.6 and 5.2 TEU seems broad enough to cover not only the competences conferred through the specific provisions of the Treaty, but also to ensure the effectiveness of the system in general. In this sense, the Member States have implicitly allowed a margin of flexibility to the action of the Union.

The above is in line with the so-called "teleological interpretation"[151] of the Treaties, according to which the Member States have empowered the Union to autonomously interpret its competences, which may also bring to a slight amendment of the original rule. The Court of Justice has generally accepted this kind of interpretation, in particular with regard to the protection of the environment[152]. In the case on the Radioactive products, the Court was asked to verify the compatibility with EU law of a regulation subjecting the sale of agricultural products coming from third countries to certain levels of radioactive contaminants. While the regulation had been adopted according to the commercial policy legal basis, the Court clearly stated that "*environmental protection requirements shall be a component of the Community's other policies*" and that the existence of a specific European

[149] Sommermann, 'Article 3 [The Objectives of the European Union]' (n.130), 161. See also: Andrea Manzella, 'La ripartizione di competenze tra Unione Europea e Stati Membri.' (2000) XX Quaderni costituzionali 531-543.
[150] Valérie Michel, 'Les objectifs à caractère transversal' in Eleftheria Neframi (ed), *Objectifs et compétences dans l'Union européenne* (Bruylant 2013), 181 and 185.
[151] Robert Schutze, *European Constitutional Law* (Oxford University Press 2016), 227-228.
[152] For the integration in other fields, see for example Case C-42/97 *European Parliament v Council of the European Union* [1999] ECR I-00869, on the integration of cultural objectives within other policies, and Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-07079. See also: Roberto Toniatti, 'Conflitti di competenza e forma di governo comunitaria: un contributo della Corte europea di giustizia. Nota a C-42/97. Parlamento c. Consiglio' (1999) 3 Diritto pubblico comparato ed europeo 1149-1157.

competence on the environment "*leave[s] intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives of environmental protection*"[153].

The question of the environmental integration clause is particularly relevant also because it corresponds to a sectoral competence of the Union, as per Articles 191-193 TFEU; accordingly, the general objectives may coincide with those specific to these clauses. The risk is then that the application of the integration clause voids the environmental competence of its meaning and effectiveness. However, the Court has clarified that the main objective of the measure is the instrument through which assessing under which competence an action falls[154]. Accordingly, when a measure predominantly aims at the protection of the environment, it shall fall under the environmental competence. Integration clauses cannot be used by the European legislator as a disguised method for adopting an act under a competence with which is more comfortable, or it has broader margins of action. The Court has thus confirmed once again that the objectives play their role always within allocated competences and can never allow the Union to depart from what Member States wanted for and from it.

When dealing with allocated competences, the choice of the correct legal basis for the act is central. Indeed, the legal basis sets both the objectives and the limits of the European competence in a given domain. As a consequence, sectoral objectives work both within the vertical (Union/Member States) and the horizontal (different domains of Union competence) division of competences.

Within the vertical division of competences, the objectives drive the European legislator in determining the level at which the action must be undertaken. Therefore, the action of the Union must be appropriate to the objective pursued by a certain sectoral competence. Moreover, the level of action is set by application of the subsidiarity principle: only when the objective cannot be satisfactorily achieved at national level, it shall be pursued at the European one[155]. When the action is deemed necessary, the principle of proportionality

[153] Case C-62/88 *Hellenic Republic v Council of the European Communities* [1990] ECR 1527, p. 19-20.
[154] Opinion 2/00 *Opinion of the Court of 6 December 2001* [2001] ECR 9713.
[155] Article 5.3 TEU: "*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*" In particular, the principle of subsidiarity is fundamental in determining *how* the competence should be exercised and not *if*. For this reason, it has been held that the principle works as a limit and a guarantee for the Union against any possible expansion of its powers by reason of the objectives pursued. Accordingly, the attribution of new powers can work only within the framework of the competences already conferred upon the Union. See:

regulate the intensity of the action, so that it does not exceed what is necessary to achieve the objective[156].

According to the "finalist approach"[157], the exercise of European competence depends on the objective of the action to be taken. Consequently, in the matter of choosing the appropriate legal basis, this is enough to link the action to the provision attributive of competence. The objective of the measure thus reflects with its subject. On the contrary, as far as the vertical division of competences is concerned, the objective of the action must be interpreted in light of the objective towards which the competence has been attributed to the Union. Only when the objective of the action and that of the Union coincide, that action can fall within the specific competence.

Although such interpretation may raise concerns on the possible enlargement of European competences without an actual conferral from the States, it is true that it also allows the system to keep fluid and up to date with the changes the society and the Union in general face.

In this sense, the history of the creation of the European competence on energy is quite symbolic. For long time, in fact, the Community enacted pieces of legislation based on objectives – and thus competences – different from those purely related to energy (e.g. commerce, environment etc.). Such activity was not in breach of the principle of conferral, because at the time the regulation of the energy sector was in fact just a consequence of other policies[158]. It is only when the Union *and* the Member States realised that time had come for the setting of truly energy-related objectives that a specific competence was created. This however happened through the treaty revision process, accordingly fully in line with the principle of conferral[159].

In the horizontal allocation of competences, the correct interpretation of the objectives of the measure is the test for the appropriateness of the chosen legal basis. However, also in this case, a coherent reading of the Treaties is required. EU competences cannot be interpreted

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Giordano Strozzi, 'Alcuni interrogativi a proposito della delimitazione delle competenze nell'Unione Europea' (1994) Rivista di diritto internazionale 136-141, 138.

[156] Article 5.4 TEU: "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."

[157] Eleftheria Neframi, 'Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'Unione européenne' in Eleftheria Neframi (ed), *Objectifs et compétences dans l'Union européenne* (Bruylant 2013), 12.

[158] Mainly in the field of free movement of goods and of services, although the latter were not completely liberalized, apart from a negative-integration approach mainly based – in general terms – on the role of the ECJ and of the "direct effect" principle.

[159] Charles Blumann, 'Rapport introductif général' in Charles Blumann (ed), *Vers une politique européenne de l'énergie* (Bruylant 2012), 7ff.

according to the principle of speciality, but they shall be rather understood according to the final objective of integration. Moreover, taking into account the sectoral objectives relevant for another competence avoids the parallelism of competences aiming at the same objective[160]. The fluid movement within the competences framework should however be limited by the clarity of the principle of conferral, in order to avoid any possible overstep from the system of the Treaties. Such containment is particularly important, because, as it will be clarified in the next paragraphs, it allows a certain confidence of the Member States in agreeing to Union's action.

3 The creation of an energy competence: the Laeken Declaration and the Constitutional Treaty

3.1 The premises to the competence question and the Laeken Declaration

The system of competences created by the Maastricht Treaty and confirmed post-Amsterdam, despite being founded on the core principle of conferral, was much less clear on how competences were in fact shared between the Union and the Member States.

Firstly, no categorization of competences was present in the Treaty. In order to identify areas of exclusive competence of the Union, it was necessary to rely on the jurisprudence of Court, which had given them some definition[161]. The same could be said with regard to supporting competences. On the contrary, shared competences were deemed to cover all those areas that the ECJ had not identified as exclusive competence and they had to be found in the specific legal bases present in the Treaty. Accordingly, both the Union and the Member States enjoyed competence, but until the Community had not taken any action, Member States were entitled to legislate in those fields, as long as it was within the limits set by the Treaty. Once the European legislator had exercised its competence, the principle of supremacy applied; accordingly, in case of conflict between national and European legislation, the latter would prevail. Moreover, the development of the doctrine of pre-emption required that, in case of harmonizing measures, the normative field would be occupied by the Community, consequently preventing the national legislator from taking any further action. With this regard, two different approaches were developed: the first is referred to as "occupation of the field", according to which the exercise of power by the Community would determine the

[160] Enzo Cannizzaro, 'L'intéraction entre objectifs politiques et compétences matérielles dans le système normatif de l'Union européenne' in Eleftheria Neframi (ed), *Objectifs et compétences dans l'Union européenne* (Bruylant 2013).
[161] Joined Cases 3,4,6/76 *Kramer* [1976] ECR 1279, p. 30-33; Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, p. 17-18; Case C-405/92 *Mondiet* [1993] ECR I-6133, p.12.

exclusion of national competences for that particular policy sector[162]. Clearly, this interpretation was highly harmful for the Member States' interests[163]. The second approach worked around the principle of subsidiarity, as a mean for the simultaneous exercise of competence both of the Member States and the Community. Moreover, conferred powers were widely drafted, leaving quite wide margins of interpretation on what the Union was or was not entitled to do. In particular, Articles 100 (harmonization in the Internal Market) and 235 (flexibility clause) allowed the Union to progressively enlarge its field of action, consequently biting national competences of the Member States. Such way of action was also supported by the case law of the Court of Justice that in many cases interpreted Member States' prerogatives restrictively, while widening those of the Community[164]. This led to growing concerns among the Member States about possibly losing many of their powers and about the changing nature of the Union that, according to many, was acting outside of the scope of the powers conferred to it.

For example, on October 12, 1993 the German Constitutional Court ruled on the participation of Germany in the Maastricht Treaty and, in that occasion, also expressed some important remarks on the relationship between Germany and the European Union and generally on the allocation of competences within the Union[165]. In particular, the Federal Constitutional Court suggested that the transfer of competences from Germany to the Union should be characterized by certainty, i.e. it should be sufficiently clear just by reading the Treaties what the Union is or is not entitled to do. The critique that the Federal Court moved to the Union was that the use of flexible provisions such as Article 235 EC had made the interpretation of the Treaties so uncertain that it was difficult to distinguish between what could be considered as an interpretation of the Treaty to what was actually an amendment of it. Accordingly, the Union would be often acting *ultra vires* and any interpretation enlarging the scope of its action would not bind Germany. Moreover, only the German Federal Court (not the ECJ) could rule on the legality of such acts, since they would possibly exceed the powers transferred to the Union[166]. Finally, the Court referred to an alleged lack of

[162] This approach was prevailing under the Maastricht Treaty, because there was no clear definition of competences, neither exclusive nor shared, and no reference to the principle of subsidiarity. See, for example: E.D. Cross, 'Preemption of Member States law in the European Economic Community: a framework for analysis' (1992) 29 Common Market Law Review 447-472.
[163] David O'Keeffe and Patrick M. Twomey (eds), *Legal issues of the Maastricht Treaty* (Wiley Chancery Law 1994), 14-15.
[164] Case 31/74 *Filippo Galli* [1975] ECR 47; Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629, Case 195/84 *Denkavit Futtermittel GmbH v Minister fur Ernährung des Landes Nordrhein Westfalen* [1985] ECR 3369.
[165] BVerfG Urteil vom 12.10.1993 2 BvR 2134/92, 2159/92.
[166] Ibid, p. 210.

democracy within the Union, because the democratic representation was only indirect, since the preeminent role in the legislative process was given to the Council, which is not elected. As a consequence, only limited powers could be transferred to the Union, otherwise the Democracy Principle would be violated[167].

Despite being probably bold and far-reaching, the decision of the German Constitutional Court is expressive of the discomfort the Member States were feeling in relation to the quiet expansion of competences the Union was experiencing at the time. Not surprisingly, the European Council of 14 and 15 December 2001 was the occasion in which the Member States clearly expressed their fears on the future of the Union and, in particular, on the expanding powers that it had been gaining over the years.

The outcome of the summit was indeed the "Laeken Declaration", where the Member States representatives clearly urged "*a better division of competences*", in order to "*clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union*"[168]. The European Council raised three main questions that had been on the table for long time: clarity, because the Treaty provisions on competence were considered unclear and confused; conferral, because the powers of the Union should be limited not only to those attributed to it, but such powers should also be better specified and enounced in the Treaties; containment, because there were voices calling for a substantial limitation of the EU power, considered in steady expansion[169].

The main concern was thus the "creeping competence" of the Union[170]. Such expression had been elaborated by academics[171] in order to describe the abovementioned process of slow and steady expansion of European competences. The representatives of the Member States were particularly concerned by the role of Articles 95 and 308 EC (now, Articles 114 and 352 TFEU), which had been largely used as legal bases for any sort of policies (included energy) and had actually brought to an expansion of the Union's field of action. A good

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[167] Steve J. Boom, 'The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?"' (1995) 43 The American Journal of Comparative Law 177-226, 182-183.
[168] European Council, Laeken Declaration on the future of Europe, 14-15 December 2001.
[169] Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (n. 99), 157.
[170] "*There is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well, the Union must continue to be able to react to fresh challenges and developments, and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the 'acquis jurisprudentiel'?"* European Council, Laeken Declaration on the future of Europe, 14-15 December 2001, p. 22.
[171] Grainne de Búrca and Bruno De Witte, 'The delimitation of powers between the EU and its Member States' in Anthony Arnull and Daniel Wincott (eds), *Accountability and legitimacy in the European Union* (Oxford University Press 2002).

example of how the EU competence was creeping can be found in the environmental competence. Indeed, the first harmonizing measures in the environmental were adopted pursuant to Article 308 EC, without an explicit competence having been attributed to the Community for this sector. In fact, environmental protection was included among European competences only in 1987, when milestone acts such as the Bathing Water Directive[172] were already almost ten years old. Clearly, However, it is clear that such legislation had little to do with market integration, while it was more strongly oriented to new European objectives that were not eminently economic.

While it is evident that provisions like Articles 95 and 308 EC lacked precision in imposing limits to EU competence, it should also be noted that the Community did not operate in complete autonomy and under no control from the Member States. Indeed, the German Constitutional Court was right in underlining a lack of democratic participation in the adoption of such acts, but they could not be considered completely outside the mandate received by the Member States, since their representatives played their role in the Council in order to get those acts approved[173]. It has been correctly underlined that the teleological application of Article 308EC or its broad interpretation by the ECJ is not the only determinant factor, but it must be also accompanied by the attribution of new competences to the EU through successive Treaty amendments[174]. The question actually raised by national governments was whether a system of majority voting was effectively ensuring the protection of *all* national interests, given that even the most powerful among the Member States could be easily overridden by the others in the Council, consequently having to blindly accept their final decision.

With regard to the energy sector, the two provisions had given the Community competence in order to ensure both the integration of energy markets (Article 95 EC)[175] and the consistency of measures adopted on other legal bases but involving the energy sector (Article 308 EC)[176]. The internal market legal basis was a useful instrument both for the Community

[172] Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ L 31, 5.2.1976.
[173] Stephen Weatherill, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1-55, 7; Luigi Corrias, *The Passivity of Law. Competence and Constitution in the European Court of Justice* (Springer Netherlands 2011), 12.
[174] Paul Craig, 'Competence: clarity, conferral, containment and consideration' (2004) 29 European Law Review 323-344, 324.
[175] See, for example: Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20–29; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas OJ L 204, 21.7.1998, p. 1–12.
[176] Article 308EC had been mainly used for the adoption of framework programmes, technological action programmes, international cooperation measures and the conclusion of international agreements, such as the

and the Member States, since it allowed the adoption of legislation pursuing a harmonious development of the market, while leaving the possibility for the Member States to derogate to these rules, under the conditions provided for by paragraphs 4 and 5 of Article 95 EC[177]. The derogating option could also balance the political uncertainty left to Member States due to the co-decision procedure provided under Article 95 EC; while Member States could not be sure that their position would be followed in the Council, they were always given a way out in case highly compelling national situations would justify derogations to the European regulation.

Accordingly, the intervention of the Union in the energy market had been tolerated – and sometimes sustained – by the Member States. However, well before the adoption of the Laeken Declaration the Commission had expressed some concerns on the developments of the energy policy within the Union, in particular underlining that *"[t]he main question regarding energy is therefore how to rationalize and bring into line the various components or energy policy so as to ensure their overall coherence and to find a better way of exercising existing powers while, at the same time, updating certain aspects in view of present conditions*[178]". Accordingly, the solution would be creating a new legal basis for energy, where the Union competence would be explicitly introduced to allow a coherent collection of all actions in the sector under a single legal basis.

In fact, the Commission had not limited its interventions to the integration of the energy market, but it also pursued (i) environmental protection and (ii) the security of energy supply[179]. Accordingly, other legal bases had been used. In particular, several energy measures seeking the protection of the environment were adopted under Article 175 EC,

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Energy Charter. Such use resorted in the adoption of 19 acts in the period between 1987 and 1999, compared, for example, to the 175 acts in the field of external relations. See IGC, CONFER 4711/00 of 22 February 2000.

[177] Paragraphs 4 and 5 of Article 95 EC so provided: "*4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them." [emphasis added].

[178] Report from the Commission to the Council on civil protection, tourism and energy SEC(1996) 496final, 5.

[179] See in this sense: Green paper - For a European Energy policy COM(1994) 659FINAL, 15-31; in the 2000 Green Paper on security of energy supply, the Commission identified the integration of energy markets and environmental protection as the main factors for the development of a European energy policy (Green Paper - Towards a European strategy for the security of energy supply COM(2000) 769Final).

which provided explicit competence in this sense[180]. In the same way as for Article 95 EC, also in this case the co-decision procedure was required and derogations were possible for Member States, which could introduce more stringent measures under Article 176 EC. Moreover, in case a measure would significantly affect the Member State's choice between different energy resources, the unanimity in the Council would be required. The expansion of the Union field of action was again under the control of the Member States at different levels. Differently, the question of security of supply could not be straightforwardly based on a specific competence, thus a variety of legal bases could be relevant: not only those already mentioned (namely Articles 95 and 308 EC), but also Articles 93 EC (fiscal measures) and 156 EC (trans-European networks)[181].

As a matter of fact, a body of substantial legislation had been built by cherry-picking competences and legal bases throughout the Treaties. However, as the Commission had noted[182] already, the lack of an explicit competence for the Union in the field of energy determined, on one side, lack of consistency in European action, and on the other, the incapacity for the Union to appropriately tackle the new emerging super-national challenges. In fact, "*energy policy ha[d] assumed a new Community dimension without that fact being reflected in Community powers*[183]" and it could no more be regarded as a collateral aspect of other policies, but it had to stand alone with its own competence. Following the idea that "*each policy area has negotiated its own specific scope of competence and appropriate procedures, allowing for better Member State control – or at least the illusion of it*[184]", both the Community and the Member States welcomed the possibility of creating a new energy competence.

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[180] Such measures mainly concerned renewable energies and energy efficiency. See: Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, p. 33–40 and Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings OJ L 1, 4.1.2003, p. 65–71.

[181] See, for example: Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity OJ L 283, 31.10.2003, p. 51–70, based on Article 93 EC.

[182] In its Communication of 1997, the Commission had clearly stated that "*The lack of such a base in the Treaty establishing the European Community compels the use of Article 235 or else moving, depending on the measures, from an Article concerning "Industry" to another concerning "the Environment" or the "Internal Market". […] The primary concern should [rather] be to identify any policy gaps, encourage synergies and avoid duplication between these Community measures so as to ensure their maximum effectiveness. An overall energy policy framework would facilitate better targeted actions around the priority Community energy objectives.*" (see, Communication from the Commission - An overall view of energy policy and actions COM(1997) 0167final, 4).

[183] Green Paper: Towards a European strategy for the security of energy supply, COM (2000) 769 final, p.3.

[184] Sacha Garben, 'Confronting the competence conundrum: democratising the European Union through an expansion of its legislative powers' (2015) 35 Oxford Journal of Legal Studies 55-89, 59.

The Laeken Declaration embraced these feelings and, in view of "*the new challenges facing the Union*", called for "*restoring tasks to the Member States and assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity*[185]" and in the respect of the "*acquis communautaire*".

The Convention on the Future of Europe was the body charged with the revision of the Amsterdam Treaty in order to draft a Constitutional Treaty for the European Union. It was instituted in February 2002, right after the Laeken European Council, and it was composed of 15 representatives of the governments of the Member States and of two members of the national parliaments of each Member State, together with 16 members of the European Parliament and two Commission representatives.

Its works lasted for almost one year and a half and on 18 July 2003 the President of the Convention, Valéry Giscard d'Estaing handed over the final version of the "Draft Treaty establishing a Constitution for Europe[186]".

3.2 The Convention on the Future of Europe: the revision of the system of competence.

The two main objectives of the Convention with regard to the question of competence were (i) clarification and (ii) reorganization. In this sense, in the First Part of the Draft Constitution, the Title III, which regulated exclusively the notion and exercise of the competence of the European Union, was introduced. The aim was indeed to allow the Member States and European citizens to have a clear picture of the competences allocated to the Union and their extent, while maintaining a certain margin of flexibility for European action.

3.2.1 Clarification

Firstly, the Draft Constitution maintained the basic and central principle that the Union is entitled to operate only on the basis of attributed competences. Article I-9(1) made clear that competences of the Union are based on conferral and that their exercise is governed by subsidiarity and proportionality. Moreover, Article I-9(2) provided that the Union "should act within the limits of the competences conferred upon it by the Member States, and that *competences not conferred on the Union shall remain with the Member States"*[187].

[185] European Council, Laeken Declaration on the future of Europe, 14-15 December 2001, p. 21-22.
[186] Draft Treaty establishing a Constitution for Europe of 18 July 2003, CONV 850/03 (hereinafter: Draft Constitution).
[187] Emphasis added.

At first glance, the emphasised addition seems to add very little to the principle of conferral as it had been interpreted until then[188]. In fact, if one looks at the *travaux préparatoires* of the Convention, it can find that the intention of the Member States was to emphasise this particular point, as it would represent a favourable element for Member States, who would clearly maintain all competences that have not been conferred upon the Union[189]. This addition was clearly a response to the abovementioned concerns on the creeping competence of the Union and to the fear that the Union would excessively interfere with national policies, as it had been underlined at the time of the adoption of the Maastricht Treaty and by the German Constitutional Court in its *Maastricht Urteil*.

Moreover, in Article I-10 the Draft Constitution introduced three different categories of competence: exclusive competence, shared competence, and competence to support, coordinate and supplement the actions of the Member States[190]. According to the Explanatory Note of the Presidium to Articles I-6, "*the key factor in establishing those categories is the extent of the legislative competence conferred on the Union in relation to that of the Member States, according to whether such competence is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues to lie with the Member States (areas for supporting action)*[191]". These categories should thus work as means of interpretation of the vertical division of competences between the Union and its Member States.

Moreover, the following Articles I-12 to I-16 listed, for each category, the specific areas of action. Accordingly, the exclusive competence (Article I-12) of the Union should be exercised in relation to competition rules necessary for the functioning of the internal market, the common commercial policy, monetary policy for the Member States which adopted the euro, customs union, marine conservation within the common fisheries policy, and external agreements necessary for internal competences, or affecting internal acts. In this segment,

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[188] Alessandra Lang, 'Le competenze dell'Unione europea' in Giovanna Adinolfi and Alessandra Lang (eds), *Il trattato che adotta una costituzione per l'Europa: quali limitazioni all'esercizio dei poteri sovrani degli stati?* (Giuffrè Editore 2006), 63.

[189] European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 10, but also European Convention Secretariat, Note on the Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored of 15 May 2002, CONV 47/02, 3.

[190] The present formulation replaces the "complementary competences" one used in the Maastricht Treaty. It followed the fear of the Convention that the previous formulation would enhance the public opinion's perception of a continuous increase of Community powers (European Convention Secretariat, Summary of the meeting on 17 July 2002, CONV 209/02, 3).

[191] European Convention Secretariat, Note from the Presidium to the Convention on the Draft of Articles 1 to 16 of the Constitutional Treaty of 6 February 2003, CONV 528/03.

the Draft Constitution brought to unity and codified the jurisprudence of the ECJ on the definition of exclusive competences[192].

While the catalogue of exclusive competences was closed, the category of shared competences (Article I-13) remained an open, residual set of competences. These included the regulation of internal market; the area of freedom, security and justice; agriculture and fisheries, with the exception of the conservation of marine biological resources; transport and trans-European networks; energy; some aspects of the social policy; economic, social and territorial cohesion; environment; consumer protection; and common safety concerns in public health matters. Two new areas of competence were also added: energy and economic, social, territorial cohesion. Although it may seem that the introduction of a list of competences adds clarity to the system, in reality no substantial change was introduced with respect to the previous situation. In fact, in order to identify the exact extent of the Union's competence and the instruments through which such competence could be exercised, it was still necessary to refer to the sectoral policies described in Part III of the Draft Constitution. Indeed, a clear notion of "shared competence" as compared to "exclusive competence" had not been included in the proposed constitutional treaty. The result was thus that the objectives of overall clarification of the system of competences were not successfully and fully achieved, as it could still result difficult to understand what was the exact difference between exclusive and shared competences only by reading the very first articles of the[193].

Finally, Article I-16 referred to the category of support competence and the relevant sectors for this competence were: industry, protection and improvement of human health, education, vocational training, youth and sport, culture, and civil protection. In these areas, the action of the Union should be limited to support that of the Member States, the adoption of harmonization measures was thus prevented in these sectors. However, given the wide scope of these policies, it appeared that they could be actually already covered by those indicated under the shared competence. This concern was also expressed by the Presidium, who underlined that "*the areas proposed by the Convention members are either areas that should appear under the shared competence (e.g. consumer protection, transport and trans-*

[192] Andrea Biondi, 'Le competenze normative dell'Unione' in Lucia Serena Rossi (ed), *Il progetto di Trattato-Costituzione Verso un nuova architettura dell'Unione Europea* (Giuffrè Editore 2004), 134. Also the Convention did not take any new position on the notion of exclusive competence v. shared competence, but simply referred back to the case-law of the Court of Justice (European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 6-7). See also: Franco Pizzetti, 'Le competenze dell'Unione' in Franco Bassanini and Giulia Tiberi (eds), *Una costituzione per l'Europa Dalla Convenzione europea alla Conferenza intergovernativa* (Il Mulino 2003).
[193] Craig, 'Competence: clarity, conferral, containment and consideration' (n. 174), 333-334.

European networks, research, development cooperation, etc.) or are already included in other areas of shared competence, such as media, which were present under both the internal market and culture"[194]. Moreover, support competences seemed also to be already partially covered by "complementary competences", which had been already defined under the previous Treaties[195]. These were areas in which the competence remains of the Member States, but the Union may can coordinate the various national policies without harmonizing them. It is thus a sub-category of shared competence in which Member States emphasize their dominant role.

Long discussions arose on the opportunity of categorizing competences and introducing lists of competences in the Treaty. In principle, Member States welcomed the draft as it seemed to be a more efficient instrument for limiting the expansion of the powers of the Union. However, the final draft is the result of the dispute on the correct interpretation of the consequence of the allocation of competences in the European Union. For long time the conferral of powers to the Union meant the loss of the same powers by the Member State. As a result, the Member States and the Union were not working together and sharing powers for the pursuit of a common objective, but they were competing on the final allocation of competence. In this sense, more clarity and competences clearly determined and listed in the Treaties were needed. Moreover, there was a commonly perceived need to make the delimitation of competences clearer not only for Member States, but also for citizens, who were entitled to know exactly the powers of the Union and its objectives. The Working Group on Complementary Competences thus suggested the introduction of a "*short, crisp and easily understood delimitation of the competence granted to the Union in each sphere of action* [in order to] *make clear that the competence in each policy area should be exercised in accordance with the provisions of the relevant Treaty Articles for each policy area*"[196]. During the negotiations, however, some Member States proposed an ever more radical solution, according to which in the Treaty an exhaustive list of both EU and national powers should have been inserted. While this solution would have probably helped clarity, it would have also completely blocked any possible development of the European project

[194] European Convention Secretariat, Note of the Praesidium to the Convention on Draft Constitution, Volume I - Revised text of Part One of 26 May 2003, CONV 724/03, 82.
[195] For a wider analysis of the meaning of "complementary competence" under the Maastricht Treaty, see: Davide Strazzari, 'Le competenze complementari e il metodo aperto di coordinamento: suggerimenti per un ruolo più attivo delle Regioni in ambito comunitario' (2003) 1 Diritto pubblico comparato ed europeo 221-251.
[196] European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 3.

and of European integration[197]. For these reasons, it was disregarded. The solution actually inserted in the proposed constitutional Treaty was certainly a compromise, but it was sufficient to block the silent expansion of EU powers. Indeed, as the catalogue of competences represents a clarification of the different types of competences that the European Union can exercise, the future enlargement of the powers of the Union would only be possible through an amendment of this part of the Treaty[198].

The academic literature showed some concerns with regard of this solution as well. The first critique was that it would risk crystalizing the system of competence[199]. Moreover, the fact that such list was inserted in each specific category of powers gave additional rigidity to the system, with the consequent risk of blocking the regulation of the division of competences between the Union and the Member States[200]. Such academic criticism was also accompanied by some political tensions, mainly coming from the German quartiers, which were disappointed by the inclusion of new areas of competence in the Draft Constitution, while none had been returned to the Member States[201]. Grounding their opinions on the Länders experience, German representatives in the Convention[202] together with some academics were in fact supporting either the creation of a close list of competences, in which those expressly reserved to Member States were clearly indicated, or, in case of political disagreement, a much more flexible system, allowing "flexible reattributions" of competence to the Member States or *vice versa*, depending on the circumstances[203]. It seems, however, that these proposals were difficult to reconcile with reality, because they would either completely paralyse the integration system, making it too rigid, or they would void of meaning the European project itself, since the European Union is first of all a

[197] For an exhaustive comparative analysis of catalogues of competences in federal systems, see: Wilfried Swenden, 'Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism' (2004) 42 Journal of Common Market Studies 371-392.
[198] Franco Bassanini and Giulia Tiberi, *Una costituzione per l'Europa. Dalla Convenzione europea alla Conferenza intergovernativa* (Il Mulino 2003), 49.
[199] Stephen Weatherhill, 'Competence' in Bruno De Witte (ed), *Ten reflections on the Constitutional Treaty for Europe* (European University Institute 2003), 47.
[200] Swenden, 'Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism', 388.
[201] Franz C. Mayer, 'Competences-reloaded? The vertical division of powers in the EU and the new European constitution' (2005) 3 International Journal of Constitutional Law 493-515, 499.
[202] The representative of the German Parliament, Mr. Teufel, stressed it particularly (European Convention Secretariat, Note on the Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored of 15 May 2002, CONV 47/02, 15).
[203]Jürgen Schwarze, 'Constitutional perspectives of the European Union with regard to the next Intergovernmental Conference in 2004' (2002) 8 European Public Law 241-254, 245. See also: L. Hoffmann and J. Shaw, 'Constitutionalism and federalism in the future of Europe debate: the German dimension' (2004) 03/04 Federal Trust Paper .

"*cooperative system of separation of powers*[204]". Rather, the wording of the Draft Constitution, far from being perfect, seems to be a compromise between the most integrationist positions and those supported by Germany.

In this sense, Dashwood pointed out that "*differentiation, in a variety of forms, has come to be recognized as a necessary feature of the Union order. It makes possible the organization […] of activities in respect of which some or all of the Member States are unwilling (or, for the time being, unready) to accept the limitation of their sovereign rights that would follow from the thorough-going application of the Community model. The acceptance of differentiation as a technique of constitution-making in the order of the Union is to be welcomed rather than regretted, since it avoids worse alternatives*[205]", such as the creation of agreements among Member States and outside the system of the Treaties. Accordingly, differentiation couples with flexibility, which was indeed needed in a system of (at the time) 25 Member States. The question however remains what is understood as "differentiation" and "flexibility". If it is interpreted as giving the Union a set of different instruments of regulation that can be adapted to policies and circumstances in order to make the integration project work, it is certainly appreciated. In this sense, the flexible nature of differentiation should also allow to regulate bundles of problems or issues together in case they cannot be categorized under a predetermined area. Such objective, however, should not be reached only through the flexibility clause, but it should be achievable through an intrinsic flexibility of the system. On the contrary, if differentiation would mean leaving out or behind some Member States with instruments such as opt-outs, this should be neglected, as it would impair the objective of integration and it would give too much lead to the Member States and their national interests.

3.2.2 Reorganization

In the pursuit of the objective of the Laeken Declaration to reorganize competences, a better coordination and limitation of the application of Articles 95 and 308 EC as legal bases was the main issue.

Before the Convention was started, many authors [206] (especially among Germans) proposed radical solutions that contemplated the deletion of Article 308 EC from the Treaty, so as to

[204] Armin Von Bogdandy, 'The European Union's vertical order of competences: the current law and proposals for its reforms' (2002) 39 Common Market Law Review 227-268, 236.
[205] Alan Dashwood, 'The relationship between the Member States and the European Union/European Community' (2004) 41 Common Market Law Review 355-381, 362.
[206] Wolfgang Clement, *Europa gestalten – nicht verwalten. Die Kompetenzordnung der Europaïschen Union nach Nizza* (FCE 2001), paras. 18-21.

enhance transparency and clarity in the use of its competences by the Union. Indeed, as it has been already discussed above, the (ab)use of the flexibility clause was one of the main concerns in the discussion on the "creeping competence" of the European Community. This issue was thus also raised in the Working Group on Complementary Competences. While the majority of the members outvoted its deletion, all agreed on the necessity of establishing better criteria for its application[207]. In particular, the it was proposed to limit its scope, excluding its applicability for (i) widening the scope of EU powers or (ii) adopting measures that in effect amend the Treaties, and (iii) for harmonization measures in areas where harmonization is forbidden[208]. This proposal was indeed in line with the previous jurisprudence of the European Court of Justice, which in several occasions had set out the limits for the applicability of the flexibility clause.

In fact, the issue at stake was not simply the scope of application of the flexibility clause, but rather understanding what kind of entity the Union wanted to be as a result of the adoption of the proposed Constitutional Treaty. As discussed[209], although the European Community could no longer be considered as a functional entity, Article 308 EC was necessary for the development of the European project. Many authors also suggested that the flexibility clause is common to many federal systems and it can be found in many European federal constitutions[210]. Moreover, in the Convention it was maintained that "*the flexibility and dynamism at the heart of the Union's past development, and which was one of its strong points, should be preserved*[211]", as it would also allow the Union to fulfil its tasks adequately[212].

In order to contain a further expansion of EU competences through the flexibility clause, the Convention operated at two different levels. On one side, the Convention decided to create

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[207] In reality, some commentators maintained that the new Article I-18 amounted to an "implied powers" clause, under which the Union's implied powers authority remained untouched, consequently showing a missed opportunity for the Union to curtail the competence creep. In this sense, the Convention would have been conservationist in its approach towards competence issues. (George A. Bermann, 'Competences of the Union' in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-first Century Rethinking the New Legal Order*, vol 1 (Hart Publishing 2004), 69).

[208] European Convention Secretariat, Note on the Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored of 15 May 2002, CONV 47/02, 14-15 and European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 14.

[209] See paragraph III.2.2 above.

[210] Cf. Art. 74 German Basic Law, on this Stettner in Dreier (Ed.), Grundgesetz Kommentar, Vol. 2 (Mohr, 1998), Art. 74 German Basic Law, para 12.

[211] European Convention Secretariat, Note on the plenary meeting - Brussels, 15 and 16 April 2002 of 25 April 2002, CONV 40/02, 6.

[212] Von Bogdandy, 'The European Union's vertical order of competences: the current law and proposals for its reforms' (n. 204), 254.

new legal bases for those areas that had been extensively regulated through Article 308 EC[213], as to substantially constitutionalize the *acquis communautaire*. On the other side, Article 308 was redrafted in a quite broad provision, providing the possibility for the Union to take measures necessary for the attainment of the objectives of the Constitution, in case it had not provided the necessary powers and within the framework of the policies defined in Part III. Moreover, the provision could not be used as a legal basis for harmonizing areas of EU competence in which harmonization was excluded by the Constitution.

With respect to the original version of Article 308 EC the new provision repealed the "operation of the common market" requirement, but it introduced the reference to the sectoral policies contained in Part III of the Draft Constitution. The provision determined tighter limits to European action and it confined the applicability of the flexibility clause to the sectors in which the Member States had already conferred powers upon the Union. Moreover, the Court had ruled that the flexibility clause could not be used in case a more specific legal basis was available[214], and since Article 308/I-18 is the most general one, its use should be confined to a very limited number of situations. This is even truer if, as mentioned above, we consider that the areas that had been indicated by the Member States as culpable of the creeping competence of the Union had been inserted in the Constitution anyway, as new legal bases[215]. Remarkably, the Convention did not retain the proposal from the Working Group V on the impossibility to use the flexibility clause as a mean for widening the scope of EU powers, as it had been already clarified by the Court in its Opinion 2/94. In fact, even if the interpretation of the Court had already clarified that this could not be the sole objective of Article 308 EC, an explicit provision would have certainly better clarified its applicability.

Moreover, the Working Group also repealed a proposal for limiting the applicability of the flexibility clause to measures aiming at "the establishment and functioning of the internal market", because "*such limitation would be too narrow since most acts adopted under Article 308 have related to other subject matter. Furthermore matters related to the internal market were already covered under TEC Article 95*[216]". It thus seems that the Convention was interpreting Article 95 EC as a sort of second flexibility clause but with a more limited scope. As a result, when no specific legal basis was available, all matters having an objective

[213] Read: tourism, energy and civil protection.
[214] Case 45/86 *Commission v Council* [1987] ECR 1493 and *Opinion 2/94* (n. 138).
[215] Weatherill, 'Competence creep and competence control' (n. 173), 28.
[216] European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 15.

falling in the scope of the regulation of the internal market would fall under Article III-172 (ex-Article 95 EC), while any other objective would be based on Article I-18.

The amendments brought by the Convention were not such as to completely change the previous system, but some clarification was made on the scope of application of the provision. In particular, more clarity was ensured through the introduction of a Protocol on the Application of Subsidiarity and Proportionality, annexed to the treaty and through the new forms of procedural control over the application of the flexibility clause: (i) the necessary consent of the European Parliament – and not only its consultation – and (ii) the assessment of the respect of the subsidiarity principle by the Member States. Although the scope for flexibility was still wide, Member States were now entitled to additional controls on its application by the Union. As a result, the provision became more democratic, as it was no more a right just of national governments to decide whether competences in new fields could be exercised, but now also citizens – through their representatives in the European Parliament – could control over the decisions taken in Brussels.

In particular, the new Protocol on the Application of Subsidiarity and Proportionality allowed an *ex-ante* control from the national parliaments on measures to be adopted at European level. The European institutions had to clearly state why the measure should be better adopted at European level according to the subsidiarity principle. The national parliament could then submit a reasoned opinion on the non-compliance of the proposal with the principle. Depending on the number of observations, the Commission could be obliged to review the legislative proposal.

However, while the Protocol referred both to the subsidiarity and the proportionality principle, only the respect of the former could be investigated by national parliaments. Such limitation appeared quite counter-intuitive, since the assessment of proportionality is the logical consequence to the allocation of competence at European level, provided that it regulates the exercise of the competence. Nevertheless, only few members[217] of the Convention proposed its introduction in the early assessment process, consequently allowing a control over proportionality only either in the institutional context of the law-making process or during an *ex post* judicial control of the Court of Justice.

Moreover, the Draft Constitution did not change in any way the procedures for adoption of acts under ex-Article 95 EC. Accordingly, it maintained its broad applicability and its ability

[217] In particular, Mr. Hain, Mr. Azevedo and Mr. Nazarè Pereira (European Convention Secretariat, Reactions to the draft protocol on the role of National Parliaments in the European Union - Analysis of 12 March 2003, CONV 611/03, 5).

to creep the European competence. As opposed to ex-Article 308 EC, the provision on the harmonization of the Internal Market was not submitted to the *ex-ante* control from national parliaments either.

3.3 The Convention on the Future of Europe: the energy competence.

As reported above, the Draft Constitution acknowledged the existence of a shared competence between the Union and Member States in the field of energy. Accordingly, it added it in the catalogue of Article I-11, under which Member States have powers to legislate only to the extent that the Union has not exercised its competence.

Under the validity of previous versions of the Treaty, the legal bases used for the development of the energy policy had been mainly Articles 95 and 175 EC, while Article 308 EC had only been only used for programmatic decisions in the energy sector. Accordingly, the flexibility clause had been correctly used only in those cases in which no other objective than energy could be identified for the measure, while in all other cases in which an internal market or environmental objective could be identified Articles 95 and 175 EC were used. However, the introduction of a specific legal basis was proposed by the Convention[218] actually as a limit the use of Article 308 EC as a legal basis for energy measures, consequently giving the wrong impression that energy was one of those sectors that had contributed to the uncontrolled expansion of EU powers.

The first draft[219] of (then) Article III-157 of the Draft Constitution was a fairly broad provision, which, according to the Presidium, should have covered the type of measures that had been adopted until then, without going into much detail[220]. As a result, although it could seem that the new provision would not have brought important changes to the previous situation, more powers to the Union could be expected, since the lack of detail should have allowed wider margins of discretion to the European legislator. In this same sense, the

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[218] European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02, 15.

[219] Article III-152: "*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 security of energy supplies in the Union, and
(c) promote energy efficiency and energy 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 a law or framework law. It shall be adopted after consulting the Committee of the
Regions and the Economic and Social Committee.
3. The law shall not affect a Member State's choice between different energy sources and the general structure of its energy supply. Such measures shall be adopted in accordance with Article [ex Article 175(2)(c)]." (European Convention Secretariat, Note from the Praesidium to the Convention on Draft sections of Part Three with comments of 27 May 2003, CONV 727/03, 110)

[220] Ibid, 110.

Presidium also proposed to move from a legislative procedure requiring unanimity in the Council – as it was under Article 308 EC – to the ordinary legislative procedure (only requiring a qualified majority voting)[221]. However, paragraph 3 of the new provision actually limited the scope of EU measures, because it provided that measures taken at EU level should not to affect Member States' rights to choose between different energy sources and the structure of their energy supply. Nonetheless, these measures could be adopted in accordance with the procedure provided for by ex-Article 175.2 (c) EC, i.e. with unanimity vote in the Council. Although the wording of the provision was *prima facie* difficult to be interpreted, the Presidium clarified that "*reference* [was] *made to measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply, which* [were] *to be adopted under a special legislative procedure by the Council, acting unanimously after consulting the European Parliament, in accordance with Article ex 175(2)(c)*[222]". The provision could be thus interpreted in the sense that while laws adopted in accordance with the ordinary legislative procedure could not interfere with national energy rights, any other act adopted in accordance with the special legislative procedure provided for by ex-Article 175.2 (c) EC and significantly affecting Member States' energy rights was admissible. As a result, the exception was only procedural, and it did not depend on the content of the proposed measure.

As a reaction to this first draft, several amendments were proposed[223]. Only three members of the Convention asked for the deletion of the entire article, but many of them encouraged the introduction of clearer references to the protection of the environment and to the national sovereignty over natural resources. This could be actually interpreted as a sign of the necessity for the Member States to maintain their control over the energy policy in all cases in which its development did not directly depend on the protection of the environment, for which action at European level had been already accepted since the adoption of the Single European Act. In fact, with regard to Article III-125 (ex-Article 175 EC), many members of the Convention proposed amendments which would introduce the majority voting instead of unanimity in the Council for measures listed in paragraph 2, thus also measures significantly affecting Member States' energy rights.

[221] Ibid, 117.
[222] Ibid, 110.
[223] European Convention Secretariat, Reactions to draft text CONV 802/03 - Analysis of 27 June 2003, CONV 821/03.

The final version of the Draft Constitution shows that minor amendments were brought to Article III-157[224], but the documents of the Convention do not show the reasons behind them.

While the new competence in part addressed the problem of resorting to the flexibility clause for *purely* energy-relating measures, it did not bring any clarification on the possibility to use other competences such as internal market and environmental protection. In particular, Article III-157 of the Draft Constitution provided that any measure falling under the energy competence would be adopted by the Union "in establishing the internal market" and "with regard for the need to preserve and improve the environment". The Draft Constitution thus acknowledged that internal market and environmental protection were still to be considered as the two main areas of intervention for energy measures, but it did not clarify whether Article III-157 should prevail over the provisions of ex-Articles 95 and 175 EC or how they should coordinate. A first option could be the application of the *lex specialis* principle, according to which the energy competence would prevail, because in the regulation of the energy sector it would be more specific compared to the more generic internal market competence and the environmental, which address energy issues only indirectly. Nevertheless, the previous legislative practice showed that relevant policy actions had been based on competences different from energy and it could not be clearly explained how much this had been due to the lack of a specific legal basis or instead to an actual suitability of those legal bases for the scope pursued by those acts. In fact, the Convention and the Draft Constitution did not address this question, but they simply introduced a new legal basis and a new competence without properly coordinating it with other provisions of the Treaty.

Therefore, it could be argued that the Convention took the stand of those commentators that had held that an explicit competence was not needed, as the European Community was already entitled to act under other legal bases, and the limited development of its energy policy was rather due to a lack of political will of the European Commission[225]. These

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[224] Article III-157: "*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 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)."

[225] Hancher, 'Energy and the environment: striking a balance?' (n. 31) and Leigh Hancher, 'A single European Energy Market - Rhetoric or Reality' (1990) 11 Energy Law Journal 217-242.

arguments were however somehow inconsistent with the reality described above, where the European Community had been (or tried to be) active in the sector notwithstanding the lack of formal competence. In this sense, it could be thus better argued that the most relevant limits that the European Commission had found had come from the Member States. Indeed, it had been easy for them to control the action of the Union in this field, because not only it did not have explicit competence, but also Articles 95 and 175 EC allowed substantial derogations to Member States in the transposition and implementation phases.

Accordingly, it is easier to agree with those who maintained that the energy policy could not be considered a policy *per se*, but rather a component of other policies[226]. In fact, this was the reality before the adoption of the new legal basis. However, it has been rightly pointed out that, instead of using other legal bases, it would be preferable to apply general principles to the energy sector, when legislative measures in this field may have an impact on the internal market or on the environment[227]. As a result, the importance of energy in the European Union would be better recognised and implemented.

Moreover, the final version of Article III-157 added a substantial limitation to the exercise of the Union energy competence. Indeed, while in the version proposed by the Presidium the limitation to the possibility to affect Member States' energy rights was only procedural, in the new version the wording changed into "*without prejudice to Article III-130.2(c)*"[228]. Accordingly, the power of the Union in the energy field was limited by the national boundaries of Member States' energy rights. However, such boundaries could be trespassed under the environmental competence, which allowed, as under the EC Treaty, to take measures "significantly affecting" Member States' energy rights in accordance with a special legislative procedure.

This limitation allows a certain speculation as to whether the new competence was actually supposed to be shared between the Union and the Member States. It is indeed hard to imagine a measure in this field that has no impact on the Member States' energy rights. In particular, if one looks at the two main Directives that had been adopted under the EC Treaty – the

[226] Rolf Wagenbaur and Richard Wainwright, 'European Community Energy and Environment Policy' (1996) 16 Yearbook of European Law 59-86.
[227] Gwenaele Rashbrooke, 'Clarification or Complication? The new energy title in the Draft Constitution for Europe' (2004) 22 Journal of Energy & Natural Resources Law 373-387.
[228] In the first version of the Draft Constitution, the provision recited as follows "*Such measures shall be adopted in accordance with Article [ex Article 175(2)(c)]"*. Clearly, the reference to Article 175(2)(c) was purely procedural, as the provision was only mentioned because of the legislative procedure provided for thereby.

Renewable Energy Directive[229] and the Internal Energy Market Directive[230] –, he can see that substantial obligations were imposed on the Member States and they were certainly able to "affect" the choice of the Member States between different sources of energy. They were not as significant as to require the unanimity voting under Article 175.2 (c) EC, but they probably could not have been adopted under the new legal basis in the Draft Constitution[231]. Accordingly, great discretion was left to the Member States and to the Union was left the role of coordinating the European energy policy, but more at a political rather than substantial level.

This is in line also with the fact that the assessment of the Convention on the legal bases previously used in the energy sector was limited to Article 308 EC. In fact, beforehand, the Union was only explicitly entitled to "take measures" in the energy sector, but "taking measures" can be rather different from actually adopting a policy. Probably, the Convention considered that a European energy policy could only be limited to the coordination of the measures already taken by the Union under other competences. This was somehow the scope of the programmatic acts adopted under Article 308 EC and this is what the Union was supposed to do under the new legal basis. Accordingly, the Union was supposed to keep on relying on other competences and use the new one only for framework regulations.

Such vision was confirmed after the discussions within the Inter-Governmental Conference (IGC) that adopted the Treaty Establishing a Constitution for Europe in December 2004, where Article III-157 was amended and renumbered as Article III-256. The provision broadly corresponds to the Convention draft article discussed above, but it inserts two main changes to its second paragraph:

"*Without prejudice to the application of other provisions of the Constitution, the objectives in paragraph 1 shall be achieved by measures enacted in European laws or framework laws. Such laws or framework laws shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee. Such European laws or framework laws shall not affect a Member State's right to determine the conditions for exploiting its energy*

[229] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, p. 33–40.
[230] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37–56.
[231] As an example, Article 3 of Directive 2001/77/EC provided that Member States "*shall take appropriate steps to encourage greater consumption of electricity produced from renewable energy sources in conformity with the national indicative targets*" and such targets were detailed in the Annex to the Directive for each Member State. Similarly, Article 21 of Directive 2003/54/EC imposed on the Member States the obligation of opening their national electricity and gas markets.

resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article III-234(2)(c)" (emphasis added).

Not only the limits to the action of the European Union were expanded also towards the "conditions for exploiting energy resources" (which however are not provided for in Article III-234.2(c) either), but the new Treaty also confirmed the prevalence of other provisions over the new energy competence. As a consequence, one may ask whether the new provision could actually change anything in the system previously operating and whether it might have added even more confusion. No guidance was given to the coordination between different policies and different competences and only general principles could help in the elaboration of any legal act and in the choice of the legal basis, consequently creating even more restraints to the operation of European action than before.

4 Energy in the post-Lisbon competence system: is anything clear?

The Draft Constitution had certainly the merit of introducing and assessing the issue of competence in the European Union and, most importantly, of trying to reply to the questions that had been raised by the Laeken Declaration. In this sense, the work of the European Convention was laudable – although not perfect – and proof of this is the fact that the IGC which adopted the Treaty establishing a Constitution for Europe brought only minor changes to the new system created by the Convention.

Unfortunately, as a result of the negative results of the referenda in France and the Netherlands, the Constitution never saw the light, and the provisions introduced by it were temporarily put aside. Nevertheless, when the negotiations for the adoption of the Lisbon Treaty started, many of the proposals of the Convention were maintained and re-introduced in the TEU and the TFEU[232]. Accordingly, the present paragraph will move from the considerations already made with regard to the Draft Constitution and it will only assess with further detail the peculiarities of the new Treaties.

4.1 The post-Lisbon system of competences

The Lisbon Treaty, as the Draft Constitution, has partially achieved the objectives posed by the Laeken declaration: clarity and containment.

With regard to clarity, the Treaty describes what the EU competence is and provides for three categories of competence: exclusive, supportive and shared. Exclusive competence is

[232] For a general overview of the new system of competences introduced by the Lisbon Treaty, see: Vincenzo Mario Sbrescia, *Le competenze dell'Unione Europea nel Trattato di Lisbona* (Edizioni scientifiche italiane 2008).

defined as the area in which only the Union can adopt legally binding acts, while Member States can legislate only if such power is delegated to them by the Union. According to Article 3 TFEU the areas of exclusive competence are: customs union, common commercial policy and conservation of marine biological resources under the common fisheries policy. Shared competences are defined as the areas in which both the Union and the Member States can adopt legally binding acts, but once the Union has exercised its competence the Member States are precluded from exercising theirs, unless the Union decides to cease exercise its competence. The list of domains in which the Union and Member States enjoy shared competence is open, i.e. shared competence is a residual category, in which any competence not expressly mentioned in the Treaties shall be included. In the category of supportive competence, the Union can only act in order to support, coordinate and supplement the actions of the Member States.

Despite the introduction of detailed categories of competences, the Treaty of Lisbon still does not give a definition to the notion of "competence" *per se,* as a result the determination of the legal basis is still fundamental in order to understand the extent of the powers that the Union can enjoy in a given sector. Some issues also raise in relation to the delimitation of each category, and in particular, between shared and support competences. In fact, the lists contained in the first articles of the Treaty are not exhaustive in defining the limits of competences, but it is necessary to look at the detailed Treaty provisions that govern the relevant area. In the domain of shared competence, in particular, the extent of Union powers can vary significantly from one area to the other. In this sense, the categorization may even be misleading, because it is not only the provisions of the Treaty that determine the competence, but it is also the modalities through which the Union has exercised it. Indeed, depending on how the competence has been exercised, the Member States may or may not lose their competence, due to the application of the pre-emption principle. Analogously, in the domain of support competences, although the Union is prevented from adopting harmonising measures, the Union can adopt "*pervasive soft law and binding hard law*"[233] to achieve its objectives, consequently giving to the Union a scope of action wider than expected.

With regard to retention, the content of the Treaty shows once again the fear of Member States for the creeping expansion of the competences of the Union and their intention to

[233] Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (n. 99), 188. The Author refers to the still open debate on how far the Union competence can go in the adoption of soft-law measures. It is indeed reported that in many occasions at the Union level acts are adopted that have almost the same strength of a binding measure, despite the formally limited competence of the Union in the given sector.

exercise a stricter control on its exercise. As an example of this, the principle of conferral receives particular attention in the Treaties and it is mentioned several times throughout the text[234]. According to some authors, these repeated references are somehow obsessive, and they would reveal the "distrustful attitude" of the Member States towards European competences[235]. It has been confirmed that the European institutions do not enjoy of competences attributed by primary law, instead in general, competence remains on the Member States, unless explicitly attributed to the Union in the Treaties. Moreover, it has been noted that it has been clear since the European Council of 21-23 June 2007 that the protection of national sovereignty would play a major role in the negotiations and drafting of the Lisbon Treaty. As a result, Member States would be even stricter than during the negotiations of the Draft Constitution in controlling the allocation of competences to the Union, due to the changed political climate that had followed the referendum in France[236].

An example of this attitude of the Member States can also be found in the decision of the German Constitutional Court on the adoption of the Lisbon Treaty (so-called, *Lissabon Urteil*[237]). As for the *Maastricht Urteil* the German Court went back to the (possible) limits to the powers of the European Union and to the European integration process imposed by the German Constitution. Moving from an interpretation normally used in public international law, the Constitutional Court stressed that the European legal order is only the result of an agreement between Member States, which thus remain the "Masters of the Treaties"[238]. For this reason, any expansion of EU competence shall be questioned as to see whether it is compatible with the constitutional principles of Germany and of Member States in general. Indeed, the European Union enjoys an autonomy which is different from sovereignty, because it is not original but derived from a decision of the Member States. The European integration process is thus reversible, and the Member States may decide to withdraw the powers conferred upon the Union at any time. Moreover, as the competences

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[234] Article 3.6 TEU "*The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties*"; Article 4.1 TEU "*In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States*"; Article 5 TEU "*The limits of Union competences are governed by the principle of conferral*" and Article 7 TFEU "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*" [emphasis added].

[235] Rossi, 'Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?' (n. 141), 94.

[236] Roberto Baratta, 'Le competenze dell'Unione tra evoluzione e principio di reversibilità' (2010) 3 Il Diritto dell'Unione Europea 517-554, 528 ff.

[237] Joined Cases BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 *Lissabon-Urteil* [2009]

[238] Miguel Poiares Maduro and Gianluca Grosso, 'Quale Europa dopo la sentenza della Corte costituzionale tedesca sul Trattato di Lisbona?' (2009) 3 Il Diritto dell'Unione Europea 503-527, 508 ff.

transferred to the Union are not unlimited, in any case a violation of the division of competences is identified by national organs, they are entitled to check the respect of the subsidiarity principle and of the German constitutional values. For this reason, the German Constitutional Court interpreted the conferral principle by proposing lists of areas of competence which shall remain a prerogative of the national parliament, as to substantially block any future possibility for European integration to develop in those areas[239]. It is indeed impossible for the German Constitution to allow a transfer of powers to another federal institution, which is given the *Kompetenz-kompetenz*. Clearly, in this judgement the German Constitutional Court went even further than what it had expressed in the *Maastricht Urteil* and its decision is explicative of the growing attention that the Member States were developing on the exercise of competence by the Union.

For these reasons, the principles of subsidiarity and proportionality, which explicitly regulate the use of competence by the Union, became more important in the Lisbon Treaty. Indeed, in many occasions the respect of these principles had seemed to be more formal than substantial. In fact, although the Commission was under the obligation to insert a statement on the application of the principles in any proposed measure, in reality it often resulted in the tautological explanation that the measure has to be adopted at European level because it has European and cross-border relevance. However, as proposed in the Draft Constitution, a Protocol on the Application of the Principles of Proportionality and Subsidiarity was attached to the Treaty and it empowers the national parliaments to run an effective control on the legislative measures proposed by the Commission before their adoption[240]. Notwithstanding the wide debate that had been developed on this point during the Convention, the national parliaments can only comment on the respect of the subsidiarity principle and not on the proportionality also in the Lisbon Treaty. In addition, the opinion of the national parliaments might not be the same of the government who voted for the measure in the Council; consequently, it could be difficult – in case of issues on the respect of the principle of subsidiarity – for the Member State to bring action against the measure before

[239] Lucia Serena Rossi, 'I principi enunciati dalla sentenza della corte costituzionale tedesca sul Trattato di Lisbona: un'ipoteca sul futuro dell'integrazione europea?' (2009) 4 Rivista di diritto internazionale 993-1015.
[240] According to some authors, the insertion of a preliminary check by the national parliaments on the respect of the principle of subsidiarity should be read as an additional example of how Member States have tried to bring back to the national level the control over the action of the European Union. Indeed, beforehand the principle of subsidiarity had been perceived more as an instrument of "Europeanization" of powers, rather than control on their correct allocation. See: Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (n. 52).

the Court of Justice on behalf of the national parliament, as the latter does not have *locus standi*.

The Lisbon Treaty also addressed the question of the applicability of the flexibility clause. Article 352 TFEU now provides that the scope of the clause only covers the policies defined in the Treaties. Its applicability is limited by the requirement for a special legislative procedure and by the fact – new respect to the Draft Constitution – that the Commission shall draw the attention of national parliaments in case of measures to be adopted on the basis of the flexibility clause. This innovation is quite important in enhancing the democratic control over the Union's action. Moreover, Declaration 42 attached to the Treaty clarifies that Article 352 TFEU "*cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union*" and that it "*cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties*". This clarifies the point that had been left unspecified by the Draft Constitution – although already addressed by the ECJ's jurisprudence – and it adds further limits to the applicability of the clause, which now really seems to be a residual option in the economy of the Treaty. As a result, it seems difficult to agree with the interpretation given by the German Constitutional Court, according to which the flexibility clause would be able to modify primary law without resorting to the revision procedure under the Treaties. Indeed, Article 352TFEU is tightly linked to the principle of conferral and it does not allow any violation of such principle. In particular, it cannot be understood as a provision conferring to the Union the *Kompetenz-Kompetenz*[241].

On the contrary, the Lisbon Treaty has done very little to tackle the issue of the competence creep from the perspective of Article 95 EC, now Article 114 TFEU. In fact, it simply replicates Article 95 EC. As a consequence, its use as legal basis is still widely possible, even in those areas in which the EU competence is tighter (e.g. support competences).

[241] A different conclusion seems to be derived by Tosato, which states that "*l'Unione, e cioè l'ente a competenze limitate e di attribuzione, gode però di una certa competenza a decidere delle proprie competenze. Questo comporta per l'Unione margini di discrezionalità nel determinare ed, eventualmente, estendere i confini delle sue attribuzioni*". Interestingly, the author refers to the new system of controls introduced by the Lisbon Treaty on the exercise of EU competences as a sort of "*attempt to the EU independence", in particular "la circostanza che le istituzioni europee non siano più i soli giudici indiscussi delle proprie competenze, appare in conflitto con l'idea che l'ordinamento dell'Unione sia sovraordinato rispetto agli Stati membri*". However, the author also recognizes that the European integration cannot be interpreted in the light of traditional constitutional law schemes: it is a peculiar phenomenon that works on the compenetrating of different legal systems. Gian Luigi Tosato, 'La delimitazione delle competenze dell'Unione europea tra istanze europee e nazionali' in Lorenzo Pace (ed), *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona* (Giuffrè Editore 2012).

As a consequence, the intent of clarification and limitation of EU powers has brought to a system that is probably more rigid, but which is apparently easier to handle in a 27-ish States system. This should be certainly read together with the fact that the areas of EU intervention have enormously widened if compared to the strictly economic objectives of the beginning of its history, and thus needing more control and certainty; however, it should also be questioned whether such system really favours the integration process and the attainment of the higher objectives the Union has posed itself. In this sense, the energy chapter seems to be a good example.

4.2 The energy competence

According to Article 4.2 TFEU in the domain of energy the Union and the Member States enjoy shared competence. However, energy is a good example of the difficulty of defining what shared competence exactly means in the system of the Treaties. It is submitted that the domain of energy shows important peculiarities, that allow the development of the argument according to which the energy competence is actually a hybrid creature, presenting characteristics peculiar not only to shared competences, but also to complementary and support competences. As a consequence, the delimitation between the powers of the Union and those of the Member States is difficult to draw.

4.2.1 The controversial nature of energy competence

According to the principle of conferral, when it is not clearly attributed upon the Union, competence is presumed to remain to the Member States. As it has been seen above, in the field of shared competences, the principle of pre-emption should apply. Accordingly, the exercise of competence by the Union should progressively empty the competence of the Member States in the same sector. When a competence is shared between the Union and the Member States, the latter are entitled to exercise their competence as long as the Union has not exercised its own. Once the Union has acted, national competence is neutralized, Member States can't take any measure anymore. This is called the pre-emption principle. This is different from the primacy principle, which only regulates the case in which a national measure conflicts with the European one, in the sense that the European measure shall always prevail over the national. The pre-emption principle is much more intrusive, since it rules out any national measure[242].

[242] Christian Timmermans, 'ECJ Doctrines on Competences' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014), 162.

The notion of pre-emption is the fruit of judicial and academic interpretation. In particular, three kinds of pre-emption have been identified[243]: (i) field pre-emption, which does not allow any margin of national intervention, since the whole field becomes occupied by the European legislation; (ii) rule pre-emption, according to which the EU measure prohibit only norms that create an actual conflict; (iii) obstacle pre-emption, under which any national measure inhibiting the realization of the EU measure's objectives is prohibited. Such division also reflects the evolution in the jurisprudence of the Court of Justice. Initially, the Court interpreted the notion in accordance with the US Supreme Court on the "occupation of the field": once a measure had been adopted at European level, the entire legislative field was prevented from national legislation. However, this case-law concerned only exclusive competences (where any national competence was *a priori* excluded) and regulations[244]. Accordingly, the Court swiftly moved to a more nuanced position, assessing the contempt and the objectives of the adopted European measure. In the area of shared competences, the Court held that the adoption of an EU measure determines the pre-emption of national competence in the specific field of its application, while the Member States are still free to adopt other regulations, as far as they respect EU law[245]. Accordingly, the level of pre-emption depends on the nature both of the competence the Union has been conferred and of the act adopted. In practice, it generally depends on the level of harmonization achieved by the EU measure: the higher is the harmonizing effect, the lower is the margin of freedom left to the Member States; however, the pre-emption can never go as far as not to leave any possibility of national action[246]. In this sense, the Protocol on the Exercise of Shared Competence attached to the Treaty of Lisbon explicitly limits the possibility of field pre-emption by providing that "*the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area*".

As a consequence, the determination of the boundaries of competence is a sophisticated exercise, where both Member States and the Union have to play their role. The Union needs to stick to the powers that have been conferred upon it, but Member States need to implement

[243] Robert Schutze, 'Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption.' (2006) 43 Common Market Law Review 1023-1048, 1038.
[244] Case 40/69 *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann* [1970] ECR 00069, p. 4 and Case 74/69 *Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co.* [1970] ECR 00451, p. 4. See also, Koen Lenaerts, *Le juge et la Constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen* (Bruylant 1988), 186.
[245] Case 31/74, *Filippo Galli* (n. 164), 29 and 34.
[246] Thierry Ronse, *Les compétences de l'Union Européenne* (Commentaire J Mégret, Editions de l'Université de Bruxelles 2017), 213.

national and European legislation respecting the primacy of EU law and according to the principle of loyal cooperation.

While Article 4.2 TFEU identifies the domain of energy as a shared competence, in describing how such competence shall be exercised by the Union, Article 194 TFEU imposes a substantial limitation to any EU action in this field. Paragraph 2 provides that EU 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*". Accordingly, any decision over these three aspects of energy regulation should remain an exclusive national competence.

This kind of limitation could *prima facie* fit into the notion of "negative competence", i.e. of sectors in which the EU intervention is in any case excluded. Some commentators[247] assessed whether in the Treaty negative competences exist or could exist. In this regard, the two Authors referred to those norms that explicitly contain a reserve of competence in favour of the Member States. The examples reported are Articles 165, 166 and 168 TFEU[248] (ex-Articles 149, 150 and 152 EC), according to which the Union's action shall *respect the responsibilities of the Member States*. In fact, Member States remain competent for determining the core legislative provisions of their national systems in the fields of education and public health respectively, while the role of the Union is coordinating, supporting and supplementing the action of the Member States. On one side, these authors maintained that such provisions do not amount to real negative competences, but rather to negative conditions belonging to a specific enabling norm; on the other side, they held that such provisions actually limit the scope of the power given to the Union, although not in a cross-sector way as a negative competence could do. It is indeed out of the European system to categorically exclude any European intervention in a certain area, since possible influences from measures based on other competences cannot be avoided.

An analogy can thus be drawn with Article 194 TFEU. Although the terminology is slightly different, it could be argued that the limitation in the second paragraph of the Article refers

[247] Von Bogdandy, 'The European Union's vertical order of competences: the current law and proposals for its reforms' (n. 204), 238-239.

[248] According to Article 165.1 TFEU explicitly states that the Union shall take action "*fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity*", similarly Article 166.1 TFEU provides that "*The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training*" and Article 168.7 provides that "*Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.*".

to the right for the Member States to determine the core structure of their energy system, without any "external" conditioning. As a consequence, the European competence would be limited to coordinating these national systems, by adopting measures that regulate aspects necessarily having a transboundary nature, but without undermining any national decision. Moreover, Article 194 TFEU shall apply without prejudice to other Treaty provisions and the derogations of paragraph 2 leave untouched the competence of the Union under Article 192.2 (c) TFEU. The cross sectoral applicability of other competences is thus safeguarded against the Member States' energy rights, consequently allowing the fluid operation of European integration in other areas of intervention.

Although it does not amount to a negative competence, the conditions imposed on the Union's activity under Article 194 TFEU may call into question the extent to which the competence is actually shared between the Union and the Member States to the point that any EU measure which could affect one of the energy rights of the Member States should be preferably adopted under other legal bases – or at least under the dual legal basis, if possible – because it would allow to overcome the limitations provided in Article 194 TFEU. However, this would jeopardize the meaningfulness of the competence itself and it would restore the situation existing before the adoption of the Lisbon Treaty, where competence had to be found here and there in other Treaty provisions.

Nonetheless, the idea that the Union may actually see its action limited only to coordination and support instruments is corroborated by some other arguments. The first combines the abovementioned theory of the "negative condition" and a historical reading of the provision. The Union would be actually coordinating national policies (i) because the intervention in the structure of national systems is precluded by the conditions of the second paragraph and (ii) because the drafting of Article 194 is based on the misconception according to which previous legislative acts in the field of energy had been only based on Article 308 EC. Therefore, the energy competence has been created on the basis of the content of those acts, which were mainly establishing programmes for international cooperation in the energy sector. The core European energy legislation actually affecting the rights of Member States had been adopted under already existing competences, which now, as then, continue to affect those rights and continue to prevail over Article 194 TFEU.

The second consideration stems from the idea that the notion of competence and in particular, of shared competence is in fact a fluid concept[249] and that the categorization of domains has limited value. In the Treaty a number of derogations can be found, and in some cases, additional obligations are imposed on the EU in order to respect national values or characteristics. While they generally entail a clearer demarcation of national and European powers, sometimes they can make us doubt on their qualification as shared competence.

The main examples of this are the areas of (i) research, technological development and space[250] and (ii) development cooperation and humanitarian aid[251]. In these two areas, which are formally shared competences under Article 4 TFEU, the Union is entitled to exercise its competence, but it "*shall not result in Member States being prevented from exercising theirs*". This entails that despite being shared competences, they do not have any pre-emption effect, but harmonization is still possible. They thus stand somewhere in-between shared and supporting competence[252]. As a consequence, the distinction between "concurrent" and "parallel" competences comes here into consideration. The notion of *concurrent* competence reflects the definition of shared competence provided by the Treaty: Member States keep their right to regulate a particular field only as long as the Union has not exercised its regulatory power, once the Union has exercised its competence, pre-emption applies. The Union is then entitled to adopt exhaustive harmonisation measures and the penetration of its regulatory powers in the national systems is quite intense. Differently, we refer to *parallel* competence when the Union and Member States' competences can be exercised alongside one another. Consequently, the pre-emption principle does not apply, but national legislation shall still not conflict with the European one, otherwise the primacy principle allows Union law to prevail in any case. The advantages for the Member States are evident: national authorities can continue their legislative and political activity and remain visible to their citizens[253]. Nevertheless, the fact that pre-emption does not apply entails that higher levels of loyal cooperation are required both from Member States toward the Union and among Member States themselves. In fact, the Treaty lays down specific obligations of coordination and consultation between the parties with the objective of strengthening each

[249] Rossi, 'Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?' (n. 141), 90.
[250] Articles 179-190 TFEU.
[251] Articles 208-214 TFEU.
[252] Takis Tridimas, 'Competence after Lisbon. The elusive search for bright lines.' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012), 69.
[253] Von Bogdandy, 'The European Union's vertical order of competences: the current law and proposals for its reforms', 248.

other's action. Quite oddly the Treaty does not explicitly exclude the possibility of harmonisation in these sectors (except for space); it is however difficult to imagine harmonising measures in sectors in which the national competence shall remain untouched and run parallel to that of the Union.

The energy competence seems then to have two main characteristics in common with parallel competences. The first is that the EU competence and the Member States' should run parallel, since the EU shall never affect the Member States' energy rights and the Member States shall never adopt measures that are in contrast with EU law. As a consequence, the effect of European action could never be the actual abrogation of the law-making rights of the Member States by way of progressive legislative measures[254]. Secondly, the European legislator is *in theory* not prevented from harmonising the sector. However, it is difficult to see how a Member State's rights could remain untouched in case a harmonising measure is adopted. As an example, can an EU measure imposing binding renewable energy targets on the Member States be considered as not affecting Member States' right to choose between different energy sources? Or, can the same be said about a measure completely banning a determined energy source throughout all the Union? Once again, the idea recurs that only coordinating measures are actually allowed.

The provisions of Article 194 TFEU, in fact, share some characteristics also with "complementary competences". Before the adoption of the Lisbon Treaty, this category referred to two different types of competences: (i) competences which were constitutionally limited to the adoption of minimum standards (e.g. environmental policy) and which had thus to be complemented by higher national standards and (ii) competences which entailed the role of the European legislator as complementing, supplementing or supporting national action through incentive measures, which could never lead to harmonisation in the field[255]. Article 2.6 TFEU only maintained this second category and the interested domains of action are listed in Article 6 TFEU[256]. Such category stands between shared competences and competences entirely reserved to Member States, but unlike shared competences, complementary competences can never totally prevent the Member States from exercising their competence in those policy areas. Accordingly, they do not have pre-emptive effect,

[254] Garben, 'Confronting the competence conundrum: democratising the European Union through an expansion of its legislative powers' (n. 184), 81.
[255] Robert Schutze, 'Lisbon and the federal order of competences: a prospective analysis' (2008) 33 European Law Review 709-722, 719 and Robert Schutze, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order' (2006) 31 European Law Review 167-184.
[256] Article 6 TFEU lists: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation.

although national legislators are always subject to the respect of EU law, and they cannot lead to harmonisation. The Union is in any case allowed to adopt legally binding acts in those sectors in order to achieve the objectives listed for the EU in each interested area. Moreover, the exemption of harmonisation is anyway subject to the transversal applicability of the internal market legislation under Article 114 TFEU. Accordingly, the Union would be able to adopt harmonisation legislation under this provision even if it impacts on support competences[257].

In addition to the areas listed in Article 2.5 TFEU, Article 2.3 TFEU provides that Member States shall coordinate their economic and employment policies according to the indications provided by the Union. These competences, described in Article 5 TFEU, are difficult to define: they formally fall under the category of shared competence, but in reality, they are much closer to support competences. They actually stem from a lack of political consensus in the Convention[258], which determined the decision of inserting them into a separate provision: some representatives believed that a truly shared competence would have been too far-reaching, considered the pre-emptive effect of those measures, but some others also believed that a support competence would have probably been too weak. As a consequence, in the social policy some aspects fall under shared competence (under Article 153 TFEU the EU is empowered to impose "minimum requirements for gradual implementation"), while the main frame relates to complementing and coordinating the activities of the Member States. Similarly, in the economic policy the EU has been conferred with the power to take dispositive and peremptory action in certain circumstances[259], but, although they are inserted in the coordinating action, they seem to be quite more thorough[260].

In such system of moving concepts, the energy competence shares much of its language and background reasoning. As already mentioned, in fact, Article 194 TFEU is the compromise result between Member States not intending to allow too much intrusion by the Union in their national systems, but at the same time understating the necessity of a supranational coordination and – for some aspects, (minimum) harmonisation – of their policies, given the growing transnational quality of energy issues. Accordingly, the limitations in the second

[257] Tridimas, 'Competence after Lisbon. The elusive search for bright lines.' (n. 252), 67.
[258] CONV 724/03, 68.
[259] According to Article 121.6 TFEU the EU "acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure"; under Article 122.1 TFEU "the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy, moreover under Article 126 TFEU the EU can adopt binding decisions imposing fines and other consequences in case of excessive budgetary deficits.
[260] Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (n. 99), 181.

paragraph have been inserted and the reference to solidarity has been added. Moreover, the fact that Article 194 TFEU does not impose a ban on harmonisation of energy policies does not necessarily mean that the powers of the Union are more extended. On one side, it has been held that the enactment of legally binding acts does not necessarily entail measures that are less far-reaching than harmonisation. In fact, harmonisation does not always supersede Member States' competence, but it depends on the nature of the actual measure. In any case, legally binding acts constrain the possibility of national action, although the competence formally continues to reside with them[261]. The drafting of support competences is flawed, and it is not clear what coordinating, supporting and supplementing Member States action actually means and what its extent is. On the other side, a clear exclusion of European intervention can have a higher impact on the extent of Union powers because it excludes any discussion over possible constraints of Member States powers. As a consequence, the role of the Union seems even more collateral than in the case of supporting competences.

Moreover, a textual analysis of the provision also suggests a certain nuance in the powers of the Union that is close to those present in the provisions relating to supporting competences. In particular, the provision shows a dichotomy in the powers conferred upon the Union as regards to the first two objectives with respect to the second two. The first two objectives provide that the EU energy policy shall (i) ensure the functioning of the energy market and (ii) ensure security of energy supply in the Union; differently, according to the second two, it shall (i) promote energy efficiency and energy saving and the development of new and renewable forms of energy and (ii) promote the interconnection of energy networks. This is followed by the consideration that the Union has stronger obligations with regard to the energy market and the security of supply than renewable energy and interconnection of networks. Moreover, such division corresponds also to the limitation of EU powers contained in paragraph 2 of Article 194 TFEU. Indeed, the right to determine the conditions for exploiting energy resources, the choice between different energy sources and the general structure of energy supply mainly deal with the attainment of the second two objectives rather than the first.

This nuance of powers is also reflected in other provisions of the Treaty, where the same words "ensure" and "promote" are used. In particular, the verb "promote" (or also "encourage") is generally used when complementary competences are provided for; examples can be the objective of promoting cooperation between the Member States,

[261] Ibid, 178.

particularly by the exchange of good practice under Article 195 TFEU (Tourism) and the objective of promoting swift, effective operational cooperation within the Union between national civil protection services under Article 196 TFEU (Civil protection). On the contrary, the verb "ensure" is generally used with regard to shared or exclusive competences and it reflects the role of the Union not only as driver but also as guardian over the realization of common policies within the EU.

It is thus clear that the simple insertion of the energy field in the category of shared competences does not tell us much on the effective allocation of powers between the Union and the Member States and on what the Union can actually do. An analysis of its objectives, also in relation with other provisions recalled in Article 194 TFEU is thus necessary.

4.2.2 The extent of the energy competence in relation with its objectives

As previously mentioned, the extent of a Union sectoral competence is also measured on the basis of its objectives. In this sense, the introduction of Article 194 TFEU had the merit of clarifying what are the objectives of the European energy policy. Such remark has also been confirmed by the ECJ, which held that Article 194 TFEU shall be considered the sole legal basis for acts aiming to the attainment of the objectives hereby identified[262].

However, as noted above, the wording of these objectives reveals a certain tempering in the extension of EU powers with regard to security of supply, energy efficiency and the development of renewable energies, which largely correspond to the exceptions contained in the second paragraph of Article 194 TFEU. However, under Article 192.2(c) TFEU the limitation to the EU powers does not apply and thus measures significantly affecting Member States' energy rights can be taken by the Union. This complex interrelation between the two legal bases raises some questions with regard to the objectives that the Union has to reach in pursuing these policies.

The question is in fact whether, in consideration of such exception, the Union is limited in the pursuit of its objectives or rather the objectives provided for in Article 194 TFEU can in any case be attained under Article 192 TFEU.

A first interpretation is mainly historical and goes back to the initial proposal of the Convention, according to which the reference to Article 192.2 (c) TFEU had exclusively procedural consequences, i.e. passing from the ordinary legislative procedure of Article 194

[262] Case C-490/10, *European Parliament vs Council* (n. 57), 67.

TFEU to the special (unanimity) actually provided for in Article 192.2 TFEU[263]. Accordingly, the Union would be still acting under the cap, and thus the objectives, of Article 194 TFEU, but according to the legislative procedure of another legal basis. Such reasoning, however, does not seem convincing: Article 194 TFEU already provides for a procedural exception with regard to measures relating to energy taxes, accordingly if the will of the drafters of the Treaty was simply providing a different legislative procedure they would have inserted that in the third paragraph of the Treaty.

Another possibility would be following the reasoning made by some authors[264] with regard to the material objectives of the Union and their relationship with concurrent and parallel competences. These authors maintain that the consideration for the material objectives of a measure can bring some shifting in the actual allocation of the competence and move the extent of competences more towards the EU. In particular, they give the example of how a material objective of the Union can in any case allow harmonisation under Article 114 TFEU, even if it is not explicitly provided for in the provision attributing the competence. Similarly, the competence shifts towards the Union also in the competition sector, where, although the Union and the Member States have parallel competences, the sole fact that a distortion of competition can have transboundary effects determines the competence of the Union. In this sense, the material objective of safeguarding the functioning of the internal market prevails over national interests on the regulation of markets internal to the single Member State. Accordingly, also in the case of the energy competence, the supranational character of the objectives would push towards a Union competence, rather than a national one. This reasoning could indeed work for the objective of the realization of the internal energy market, but it is certainly not viable with regard to the development of renewable energies and – probably – to the security of energy supply either. In fact, it seems that the two provisions that we are confronting here are too specific and sectoral, accordingly it would be difficult to simply move the material objectives of one to the other. In the case of the harmonisation of the internal market or the competition policy the relationship between objectives is general/particular or like/like and it works, but here it is specific to specific objective.

[263] Tim Maxian Rusche, *EU Renewable electricity law and policy. From national tagets to a common market.* (Cambridge University Press 2015), 213.
[264] Laurence Potvin Solis, 'Compétences partagées et objectifs matériels' in Eleftheria Neframi (ed), *Objectifs et compétences de l'Union Européenne* (Bruylant 2013).

As a consequence, the possibility that the applicability of Article 192.2(c) TFEU determines also the pursuit of the objectives of Article 191 TFEU seems more plausible. Nevertheless, further considerations are needed.

First, the objectives of Article 191 TFEU are clearly different from those of Article 194 TFEU. In fact, it provides that Union's action should aim at "*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*". As a consequence, acting under the objectives of Article 191 TFEU would mean substantially changing the nature of the measure to be taken. Except – probably – for the promotion of renewable energies and energy efficiency, which could fall under the objective of improving the quality of the environment and the rational utilisation of natural resources, all the other objectives of the energy policy could not be attained under Article 192.2(c) TFEU. The result would thus be that the limitation of the EU competence with respect to Member States' rights in the context of energy policy is absolute.

Secondly, it would also mean that the environmental objectives prevail over the energy one and they are the only ones that could justify an intrusion in national energy prerogatives. Moreover, Article 192.2(c) does not mention one of the energy rights, i.e. the Member State's right to determine the "conditions for exploiting its energy resources". As a consequence, such zone of national competence would be completely cut out from any EU intervention, in the attainment of both energy and environmental objectives.

It is submitted that there seems to be no possibility of transposing the energy objectives to the environmental clause and consequently allowing the Union to intervene on the Member States' rights. However, as it will be further analysed in the next chapter, by virtue of the integration principle the opposite could be done, consequently allowing broader margins of intervention of the Union under Article 194 TFEU.

Such analysis, however, makes us doubt on the actual innovation brought by the introduction of the energy competence with respect to the attainment of the energy objectives. In fact, before the adoption of the Lisbon Treaty, the Union was allowed to reach those objectives on the basis of the different competences that we have analysed above and without any limitation. In this sense, the conclusion of Nowak[265] according to which the inclusion of

[265] Bartłomiej Nowak, *Energy Policy of the European Union. Chosen legal and political aspects and their implications for Poland* (WAiP 2009).

energy as an area of shared competence in the Lisbon Treaty should be perceived as an attempt to establish a "*special cooperation modus operandi*" between the Union and the Member States in the interest of greater transparency with respect to the energy matters can be agreed upon. Nonetheless, it seems that this new *modus operandi* has in reality determined a "renationalization" of some of the energy rights to the detriment of the Union competence.

5 Conclusion

The chapter has analysed the question of competence surrounding the regulation of energy in the European Union. The peculiar nature of EU as an international organization has important repercussions on the allocation and the extent of its competences. In fact, the Union is now a hybrid entity, where many characteristics of international organizations are still present, but the variety and extension of its objectives move it closer to a state. In this sense, while its activity shall be limited to the attainment of the objectives that the Member States have given it, such same objectives cannot be the reason for the Union to go beyond the powers that have been explicitly conferred upon it. Accordingly, they are both the trigger and the limit of Union action.

The tight boundaries of the relation between objectives and the limits imposed by the principle of conferral allowed the Union to steadily expand its powers for long time. As a consequence, new areas of intervention and new objectives arose. Energy was one of them. For long time the Union has regulated the energy sector without being attributed a specific competence but basing its measures mainly on the internal market and environmental competence. As a consequence, it was considered as one of the examples of the "creeping competences" of the Union and it was thoroughly assessed during the European Convention.

The Convention was created as a response to the questions raised by the Laeken Declaration with regard to the European competence and its works produced the Draft Constitution. In the general reorganisation of the competence system, for the first time energy was inserted as an explicit shared competence. However, the creation of the new legal basis did not solve many of the problems previously expressed: the internal market competence and the flexibility clause were still valuable instruments for the regulation of many aspects of the energy market and the coordination with these provisions was not clarified; moreover, limits to EU action were imposed with regard to the Member States' energy rights and the reference to the environmental competence brought on further problems of interpretation of the extension of the new competence of the Union.

The Lisbon Treaty did not bring any clarity, on the contrary the problems in the allocation of competence in respect to other provisions of the Treaty. The recognition of energy as a shared competence is in reality just a formality, because the analysis of the provision allows strong arguments for its categorization as complementary competence. Consequently, the powers of the Union should be limited just to the support and coordination of the national policies.

Moreover, the ambiguity in the formulation of its objectives and the limits that are imposed to their attainment by the application of the principle of conferral do not allow the Union to pursue them under other legal bases. However, while the Member States' energy rights seem absolute under the energy competence, they show their weakness under other legal bases. In particular, the reference to Article 192.2(c) TFEU and the overall drafting of the environmental chapter of the Treaty show that the pursuit of environmental objectives allows the Union to affect, even significantly, those same national rights.

As a consequence of the long Convention's discussions on the nature and extent of the European competence and of the adoption of the Lisbon Treaty, the EU has formally gained a new competence, but it has actually lost much of its powers in the regulation of the field.

Under the EC Treaty the Union adopted important pieces of legislation, without seeing its action limited by the respect of the national energy rights. Each of the possible and used competences was shared and the only given limit was the unanimity requirement under Article 175.2(c) EC, when a measure was significantly affecting the energy rights of the Member States. Nonetheless, the interests of the Member States were protected by the derogations both under Article 176 and 95 EC, although they had to justify them. This allowed a confident approach of the Member States towards the Union and the coherence of the European system as well, since only peculiar situations could justify derogations.

The new system shows a mistrustful approach of the Member States towards the Union. They have substantially reversed the situation: national prerogatives shall be generally preserved, and the action of the Union shall be limited as not to affect them. Only objectives higher than the energy ones (e.g. the protection of the environment) can allow more pervasive EU measures. This, however, has important consequences on the coherence of the European system and on the attainment of the energy objectives that the Member States themselves imposed to the Union.

IV. THE CHOICE OF THE LEGAL BASIS: A DIFFICULT RELATIONSHIP BETWEEN ENERGY AND ENVIRONMENT

Summary: 1 Introduction – 2 The choice of the legal basis: energy and environment or energy vs environment? – 3 The general principles of EU law as a guiding light in the choice of the legal basis – 4 Conclusion

1 Introduction

The choice of the legal basis performs two central functions in the constitutional system of the Union: the first is defining the division of powers between the Union and the Member States and the second is regulating the balance of powers between the institutions. Although *prima facie* quite technical, such question actually goes right to the heart of the constitutional balance of the Union and it has raised a relevant number of challenges before the Court of Justice. For this reason, the Court has often been accused of imposing a *gouvernement des juges*, since it would decide at the judicial level what should instead be decided at the political level. While, in our opinion, the Court cannot be blamed for it, since it is required to judge the cases that are brought to its attention and to ensure the coherence and effectiveness of EU law, the blame (if so we can call it) should be on the European institutions, which are sometimes unable (or unwilling) to correctly interpret and implement the competences and the objectives that the Treaties give them.

In addition, when the formulation of the provisions of the Treaties is not clear or the margin of discretion left to one of the actors of the legislative process is too wide, the choice of the legal basis can become an even bigger and more frequent problem. This is the case also for the energy legal basis. Indeed, it raises question both on the vertical (unclear formulation of the limits for the Union action with regard to the Member States) and horizontal (wide and diverse formulation of the objectives and unclear interaction with other Treaty provisions) division of competences. In particular, the new constitutional set-up does not seem to be well-suited to reconcile the objectives of the protection of the environment and develop the European energy market, which are increasingly intertwined.

This chapter first provides an introduction on the case law of the Court of Justice on the choice of the legal basis and the academic literature so far produced on the topic. Then, it moves to the relationship between Title XX on the Environment and Title XXI on Energy and the possible outcomes of the choice of the legal basis for measures that aim both at developing the energy market but also protect the environment. Finally, it will assess three

general principles of EU law, namely solidarity, environmental integration and proportionality, as interpretative tools for the solution of issues regarding the choice of the legal basis.

2 The choice of the legal basis: energy *and* environment or energy *vs* environment?

2.1 The doctrine and jurisprudence on the choice of legal basis

Due to the fact that the European Union is entitled to act only within the limits of the powers conferred upon it by the Member States and that these powers are an enumerated list, the institutions are obliged to found their acts on the provision that empowers to the Union to adopt the measure. This provision is referred to as "legal basis" and can be found either in the Treaties or in a previous legislative measure, which is based in turn on a provision of the Treaty[266].

The legal basis does not only set the limits to the Union's competence, but it also specifies the objectives to be pursued through the measure to be adopted and the procedure to be followed for its adoption. As a consequence, it also puts boundaries to the powers and prerogatives of the Member States. Its function is thus twofold: on one side, it is instrumental, because it allows the Union to carry out its tasks for reaching the objectives expressed in the Treaties; on the other side, it works as a guarantee, as it protects individuals, Member States and the Union from the adoption of measures for which the EU has no powers[267].

The choice of the legal basis has increasingly acquired a central role following the development of the Treaties and the enlargement of the Union's competences. Indeed, before the adoption of the Single European Act it was mainly a matter of choosing between Articles 100A and 235 EC. The SEA and the subsequent Treaties, instead, introduced not only new areas of competence for the Union, but they also introduced new legislative procedures; as a consequence, using one legal basis instead of another could have relevant effects on the institutional balance of the Community/Union (and on other validity-related aspects of the concerned acts, as well, such as the approval procedure, for example). For this reason, most of the disputes relating to the legal basis were interinstitutional disputes and were determined by the complaints of either the Parliament or the Council on the exercise of their veto right.

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[266] Enzo Cannizzaro, *Il diritto dell'integrazione europea. L'ordinamento dell'Unione* (Giappichelli Editore 2014), 239; Enzo Cannizzaro, 'Gerarchia e competenza nel sistema delle fonti dell'Unione europea' (2005) Il diritto dell'Unione europea 651.

[267] René Barents, 'The internal market unlimited: some observations on the legal basis of Community legislation' (1993) 30 Common Market Law Review 85-109, 92.

There are two factors that may bring to a wrongful choice of the legal basis: the first is the general formulation of competences in the Treaties, which allows a certain margin of discretion in the interpretation of their limits; the second is that the Treaties themselves do not give any indication as to the methods and principles to be followed in the exercise of such choice, but the institutions need to rely on the (abundant) jurisprudence of the Court of Justice – which however has built on a case by case basis and on an *ex-post* analysis. Arguments on the legal basis may take various forms, both in terms of subject matter and type of proceedings, thus the Court needs to systematically examine each of them. In particular, referrals to the Court have been classified according to the arguments relied on into three main (very different) categories: (i) lack of competence of the Union, (ii) lack of competence of the adopting institution, (iii) reliance of the institution on an incorrect legal basis[268].

The fragile interinstitutional equilibrium leaves also room for a certain political speculation over the choice of the legal basis; in fact, while the Commission and the Parliament may favour those provisions which provide for majority voting, allowing higher democratic standards but also more power to these two institutions, the Council may be more interested in provisions requiring unanimity voting, because this will allow the Member States to better defend their positions to a maximum, with an intergovernmental approach. Accordingly, depending on the subject-matter of the measure to be adopted the three institutions may have very different positions as to the legal basis to be chosen and it may be strongly influenced by considerations of opportunity[269] which may be considered as doubtful or even wrong from an EU law perspective.

Moreover, disputes on the legal basis can also be used as a tool for obtaining a final statement by the Court on the interpretation of unclear Treaty provisions. Indeed, in many cases the institution challenging the measure does not seek to attack a particular legislative objective, but it aims at expressing its viewpoint on the interpretation of a certain Treaty article in a public forum. Similarly, it might also be the case that the challenge is the most effective way to obtain by the Court an official interpretation of an otherwise uncertain Treaty provision[270].

[268] Kieran Bradley, 'The European Court and the legal basis of Community legislation' (1988) 13 European Law Review 379-402, 380.
[269] Scott Crosby, 'The single market and the rule of law' (1991) 16 European Law Review 451-465.
[270] Holly Cullen and Andrew Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (1999) 36 Common Market Law Review 1243-1270, 1245.

In light of the above, the Court of Justice has ruled that the choice of the correct legal basis is a matter of "*constitutional significance*"[271] and it "*may not depend simply on an institution's conviction as to the object pursued*"[272], but has to be founded on objective elements, that are amendable by judicial review. It also needs to be explicitly indicated in every European measure (usually in the first recital) and the lack of indication determines for the act to be null and void[273].

Over the time, the Court has built a solid jurisprudence establishing four main criteria that should guide the institutions in the choice of the legal basis and under which it should act as the guardian of legality over inter-institutional balancing issues[274].

2.1.1 Aim and content of the measure and the "centre of gravity" test

The first criterion relates to the aim and content of the measure[275]. Such rule, which is also referred to as "centre of gravity" approach, as determined in the landmark decisions "Titanium Dioxide"[276] and "Waste Directive"[277], requires the institutions to use the legal basis that corresponds to the main object and purpose of the measure to be adopted[278]. The task of the adopting institution is thus to correctly assess the objectives it wants to pursue with the act and the corresponding provision of the Treaty.

However, it is also possible that more than one objective is pursued in the same measure. In this case, the case law of the Court requires that "*if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component*"[279]. The rule of predominance thus provides that normally each act should be based on only one Treaty provision.

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[271] Opinion 2/00, *Opinion of the Court of 6 December 2001* (n. 154), p. 5. See also: Barbara Guastaferro, *Legalità sovranazionale e legalità costituzionale : tensioni costitutive e giunture ordinamentali* (Giappichelli 2013), 60.
[272] Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] ECR I-2867, p. 10.
[273] Carlo Curti Gialdino, *I vizi dell'atto nel giudizio davanti alla Corte di giustizia dell'Unione europea* (Giuffrè Editore 2008), 122.
[274] Gian Michele Roberti, 'La giurisprudenza della Corte di giustizia sulla base giuridica degli atti comunitari' (1991) IV Foro it 99-119.
[275] Case 45/86 *Commission v. Council* [1987] ECR 1493 (n. 214).
[276] Case C-300/89, *Commission v Council (Titanium dioxide)* (n. 272).
[277] Case C-155/91 *Commission v. European Parliament and Council ("Waste Directive")* [1993] ECR I-939
[278] Case 45/86 *Commission v Council* [1987] ECR-01493, Case C-242/87 *Commission v Council* [1989] ECR I-1425, Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, Case C-176/03 *Commission v. Council* [2005] ECR I-7879, Case C-166/07 *Commission v. Council* [2009] ECR I-7135.
[279] Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, para. 55 and the case law cited therein.

Determining the objective of a measure also relates to the delicate equilibrium of powers between institutions and Member States, in addition to the different extension of the competence provided for throughout the articles of the Treaty. Consequently, the correct identification of the predominant objective may either avoid future disputes on the legal basis or determine the victory of the adopting institution in a possible judicial review of the measure.

However, a certain margin of discretion is left in the hands of both the adopting institution and then the Court. Indeed, it is often the case that a measure pursues a number of objectives and the predominance of one over the others is not always clear-cut. In particular, it seems that the rule of predominance subordinates the determination of the legal basis exclusively to the EU legislator's decision to favour one objective over the other, adapting the content accordingly[280].

In the attempt to maintain the objectivity of its scrutiny, the Court has developed a test on the choice of the legal basis in which the different criteria are applied by way of progressive exclusion: if the first criterion is satisfactorily fulfilled, the following are not taken into consideration. As the identification of the aim and content of the measure has been placed first, it seems that the correlation between aim of the act and legal basis prevails even over any possible restriction of the powers of one of the actors involved.

This criterion, theoretically unquestionable, is sometimes contradicted by its practical application. In order to identify the objectives and content of a measure, the Court conducts its scrutiny starting from the preambles of the act and then moving to its content. Such approach is certainly viable when the preambles are proven against the main articles and vice versa, but it can be flawed when the Court interprets the content of the measure in the light of its objectives. In fact, relying on the recitals of a measure may be a double-edged sword: on one side, it is certainly customary for the European institutions - and in particular the Commission - to indicate in that part of the act their purposes, on the other side, it is also the place where the institutions make some political statements, which may go beyond or simply be different from the actual aim and content of the measure. In addition, the recitals are only an interpretative tool, but they are not binding provisions like the main body of an act.

[280] Pal Wenneras, 'Towards an ever greener Union? Competence in the field of the environment and beyond' (2008) 45 Common Market Law Review 1645-1685, 1670.

As a consequence, the objectivity of the legal basis test by the Court has been put into question[281]. In particular, already in the beginning of the '90s, some authors expressed the possibility that the Council or the Commission could "*argue for a formulation which justifies their preferred legal basis*" and that "*the preamble and wording of the measure* [would] *be drafted so as to facilitate this*"[282].

The case law based on the interpretation of the recitals of the measure is wide and it starts already from the *Waste Directive* case: the case concerned a directive that harmonised national programmes on the disposal of waste and both the Commission and the Council argued that the case had to be solved on the basis of the identification of the "principal" objective of the measure. The Commission held that the principal objective was the functioning of the internal market, while the Council maintained that it was the protection of the environment. Basing its decision on the reading of the recitals of the directive, the Court interpreted it as to be mainly aimed at the protection of the environment and thus to be based on Article 130s (now 192 TFEU)[283]. It thus agreed with the position of the Council, which was also the drafter of the measure and had quite a large possibility to influence its later interpretation[284].

More recently, a considerable number of cases on the choice of the legal basis regarded the CFSP (Common Foreign and Security Policy) and the external action of the Union in general, since in such cases the relevance of the objectives of the measure is higher, given its effects also on the competence of the Union as external actor. In this context some striking interpretations of the Court on the relevance of the preambles of the measure have received extensive comments by the legal literature.

With regard to the use of the preambles by the adopting institution, the literature[285] found fertile soil in the first preamble of Regulation 1013/2006 on shipment of waste[286],

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[281] Ibid. and also Ludwig Krämer, *Casebook on EU Environmental Law* (Hart Publishing 2002), 9.
[282] Nicholas Emiliou, 'Opening Pandora's Box: the legal basis of Community measures before the Court of Justice' (1994) 19 European Law Review 488-507, 499.
[283] The decision of the Court appeared to be in contrast with the one taken in the *Titanium Dioxide* case. In that occasion, however, the issue was slightly different, because the Court found that the two objectives of the measure – protection of the environment and functioning of the internal market – had the same weight. Accordingly, it moved to the following step of the review process (that will be analyzed further in this chapter) and to the assessment of compatibility of the procedures provided for by the two legal bases. In that case they were not, so the internal market legal basis prevailed, being the more democratic.
[284] The consideration must also be coupled with the fact that at the time the Directive had been adopted with the unanimity procedure in the Council, after a proposal of the Commission.
[285] Marcus Klamert, 'Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?' (2010) 35 European Law Review 497-515, 503.
[286] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1–98.

implementing the Basel Convention. The final version of its first preamble says: "*The main and predominant objective and component of this Regulation is the protection of the environment, its effects on international trade being only incidental*"[287]. The wording of the provision seems a copy-paste of the phrases normally used by the Court[288] when ruling on the choice of the legal basis. Some commentators thus argued that the Commission had willingly drafted the recital as similar to the Court's words as possible, in order to avoid its future negative assessment.

Indeed, when later the legal basis of the Regulation was challenged, the Court[289] affirmed: "*as regards the objective of the contested regulation, recital 1 in the preamble thereto states that '[t]he main and predominant objective and component of this Regulation is the protection of the environment'*"[290] and "*consequently, it is evident from the above analysis of the contested regulation that, both by its objective and content, it is aimed primarily at protecting human health and the environment against the potentially adverse effects of cross-border shipments of waste*"[291] . Some authors[292] critically addressed this judgement as simply accepting without question the assertions of the legislature and for not taking into sufficient account the context in which such measure would operate[293].

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[287] The first version of the same provision was different: "*The primary objective of the Regulation is protection of the environment and the legal basis is therefore Article 175(1) of the EC Treaty. However, since the provisions of Titles IV, V and VI on exports out of, imports into and transit through the Community to and from third countries, are also rules on international trade, the legal basis as regards these specific provisions is Article 133 of the EC Treaty*" See: Proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste, COM(2003)0379 final.

[288] In particular the Court requires the "*main or predominant purpose or component*" to be identified when a twofold purpose is identified, while the other is "*merely incidental*". See, *inter alia*: Case C-155/91 *Commission v Council* [1993] ECR-I-939, paras. 19-21, Case C-36/98 *Spain v Council* [2001] ECR I-779, para. 59 and Case C-137/12 *Commission v Council* [2013] EU:C:2013:675, para. 53.

[289] Case C-411/06 *Commission v. European Parliament and Council* [2009] ECR I-9713.

[290] Ibid, para. 51.

[291] Ibid, para. 62.

[292] Marise Cremona, 'A reticent Court? Policy objectives and the Court of Justice' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and external relations law: constitutional challenges* (Hart Publishing 2014), 23.

[293] The issue was particularly striking in this case because not long before the Court had ruled on the decision implementing the Rotterdam Convention stating that it should be based on both Articles 133 and 175EC. The two conventions had really similar content: the Rotterdam Convention provided for a prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, while the Basel Convention provided for a very procedure but in relation to the shipment of waste. However, in the first case, the Court ruled that the Rotterdam Convention introduced an explicit link between trade and development, while in the second case, it ruled that any reference to import and export of waste in the Basel Convention were meant in a non-commercial manner. As a consequence, the decision implementing the Rotterdam Convention is based both on Articles 133 and 175 EC, while the Regulation 1013/2006 is now based only on Article 175 EC. In this sense, see also: Panos Koutrakos, 'Case C-94/03, Commission v. Council, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-1; Case C-178/03, Commission v. Parliament and Council, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-107.' (2007) 44 Common Market Law Review 171-194 and Dora Schaffrin, 'Dual legal bases in EC environmental law revisited: note on the judgments of the European Court of Justice in the cases C-94/03 (Commission of the European Communities v. Council of the European Union) and C-178/03 (Commission of the European Communities v. European

While the issues regarding the external action of the Union and the interpretation of the objectives of EU measures extend to the prioritization of intra-EU over external objectives, for the purposes of the present work it suffices to say that the perplexities expressed above can also apply to internal issues. Indeed, although the preambles of a measure are not the sole parameter on which the Court relies, when they are overvalued the ability of the Court to shield the exclusively legal issues from the political choices may be affected. This particularly applies when a different extension of the Union's competences follows the prevalence of a certain objective, as it is in case of the choice between the energy and the environmental legal bases[294]. Indeed, the choice of the legal basis is also a matter of prioritizing objectives: while in cases such as the implementation of the Rotterdam Convention or the Basel Convention the choice was between the development of international trade and the protection of the "Union interest", in other cases it could be the prevalence of one EU objective over the other or the prevalence of the Union interest over the interest of the Member States. However, since it is the case law of the Court itself to provide that the pursuit of a certain objective through a legal act cannot follow the simple decision of the legislature, but it shall be based on objective criteria, simply accepting the legislature's choice could mean denying an effective judicial review of the act.

2.1.2 Multiple objectives: dual legal basis and the compatibility of legislative procedures

When the legislature is not able to determine a prevailing objective and the two are "indissolubly linked with each other"[295], the measure can be adopted pursuant to a dual legal basis. Recourse to a joint legal basis is exceptional, thus in case the two objectives, although equally important, can be separated, two different acts must be adopted[296]. An additional condition applies: the decision-making procedures provided for by the two Treaty provisions

Parliament and Council of the European Union)' (2006) 15 Review of European, Comparative and International Environmental Law 339-343.

[294] See paragraph IV.2.3 below.

[295] Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107, Case C-155/07, *Parliament v. Council* (n. 279), Case C-91/05 *Commission v. Council* [2007] ECR I-03651 and Case C-211/01 *Commission v Council* [2003] ECR I-8913.

[296] Although it is out of the scope of this contribution, the issue of the limits for the use of a dual legal basis are particularly relevant in the conclusion of international agreements by the EU. Indeed, in this field it is quite likely that the agreement covers a number of commitments that refer to an equally wide number of EU competences. As an example, in the context of WTO agreements the use of the dual legal basis is quite common. See: Marise Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon' (2010) 35 European Law Review 678-694.

have to be compatible with each other and not prejudice the rights of the European Parliament[297].

The Court has always been very strict in allowing the use of the dual legal basis and its assessment of the equal importance and connection of the two objectives is very rigorous. When a case is brought to its attention by an institution or a Member State contesting the (non-) use of a joint legal basis, the Court usually follows the same method of analysis: it starts by determining the scope of the Treaty provision that comes into play in the given case, then it runs the usual analysis on the aim and content of the measure and their relationship, in order to verify whether they are inseparably linked, and if either is prevalent. When the objectives are actually equally important and tightly connected, the Court verifies the compatibility of the legislative procedures and any possible harm to the Parliament's rights due to the combination of two legal bases. In case the two procedures are not compatible or divest the role of the Parliament, the test on the aim and content of the measure has to start again, since the Court is obliged to identify a predominant objective in order to found the measure on a single legal basis.

The analysis of the relevant case law shows that the Court sticks to two main points in this kind of cases: the first is the prevalence of the *accessorium sequitur principale* rule, applied not only with regard to the content of the measure, but also with regard to the content of the legal basis. Indeed, while in cases where just one legal basis must be identified, the question focuses on the main objective and content of the measure, when it comes to the possible dual legal basis, the problem moves also to the relationship and the compatibility of the two Treaty provisions. Accordingly, the option of the joint legal bases is viable only when the two objectives of the measure are equally important *and* the two proposed legal bases are not linked by a *lex specialis* vs *lex generalis* relationship, this meaning that the pursuit of the objectives of the first cannot be included within those of the other.

This kind of assessment is quite evident in those decisions where the Court was confronted with Articles 100A EC (now, 114 TFEU) or 235 EC (now, 318 TFEU) and more specific provisions such as Article 130r EC (now, 192 TFEU)[298]. In all these cases, the Court ruled that the two legal bases could not be combined, and the conflict had to be resolved according

[297] Case C-300/89, *Commission v Council (Titanium dioxide)*, Case C-94/03 *Commission v. Council* [2006] ECR I-1, para. 36 and 52.
[298] See, for example: Case C-155/91, *Commission v. European Parliament and Council ("Waste Directive")*, Case C-268/94 *Portugal v Council* [1996] ECR I-6177Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755. In this sense, the Opinion of AG Kokott in case Case C-155/07, *Parliament v. Council* paras. 70-80 is also interesting.

to the "centre of gravity" test. Indeed, also in the *Titanium Dioxide* case (notwithstanding the incompatibility issue, as we will see below), the reason why the Court ruled on the prevalence of Article 100A over Article 130r EC was precisely that "*the objectives of environmental protection referred to in Article 130r may be effectively pursued by means of harmonizing measures adopted on the basis of Article 100a*"[299]. To the contrary, it is when two sectoral legal bases are concerned that issues may arise on their prevalence: in that case, either the content of the measure is prevalently related to either of the two, or a prevalence cannot be determined just in function of their width or specificity of their objectives.

The second point concerns the compatibility of the legislative procedures. The adoption of the Lisbon Treaty has somehow tempered the possibility of conflicting legislative procedures, because in the vast majority of the provisions the ordinary legislative procedure is required. However, there are still a number of sectors that are subject to special legislative procedures and many of them relate to sensitive sectors in which the Member States preferred to maintain a form of stricter control on the action of the Union, by way of stronger majorities or unanimity in the Council[300]. Accordingly, a conflict may still arise, and it is thus still important to understand how it should be solved.

Great part of the academic and jurisprudential discussion on the compatibility of legislative procedures has originated from the *Titanium Dioxide* case. Indeed, in that occasion the Court held that the cooperation procedure and the unanimity vote in the Council were not compatible, because the "*use of both provisions as a joint legal basis would divest the cooperation procedure of its very substance*"[301]. In other words, the enhanced participation of the Parliament in the legislative procedure would be jeopardized. As a consequence of this finding, the Court ruled that the measure at issue had to be based on Article 100A EC. The literature that followed this decision interpreted the reasoning of the Court in the sense that in case of conflicting procedures, the provision with the most democratic procedure should be chosen as a legal basis[302].

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[299] Case C-300/89, *Commission v Council (Titanium dioxide)*, para. 24.
[300] For example, a special legislative procedure is provided for by Article 79 TFEU (Border checks, asylum and immigration), Article 87 TFEU (Police cooperation), Article 113 TFEU (Tax provisions), Article 153 TFEU (Social policy), Article 194 (Energy), Article 48 TEU (Treaty revision).
[301] Case C-300/89, *Commission v Council (Titanium dioxide)*, para. 18.
[302] Han Somsen, 'Case C-300/69, Commission v. Council (Titanium dioxide), Judgment of 1 1 June 199 1, not yet reported' (1992) 29 Common Market Law Review 140-151, 150; Paul Craig, 'Case C-133/06, European Parliament v. Council (Delegation of legislative power), judgment of the Grand Chamber of 6 May 2008, [2008] ECR I-3189.' (2009) 46 Common Market Law Review 1265-1275, 1273. See also the case law on this line: Case C-178/03, *Commission v. Parliament and Council*, para. 59; Case C-155/07, *Parliament v. Council*, paras. 77-83; Opinion of AG Kokott in case Case C-178/03, *Commission v. Parliament and Council*, paras.63-64 and in case Case C-155/07, *Parliament v. Council*, paras. 90-91.

Actually, while the Court acknowledged that the *combination of the legal bases* deprived the Parliament of its prerogatives, it then applied Article 100A because the overall objectives of the measure could be better achieved on the basis of that provision. This means that when it comes to legal basis adjudication, the Court runs an assessment more centred on the aim and content of the measure, rather than on the rights of the Parliament. In another, more recent, occasion the Court also explained that the "*importance of the Parliament's role in the Community legislative process*" is relevant only to assess the "incompatible procedures" condition[303]. It has thus been correctly pointed out that "*in principle, institutional arguments can be used to exclude recourse to dual legal basis, but not ultimately to single out the correct provision*"[304]. In this sense, Advocate General Maduro expressed serious doubts as to the merits of a preference for decision-making procedures which maximise the participation of the Parliament, holding that to accept such principle "*would be tantamount to altering the institutional and democratic balance laid down by the Treaty*"[305]. Indeed, the existence of special legislative procedures that provide for lesser participation of the Parliament in the Treaty is the result of the decision of the Member States conferring their powers to the Union. In the case of conflicting procedures, the question to be addressed is thus not "which legal basis gives larger powers to the Parliament" but "which legal basis better pursues the objectives of the Union as laid down by the Member States in the Treaties.

Advocate General Maduro felt that it was not the time for a shift in the case law of the Court and it is probably not a role that can be undertaken by this thesis either. However, since the initial objective of the analysis of the case law was to show methodological patterns for the institutions in the choice of the correct legal basis for their measures, consequently addressing more the adoption rather than the review stage, it is probably interesting to convert these doubts into a proposal for future legislative actions. Reaffirming the correct meaning of *Titanium Dioxide* and giving more relevance both to the principle of conferral (this meaning that the Union's action should stop where the Member States so indicated) and to the effective pursuit of the objectives of the Union would on one side allow the adoption of more effective legislation and, on the other side, it would also avoid further litigation and any possible political exploitation of it.

[303] Case C-155/07, *Parliament v. Council*, paras. 78-79.
[304] Vincenzo Randazzo, 'Case C-155/07, Parliament v. Council, judgment of the Court (Third Chamber) of 6 November 2008, not yet reported' (2009) 46 Common Market Law Review 1277-1291, 1290.
[305] Opinion of Advocate General Maduro in Case C-411/06, *Commission v. European Parliament and Council*, footnote 5.

On one side, the academic literature[306] has extensively commented on the use by the institution of litigation on the legal basis as to see reaffirmed their rights in some particular fields of action. Indeed, especially in the past, legal basis challenges have been used either to re-affirm the role of the Parliament in the legislative process, or to have a definitive interpretation on the extent as to which a certain Treaty provision applies, or again to limit the Community's powers against those of Member States. It seemed that "*Member States* [would] *regain in the Council what they give up in the division of powers operated by the Treaty, albeit that they exercise these powers collectively through the Community rather than as individual states*"[307], and thus the legal basis would be even more the instrument for affirming such powers in any case. This kind of disputes would be certainly avoided if – already at the proposal stage – considerations on the role of the institutions would be made and more thorough analysis on what really matters in the given measure would be pursued.

On the other side, from 1991, when the *Dioxide Titanium* judgment was given, the Court seems to have become less categorical in determining the (in)compatibility of legislative procedures and it has started to propose new solutions[308]. Sticking to the need that the combination of the two does not affect the Parliament's rights, it has also accepted the contextual use of the co-decision procedure (i.e., highest involvement of the Parliament possible) and other legislative procedures[309]. The Court in particular maintained that "*it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure*"[310], this meaning that no decision on the legal basis can be taken only because of the legislative procedure provided for therein. Although some authors[311] expressed some doubts on these kinds of combination, it seems that this shows a more pragmatic approach of the Court towards the issue of dual legal basis and on the institutional balance in general. It tries to allow the highest

[306] Cullen and Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (n. 270); Barents, 'The internal market unlimited: some observations on the legal basis of Community legislation' (n. 267).
[307] Bradley, 'The European Court and the legal basis of Community legislation' (n. 268), 381.
[308] For some insights on the relationship between the Court and the political institutions of the Union, see: Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) University Of Chicago Legal Forum 93-133.
[309] For example, in Case C-178/03, *Commission v. Parliament and Council*, the Court allowed the combination of the co-decision procedure with another procedure providing for the sole consultation of the Parliament; in Case C-155/07, *Parliament v. Council* the Court allowed the same kind of combination; in Case C-166/07, *Commission v. Council*, the Court held that the co-decision procedure was compatible with a procedure requiring the unanimous vote in the Council.
[310] Case C-130/10 *Parliament v. Council* [2012] ECLI:EU:C:2012:472, para. 80.
[311] Tim Corthaut, 'Institutional pragmatism or constitutional mayhem? Note to Case C-166/07, *European Parliament v. Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 3 September 2009, [2009] ECR I-7135' (2011) 48 Common Market Law Review 1271-1296.

participation of all the legislative bodies involved, while maintaining the focus on the objective pursued by the measure. It actually seems that the Court accepts the fact that the preservation of the Parliament's rights does not exclude *per se* the protection of the Council or the Member States' rights *as well*. In addition, this does not involve the rejection of *Titanium Dioxide,* but, to the contrary, its further confirmation, since it preserves the rights of the Parliament in any case, while strengthening the vertical against the horizontal division of competences. Lastly, we believe that this approach also enhances legal certainty, since the decision of the Court is based on an actual assessment of the case and not on a general rule which may not correspond to the best legal option[312].

The steps taken in this direction by the Court allow to believe that the institutions could similarly work for the use of the dual legal basis also when the legislative procedures seem to be incompatible, by trying to work out new inter-institutional balance patterns. Indeed, the fact that the Court has been the first to propose and accept these new methodologies could be a comforting precedent for the Parliament and the Council. Moreover, the growing number of competences and objectives attributed to the Union may always call for new challenges at constitutional level, which are not entirely foreseeable by reading the text of the Treaties and notwithstanding the larger use of the ordinary legislative procedure in the Lisbon Treaty, in particular if the relevance of the transversal objectives in the exercise of Union competences is taken into consideration.

2.2 Transversal objectives and the environmental legal basis

In the Treaties there are concepts and objectives that by their nature cannot be limited to a certain sector of intervention[313]. One of these is the protection of the environment, which also happens to be the most pervasive and difficult to define[314]. Indeed, the notion of environment does not find any legal definition and although it overlaps many other concepts (e.g., nature, human health, land-planning, sustainable development etc.), it is often limited by nimby factors that do not allow a full consideration of the issues related to it.

[312] Kieran St Clair Bradley, 'Powers and procedures in the EU constitution: legal bases and the Court' in Paul Craig and Grainne de Búrca (eds), *The evolution of EU law* (Oxford University Press 2011), 105.
[313] These can be usually found in the provisions having general application, under Title II of the TFEU. Objectives like the protection of human health, the fight against discrimination, the protection of the environment and the protection of consumers need to be considered by the European institutions when adopting measures in any relevant field of EU action.
[314] Proof of this can be found in the Single European Act, where for the first time the principle of environmental integration was inserted, even before including the provision of a Community action in the field of the protection of the environment.

When it comes to the choice of the legal basis, these objectives bring further difficulties to an already complex field of law. Concerns like the protection of the environment are considered increasingly relevant in the development of EU policies, but their growing importance makes it even more difficult to determine where the centre of gravity of a measure pursuing these and other objectives rests.

Article 192 TFEU has a very broad scope and the requirement of the ordinary legislative procedure in most of the cases should normally lower the risk of conflicts of legal bases[315]. Moreover, Article 11 TFEU imposes the integration of environmental protection requirements in all EU policies and activities. As a consequence, more frequently than in the past environment-related measures have become part of other policies of the Union. Although Article 192 TFEU is the relevant legal basis for environmental measures, the integration clause can be a sufficient basis for environmental measures that are only an aspect of other policies. However, neither the Treaties nor the institutional practice show when environmental provisions are as relevant as to become an environmental policy under Article 192 TFEU and thus need to be founded on that basis. As a consequence, the prevalence of the environmental competence over other competences might not be as self-evident as one might think, and this contributes to litigation over the choice of the legal basis[316].

The situation is further complicated by the fact that, to the contrary of other sectors, the environmental competence of the Union is not directly linked to a specific field of action, but it is rather based on a number of broad objectives, many of which cross other policies. Indeed, Article 191 and 192 TFEU do not limit themselves to the formal attribution of competence to the Union, but they set goals, principles and criteria of action. Nonetheless, the case law of the Court has shown that not all of the measures that are somehow connected to the environment have to be adopted under the environmental legal basis.

The first ruling in this sense has been the *Titanium Dioxide* judgement, where the Court, as we have seen, ruled that "*pursuant to the second sentence of Article 130r(2) of the Treaty, "environmental protection requirements shall be a component of the Community's other policies". That principle implies that a Community measure cannot be covered by Article 130s merely because it also pursues objectives of environmental protection*"[317]. Moreover,

[315] Stefano Amadeo, 'Articolo 192 TFUE' in Antonio Tizzano (ed), *Trattati dell'Unione europa* (Giuffrè 2013), 1639.
[316] Nicolas de Sadeleer, 'Environmental governance and the legal bases conundrum' (2012) 31 Yearbook of European Law 373-401, 376.
[317] Case C-300/89, *Commission v Council (Titanium dioxide)*, para. 22.

the Court maintained that since "*Article 100a(3) requires the Commission,* […]*, to take as a base a high level of protection in matters of environmental protection* [, t]*hat provision thus expressly indicates that the objectives of environmental protection referred to in Article 130r may be effectively pursued by means of harmonizing measures adopted on the basis of Article 100a*"[318]. At the time the judgment was interpreted as a clear intention of the Court to put Internal Market issues at the centre, while leaving the protection of the environment in a subsidiary position. Shortly afterwards, in two cases concerning two different directives on the handling of waste, the Court ruled that the environmental legal basis had been correctly applied. It seemed then that the Court was changing its own case law and that Article 100a EC had to be abandoned as a possible legal basis for environmental measures.

In fact, neither of these was correct, the Court had simply applied the "centre of gravity" test and proven that environmental objectives cannot be categorised *a priori* and only a case by case analysis can prove their actual weight. The incredible amount of environmental legislation adopted by the EU shows that there are some measures that clearly pursue an environmental objective (e.g. measures on the protection of wildlife, of water, of flora etc.), but the majority of them is cross-cutting. As a consequence, although a general rule cannot apply, there is a need for some guiding criteria, which are applicable not only by the Court but also by the institutions at the stage of measures' proposals.

In this sense, it has been held[319] that the role of the transversal objectives such as the protection of the environment is twofold: (i) it would avoid possible conflicts of legal bases and (ii) it would also allow the movement of principle and rules from one sectoral policy to the other, ensuring the coherence to the European legal system. In this view, transversal objectives would allow a broader interpretation of sectoral legal bases, allowing also the inclusion of environmental objectives. The example brought is the inclusion of environmental objectives in a measure determining the conditions for the import of agricultural products coming from third countries and thus normally falling under the Common Commercial Policy[320]. Indeed, the Court held that "*Articles 130r and 130s are intended to confer powers on the Community to undertake specific action on environmental matters. However, those articles leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives of environmental protection*"[321]. This interpretation

[318] Ibid, para. 24.
[319] Michel, 'Les objectifs à caractère transversal' (n. 150).
[320] Case C-62/88 *Greece v Council* [1990] ECR I-1527.
[321] Ibid, para. 19. It is the same line of reasoning followed in *Titanium Dioxide*.

cannot be stretched up to the point of voiding the *effet utile* of the sectoral provision to which the transversal objectives correspond. In a sort of system of checks and balances, the widening of the scope of one would determine the reduction of the other's. As a consequence, any possible conflict between legal bases would be resolved by a sort of natural coordination between objectives. Although fascinating, this interpretation – by the author's own admission – does not add anything to the scheme of the centre of gravity already followed by the Court and it seems to simply rephrase the reasons of many of the disputes on the legal basis. The second point is instead more convincing, according to which transversal objectives would enhance the coherence of the system. In this sense, the precaution principle could be used, for example, in the agricultural policy and in particular with the objective of protecting human health[322]. The Court would thus base its reasoning on a principle taken from the environmental policy without even mentioning the integration clause or Article 175 EC. This reading is also in line with the fluidity of the European system of competences and policies, as described in the second chapter of this thesis, consequently allowing much more coherent and contextualised policies.

Nonetheless, considerations on the pursuit of EU objectives may also be coupled with concerns on the overall level of EU integration to be achieved. This is evident in all those cases in which balancing different objectives also entails choosing between different levels of harmonization. In this sense, environmental objectives are a classic example, given that the environmental competence only allows minimum harmonisation. The question could thus be: can the desired level of environmental protection be satisfactorily achieved by way of integration or is the environmental legal basis needed? A significant aspect of this analysis is also that under Article 193 TFEU – which always applies to measures adopted under Article 192 TFEU – Member States can adopt more stringent national measures, provided that they inform the Commission.

From a policy perspective this raises two questions: (i) the possibility of having different levels of environmental protection throughout the Union and (ii) a possible race to the bottom in which Member States push for the adoption of lower not only environmental but also economic standards, with the excuse that more virtuous Member States can raise them at a later stage. On the other side, it is not sure that the simple integration of environmental objectives would allow the same levels of environmental protection than the use of the sectoral legal basis: the standards may be imposed uniformly throughout the Union, but they

[322] Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265.

would probably be lower. And so, is it better a lower but more uniform standard, or a higher but uneven standard?

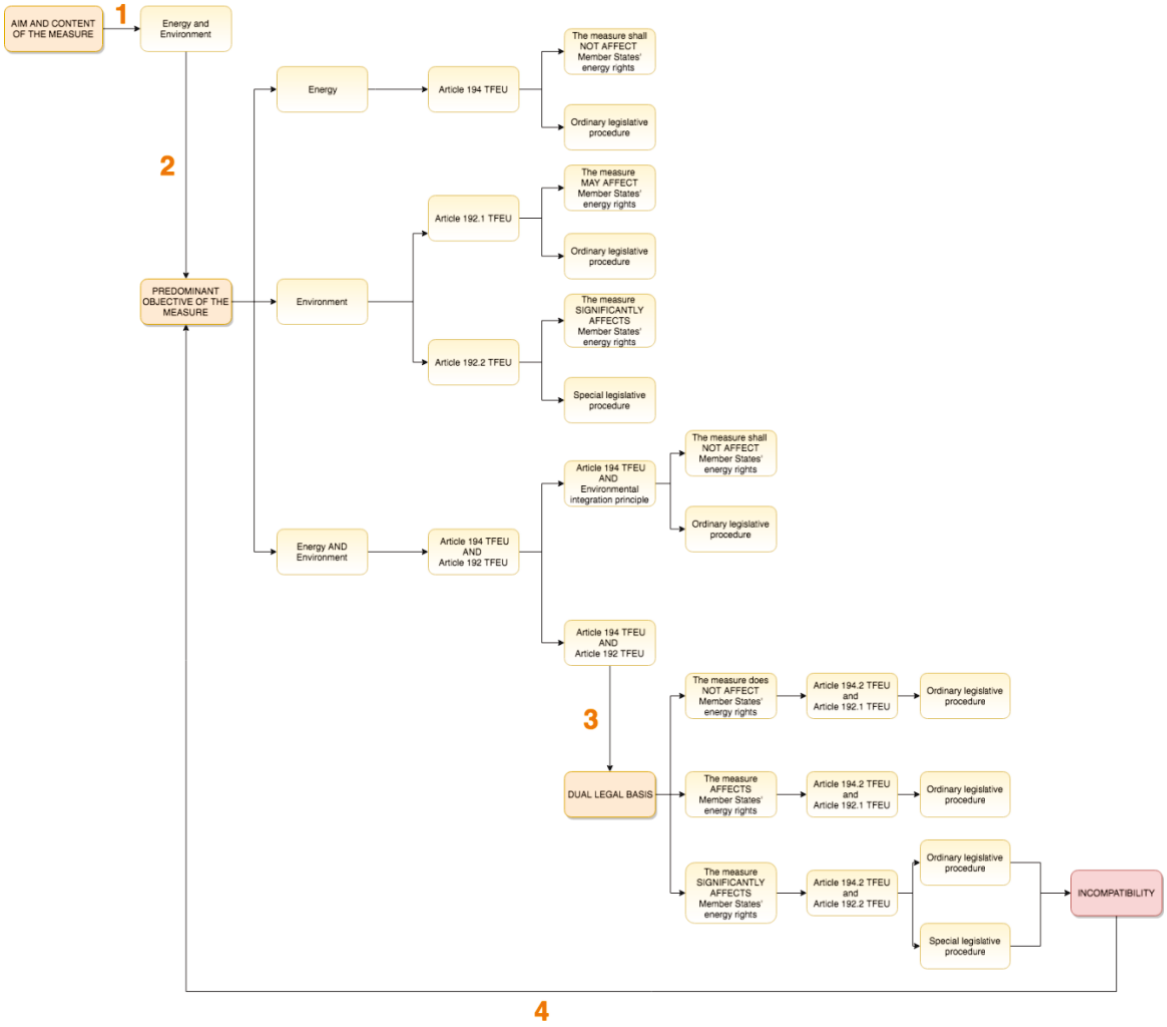
From a more strictly legal perspective, it seems that the inclusion of environmental objectives by way of integration would allow more legal certainty to EU policies and would better serve the function of these transversal objectives, which is – as said – giving coherence to the EU legal system. However, it is also observed that the reality both of the institutions and of the Court pushes much more in the direction of the use of the sectoral legal basis or the dual legal basis, even in those cases in which the objectives do not seem that indissociably linked. This is probably an acknowledgment of the inability of properly conducting a "centre of gravity test" or of the incommensurable importance of the environmental objectives, the question whether the dual legal basis is the optimum remains to be seen.

2.3 Energy and environment

As we have seen in the first chapter of this thesis, the interaction between Articles 194 and 192 TFEU is not smooth[323]. Nonetheless, there are a number of areas of the energy policy that have an intrinsic environmental component, but the flawed formulation of the energy competence together with the abovementioned complexity of the theory on the choice of the legal basis may result in deadlocks in the legislative procedure or in further legal basis challenges.

The flowchart here below shows the possible outcomes of the application of the rules on the choice of the legal basis as theorised by the Court and as described in the previous paragraphs. The starting assumption is that the measure to be adopted pursues both energy and environmental objectives. Hereafter we will comment the flowchart following the structure proposed above.

[323] See Paragraph II.3.5.2 above.



2.3.1 Aim and content of the measure.

The regulation of the energy sector is more and more connected with the protection of the environment and the two sectoral legal bases refer to each other. As a consequence, a growing number of energy pieces of legislation also aim at protecting the environment. It is sufficient to mention some remarkable examples, such as the Directive on the promotion of renewable energies[324], the Directive on energy efficiency[325], the Directive on the Emission Trading System[326], but also non-legislative acts such as the Commission Recommendation on shale gas[327]. As a consequence, it seems natural to admit that measures relating to these

[324] 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 Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.
[325] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56.
[326] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.
[327] 2014/70/EU: Commission Recommendation of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, OJ L 39, 8.2.2014,

and similar questions pursue a twofold objective and as such they need to be considered in the determination of the relevant legal basis.

Among them, the promotion of the use of renewable energies is probably the most interesting. In fact, renewable energy is understood to be energy from renewable non-fossil sources such as wind, solar biomass and geothermal power. The exploitation of these sources allows the production of electricity, which can be used in the place of energy produced from traditional sources, such as carbon and oil. Indeed, Article 194 TFEU has as one of its objectives the "development of new and renewable forms of energy". Moreover, the support of renewable energies can have an important part to play in promoting the security of energy supply, but it can also reduce EU's dependence on imported oil and external energy sources. Again, under Article 194 TFEU the objective of "*ensur[ing] security of energy supply in the Union*" shall be pursued. Accordingly, a measure on renewable energies may well fall under these two objectives of Article 194 TFEU. In addition, the use of renewable energies is also beneficial for the environment, since it helps to reduce greenhouse emissions, thus also combating climate change, which is one of the objectives of the EU environmental policy provided for in Article 191TFEU.

Nonetheless, the academic literature is divided on the correct connotation to be given to renewable energy measures. Some[328] argue that the reduction of greenhouse emissions only follows to energy saving and energy efficiency. On the other side, some other[329] argue that the main purpose of renewable energy measures is indeed the reduction of greenhouse gases and the prudent use of natural resources.

As a consequence, while it is in both cases sure that the twofold objective is present, depending on how the interpreter, or better, the institution adopting the act sees the purpose of renewable energy, the main or predominant objective of the measure can differ significantly.

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p. 72–78. Reins has extensively analyzed the question of the legal basis for shale gas extraction and has come to the conclusion that the environmental legal basis would be more appropriate. See: Leonie Reins, 'In search of the legal basis for environmental and energy regulation at the EU level: the case of unconventional gas extraction' (2014) 23 Review of European Community and International Eunvironmental Law 125-133 and Reins, *Regulating Shale Gas, The Challenge of Coherent Environmental and Energy Regulation*. However, Stokes seems to argue for Article 194TFEU as the correct legal basis for shale gas. See: Elen Stokes, 'New EU policy on shale gas' (2014) 16 Environmental Law Review 42-49.

[328] Schmitt von Sydow, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy' (n. 49), 44.

[329] Peeters, 'Governing towards renewable energy in the EU: competences, instruments, and procedures' (n. **Error! Bookmark not defined.**), 46.

2.3.2 Main or predominant objective.

When two or more objectives are identified, priority shall be given to the main or predominant purpose. Accordingly, the "centre of gravity" test shall be applied. The flowchart shows indeed that – depending on the identified predominant objective, really different outcomes are possible. In particular, such differences do not only weigh on the applicable legislative procedure, but also on the extent of the powers to be exercised by the Union. As a consequence, the choice of the legal basis in this context may not only be technical but also highly political.

If we look at the scheme, the possible outcomes are the following:

(i) the energy objectives (development of renewable energies and security of supply) are considered predominant, thus under Article 194.2 TFEU the Union shall adopt measures that do *not affect* a Member State's energy right, according to the ordinary legislative procedure;

(ii) the environmental objectives (protection of the environment and fight against climate change) prevail, then under Article 192 TFEU the Union has two options: either to adopt measures that *may affect* a Member State's energy right in accordance with the ordinary legislative procedure as provided for by Article 192.1 TFEU or to adopt measures that *significantly affect* a Member State's energy right in accordance with the special legislative procedure as provided for by Article 192.2 TFEU;

(iii) both objectives are considered equally important and it is impossible to determine a predominant purpose. In this case, the easier option would be to be able to satisfactorily chase the environmental objectives by application of the environmental integration principle, since it would allow the use of a single legal basis, Article 194 TFEU. Such option is not immediately viable, and it leaves open some questions, such as the limited extension of the EU competence and the extent of environmental protection achievable by way of integration only, due to the *caveat* of Article 194.2 TFEU[330]. If the application of the environmental integration principle is not possible or satisfying, the other option is to resort to the dual legal basis, as analysed in the following section.

[330] The viability of the environmental integration principle is extensively analyzed in Paragraph IV.3.2.

Interestingly, the acts recently adopted by the Union relating both to energy and the environment, such as the Regulation on energy labelling[331], the Directive on the energy performance of buildings[332], and the Energy Efficiency Directive[333], have all been based solely on Article 194(2) TFEU[334]. It thus seems that the energy objectives prevail, although all these measures have relevant effects on the environment, in particular in the reduction of greenhouse gas emissions. It must be noted, however, that all these measures, despite being highly energy-related, did not entail any possible influence on the Member States' decisions on their energy structure, accordingly their energy aim could be "safely" strengthened by the choice of Article 194 TFEU.

2.3.3 Dual legal basis

The dual legal basis could in principle be the right instrument in order to equally ensure the pursuit of both the environmental and energy objectives, as long as the two provisions of the Treaty do not provide for incompatible legislative procedures. As the flowchart shows, however, the actual possibility of resorting to such option is influenced by whether and how the measure affects the Member States' energy rights.

So far, neither in the Treaty nor in the Court case law it is possible to find a definition of the notion of "affecting". As a consequence, wide margins of discretion are left to the drafters of the measure. In order to shed some light, it is in any case possible to reason by analogy with other provisions of the Treaty in which the word "affecting" is used. For example, Article 192.2(b) TFEU requires a special legislative procedure for measures "*affecting* town and country planning, quantitative management of water resources, land use". Some authors[335] have in the past commented in the sense that "affecting" must be interpreted strictly and it should not include any measures that only have some *consequences* on the layout of the territory of a Member State, otherwise it would mean that any area-related environmental policy should be adopted unanimously. Instead, it should bring a change to

[331] Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, OJ L 198, 28.7.2017, p. 1–23.
[332] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13–35.
[333] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56.
[334] Differently, during the negotiations of the "Winter Package" (the package of energy measures presented by the Commission on the 30th of November 2016) long discussions have taken place on the correct legal basis to be chosen, especially with regard to the Recast of the Renewable Energy Directive, that had been adopted under Article 174EC. For a thorough analysis on the matter, see paragraph V.4.
[335] Jan H. Jans and Hans Vedder, *European environmental law after Lisbon* (Europa Law Publishing 2012), 61.

the present situation. Although it seems a more empirical rather than legal explanation, it could anyway be useful for interpreting the *caveat* of Article 194.2 TFEU. With regard to renewable energy, there would be a sort of "rationality threshold", according to which the Union is allowed to adopt measures that "promote" the development of renewable energies, while the Member States are given leeway in the determination of the methods for such promotion. Furthermore, such reading would confirm the interpretation of the EU energy competence proposed above, according to which it would be a coordinating competence rather than an actually shared competence.

The uncertain interpretation, coupled with the fact that until recently the meaning of "significantly affecting" had not been clarified either, led to contrasting interpretation also on the legal basis of the Renewable Energy Directive. Indeed, while it is based on Article 192.1 TFEU and thus – in theory – it should (not) affect the Member States' freedom to determine their own energy mix, some authors[336] critically commented that the Directive actually *significantly* affects the national rights and should thus have been based on Article 192.2 TFEU, in reason of the mandatory national targets imposed by the Directive to the Member States[337].

However, the Court of Justice has been recently asked to clarify the meaning of "significantly affecting"[338]. In the commented case, Poland asked the Court to annul Decision 2015/1814 of the Parliament and Council on the establishment and operation of a market stability reserve for the Union of greenhouse gas emission trading scheme. The main plea of the Member State was the infringement of Article 192.2 (c) TFEU on the ground that the decision was adopted according to the ordinary legislative procedure although it significantly affected a Member State's choice between different energy sources. According to the Government of Poland, the contested measure affected its energy rights by increasing the price of allowances and consequently influencing the market towards gas-fired power stations, instead of coal-fired power stations. It thus relied on the effects of the measure,

[336] Leal-Arcas and Filis, 'Conceptualizing EU Energy Security through an EU Constitutional Law Perspective' (n. 2), 1246.
[337] The fact that Directive 2009/28 does not *significantly* affect Member States' energy rights but it only *affect* them seems to be confirmed by AG Bot in the Ålands Vindkraft case, where it held: "*Whilst it is clear from the second subparagraph of Article 194(2) TFEU that the European Union's energy policy is intended to preserve freedom of choice as regards national energy mixes, without prejudice to Article 192(2)(c) TFEU, such energy policy decisions may nevertheless be affected by measures adopted by the European Union in the context of its environmental policy, as is demonstrated by Directive 2009/28 itself, which, by laying down mandatory targets for green energy consumption in each Member State, necessarily exerts an influence on the composition of their respective energy mixes.*" [emphasis added] (AG Opinion Case C-573/12 *Ålands vindkraft AB v. Energimyndigheten* [2014] ECLI:EU:C:2014:2037, para 104).
[338] Case C-5/16 *Republic of Poland v European Parliament and Council of the European Union* [2018] nyr.

rather than on its aim and content in order to support its plea, specifically holding that Article 192.2 (c) TFEU is drafted in a way that clearly requires the legislature to specifically assess the effects of the measure, rather than the objectives pursued by its adoption.

In its decision the Court did not directly address the meaning of "significantly affecting", however it clarified some important points. First, it clarified that the choice of the legal basis cannot be founded on the effects of the measure, because it would be tantamount asking the legislature to make a speculative assessment, given that the actual effects of a measure can only be analysed after its entry into force[339]. Accordingly, only the aim and content of the measure are relevant. Secondly, the Court held that "*Article 192(2) TFEU must be read in conjunction with Article 191 TFEU, which seeks to give the European Union a role in the preservation of the environment and the fight against climate change, in particular by establishing and executing international agreements to that end. As the measures taken to that end necessarily affect the energy sector of Member States, a broad interpretation of point (c) of the first subparagraph of Article 192(2) TFEU would risk having the effect of making recourse to the special legislative procedure, which the Treaty FEU intended as an exception, into the general rule*". Article 192.2 (c) TFEU can thus form the legal basis of a measure only if its aim and content is to significantly affect the Member States' choice between different energy sources.

Interestingly, the Court seems to say that environmental measures relating to the energy sector *per se* affect the energy sector of the Member States and, it being the rule, the ordinary legislative procedure should apply. Exceptionally, when these measures *significantly* affect the national energy sectors, the special legislative procedure should apply. Moreover, the national impact of the measures cannot be a justification for the Member States to block these acts through the veto right in the Council[340]. As a consequence, the Article 192.2(c) TFEU should not be the first option in the determination of the proper legal basis [341].

The Court thus rejected Poland's plea, confirming that Article 192.1 TFEU was the correct legal basis, since the operators' choice of a certain energy source would remain untouched

[339] Ibid, para. 41.
[340] Similarly, Advocate General Mengozzi acknowledged the risk that a broad interpretation of the provision could resort in a substantial block of any initiative at EU level, consequently impeding the development of energy questions within the environmental policy. See: AG Opinion Case C-5/16 *Republic of Poland v European Parliament and Council of the European Union* [2018] ECLI:EU:C:2017:925, para. 25.
[341] Geert Van Calster, 'Mengozzi AG saves ETS in energy policy legal basis opinion.' (*GAVC Law - Geert Van Calster,* 05 December 2017) <https://gavclaw.com/tag/c-5-16/> accessed 03 June 2018.

given that it does not depend on the price of allowances alone and the EU does not dictate in any way such choice that remains in the hands of the operators.

Although the Court did not give a definition of "significantly affecting", AG Mengozzi briefly intervened on it, holding that it relates to measures that "*bring about a significant change in the general structure of the* [Member State's] *energy supply or directly affect its choice between different energy sources*". Moreover, "*as a derogation, Article 192.2(c) TFEU is to be interpreted strictly, especially since an efficient modern environment policy cannot ignore energy questions*". Accordingly, "*the applicant's proposed interpretation of Article 192.2(c) TFEU* […] *would effectively block any legislative initiative by recognising a right of veto for Member States*".

These few lines do not add much to what one may get from the usual interpretation of the word "significant" by the Court and academics in other fields of EU law[342]. The AG somehow limits himself to the facts of the case and in particular that the effect on the Member State's energy choices were only an indirect consequence of the application of the measure. In addition, the effects of the measure were not even touching upon the Government's decisions, but rather on the energy market operators. Anyway, if such interpretation is applied to the renewable energy sector, it could be understood that for a EU measure to be considered "significantly affecting" Member States' rights, it has to impose, for example, a general ban to the production or import of energy from fossil fuels in favour of renewables (significant change in the general structure of the energy supply) or impose the exploitation of only a certain array of renewable sources, without taking into consideration the peculiarities of each Member State (directly affecting the choice between different sources). Although it is not predictable, so far it seems that this is not the path the Union is walking for its renewable energy policies and it would also justify the need for an unanimity vote, given the impact that such a decision might have on the development of national systems. Moreover, such interpretation seems also to explain the reason why the

[342] Before this case, academics had to interpret this provision only by analogy, since there was no specific ruling in this sense. In particular, the interpretation of the word "significant" had been borrowed from other sectors of EU environmental law. For example, with regard to the EIA Directive, the Court held that "a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a *substantial or irreversible change* in those environmental factors, irrespective of its size" and that (Case C-392/96 *Commission v Ireland* [1999] ECR I-05901, para. 66 [emphasis added]). Similarly, with regard to the Habitat Directive, the Court ruled that "where such a plan or project has an effect on that site but is not likely to *undermine its conservation objectives*, it cannot be considered likely to have a significant effect on the site concerned" (Case C-127/02 *Waddenvereniging and Vogelsbeschermingvereniging* [2004] ECR I-07405, para. 48 [emphasis added]). Such decisions of the Court were already quite comforting and linking the significance of the effects of a measure to really exceptional circumstances, which do not seem to fit with the renewable energy policy adopted by the EU so far (although, *contra*, see: Reins, *Regulating Shale Gas, The Challenge of Coherent Environmental and Energy Regulation* (n. 327), 44).

Union did not found the Renewable Energy Directive on Article 192.2 TFEU, as it leaves wide margins of discretion to the Member States in the choice of their energy sources, while imposing national binding targets on the share of energy to be produced from renewable sources.

Bringing the decision of the Court and the opinion of AG Mengozzi outside the tight boundaries of ETS regulation, it should be welcomed as good case law in the development of environmental policies, because it gives the Union wide margins of discretion in its policies, before it has to resort to measures requiring the unanimity of the Member States. However, it remains doubtful what the actual meaning of Article 194 TFEU is. Indeed, it is not clear if and when it can be used as sole legal basis, but also what is its role when used jointly to Article 192 TFEU. It seems that the Court takes for granted that certain energy questions (read ETS, renewables, new sources of energy etc.) that necessarily need to be developed and addressed under the environmental policy and that Article 194 TFEU and its objectives are only applicable for questions strictly relating to the development of the energy market.

All the above allows to draw some conclusions on the use of the dual legal basis for energy measures. It is first clear that as long as none of the Member States' rights is affected, the two Treaty provisions can well stay together and the measure will be adopted according to the ordinary legislative procedure, as provided for by both Articles 194.2 and 192.1 TFEU. When instead the measure is capable of affecting such rights, the dual legal basis is still possible at the same conditions as above, but, since Article 194.2 TFEU clearly excludes any intervention on the Member States' energy rights, any impact on such rights must be justified by the pursuit of the environmental objectives – in particular, the preservation and improvement of the environment and the prudent and rational use of resources. This approach could be applicable for measures concerning renewable energy sources or Emission Trading Systems[343], however it would not allow the pursuit of the majority of the objectives provided for by Article 194 TFEU (i.e. ensuring the functioning of the energy market, ensuring security of energy supply and promoting the interconnection of energy networks) for which a connection with the environment is not always present. Lastly, should the proposed measure *significantly* affect national energy rights, it could not be adopted under a dual legal basis, because Articles 194.2 and 192.2(c) TFEU provide for

[343] If one adheres to the interpretation according to which the regulation of the promotion of renewable energy is actually more intended to the protection of the environment, rather than the development of the energy market.

incompatible legislative procedures (namely, the ordinary and the special legislative procedure, with unanimity in the Council). As a consequence, the measure should be only based on Article 192 TFEU, consequently being recognized a predominant environmental objective.

As a further comment, among the three options above it seems that only when using Article 194.2 and 192.1 TFEU as joint legal basis the competence is actually shared between the Union and the Member States and there is room for all actors to fairly participate in the negotiations of the measure. Moreover, Article 193 TFEU also allows the Member States to adopt more stringent measures in case they believe it necessary for the protection of the environment[344]. The question remains how much the possible political bias of the Member States may influence the outcome of the negotiations and the content of the measure.

In the past, the CJEU has been asked to rule on cases where contrasting interests between the Union and the Member States as well as the actual existence of an EU competence were at stake.

In the famous *Tobacco Advertising*[345] case the Court was asked to decide on the correct legal basis for a measure providing for a general ban to advertising of tobacco products. The objectives of the measure were thus the correct functioning of the Internal Market and the protection of human health, respectively provided for by Articles 100A and 129 EC. For the purposes of this thesis, the main issue was that while Article 100A EC allowed the harmonization of national measures, conversely Article 129 EC expressly prohibited this kind of measures. Consequently, the extent of the possible Community's intervention was radically different between the two provisions. The Court held that while the Union is allowed to adopt internal market measures that also have an impact on the protection of human health, such measures "*may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129*"[346] and it shall genuinely pursue the objective of improving the conditions for the functioning of the internal market. Indeed, in that case the Court annulled the directive based on Article 100 EC since

[344] Article 193 TFEU leaves to the Member States a national competence in the field of the environment. Accordingly, as long as the national measure pursues the same environmental objectives as the European one, it can be freely determined by the Member States. However, an important limit is imposed to this national competence: it cannot interfere with other areas of EU competence. As a result, it is not clear whether the powers of the Member States can affect the EU energy competence and, if so, how. In fact, it could be a method for adopting more favorable national measures without encountering the limits of a legislative procedure at EU level, but just the control from the Commission under Article 193 TFEU. See: Stefano Amadeo, 'Articolo 193 TFUE' in Antonio Tizzano (ed), *Trattati dell'Unione europea* (Giuffrè 2013), 1649.
[345] Case C-376/98, *Germany v Parliament and Council* (n. 278).
[346] Ibid, para 79.

the pursuit of the harmonisation of the internal market was not prevailing and the distortions to competition were not sufficient to justify the measure.

Similarly, the formulation of Articles 194 and 192 TFEU would require that the compression of Member States' energy rights is allowed only by the *actual* existence of environmental objectives and it cannot be used by the Union only as an excuse for adopting more stringent measures. Moreover, with particular reference to the provision of Article 192.2(c) TFEU, the fact that it amounts to an exception with respect to the general provision of Article 194 TFEU seems to require further justifications for its use.

In its Opinion 1/2008[347] the Court ruled on the correct balance of interests between the Community and the Member States in relation to the Common Commercial Policy (Article 133EC, now 207TFEU). In particular, the Commission asked whether the competence of the Community to conclude agreements with other WTO members was exclusive or shared and which was the appropriate legal basis for such agreements. The Opinion sheds some light on the factors that influence the choice of the legal basis, especially where there is a need to represent the potentially different interests of the Union and its Member States[348].

Article 133EC provided that, in general, the Community had exclusive competence in concluding international agreements under paragraph 1, however two relevant exceptions applied: (i) when the subject of the agreement requires the unanimity vote in Council for internal decisions, such legislative procedure is required also at international level, (ii) if the agreement concerns one of the sensitive sectors provided for paragraph 6[349], the Community and the Member States have shared competence and the latter are allowed to participate in the negotiations of the agreement. In any case the powers of the Community could not go beyond to its internal powers.

In this context, the Commission held that the shared competence provided for in paragraph 6 had to be interpreted strictly, consequently excluding the negotiation of horizontal agreements (covering all service sectors), that instead would fall under the exclusive competence of the Community, but would require the unanimity vote in the Council, according to paragraph 5.

[347] Opinion 1/2008 *General Agreement on Trade in Services (GATS)* [2009] ECR I-11129.
[348] For an extensive analysis of the case, see: Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon' (n. 296).
[349] Namely, trade in cultural and audiovisual services, educational services, and social and human health service.

Clearly, identifying one of the sensitive sectors as the main subject of the measure would affect not only the horizontal, but also the vertical division of competences. The Court adopted a purposive interpretation of Article 133.6 EC, maintaining that "*The second subparagraph of art.133(6) EC allows the interest of the Community in establishing a comprehensive, coherent and efficient external commercial policy to be pursued whilst at the same time allowing the special interests which the Member States might wish to defend in the sensitive areas identified by that provision to be taken into account*"[350]. Were the provision to be limited to agreements relating exclusively or predominantly to the sensitive sectors, the participation of Member States in horizontal agreements would be excluded and their interests would remain unprotected. Indeed, the unanimity vote in the Council in the context of an exclusive competence is in no way comparable to the joint negotiation of the agreement, given that it does not influence the nature of the competence of the Community[351].

For this reason, both the Court and some intervening Member States[352] maintained that the use of the "centre of gravity" test may not be suitable for cases concerning the vertical division of competences. In fact, the Court seems to suggest that in this type of cases the preservation of the principle of conferral and the allocation of powers - as wanted by the Member States in the Treaties - has priority over the application of the methods for the determination of the legal basis. Similarly, in case C-13/07 AG Kokott held that the Court correctly applies the "centre of gravity" test. "*However, this consideration relates to legal measures in respect of which the Community's competence as such is beyond doubt and where it is necessary only to clarify which of several existing areas of Community competence is to be used (horizontal demarcation of competence). If, on the other hand, the Community is competent only in respect of certain components of a proposed act, while other components come within the competence of the Member States, (vertical demarcation of competence) the Community cannot simply declare that it is competent for the entire act by way of a main-purpose test. Otherwise it would undermine the principle of limited conferred powers*"[353].

The same reasoning can also apply to the joint use of Articles 192.1 and 194.2 TFEU. The choice of Article 194.2 TFEU as legal basis could indeed be influenced by the political will of protecting the energy interests of the Member States. On the other hand, the predominance

[350] Opinion 1/2008, *General Agreement on Trade in Services (GATS)*, para. 136.
[351] Ibid, para. 141.
[352] The argument was put forward by the Czech and UK Governments. Ibid, para. 92.
[353] Opinion Case C-13/07 *Commission v. Council* [2010] ECLI:EU:C:2009:190, para. 113 [emphasis added].

of the environmental objective would involve a wider competence of the Union to the detriment of the Member States. Finally, if using a dual legal basis (for a measure affecting a Member State's energy rights), such issues should be coordinated within the same measure.

Both for international agreements and EU measures pursuing both energy and environmental objectives, a predominant purpose approach may not be working. In the first case, when the provisions of the agreement are differentiated depending on the country to which they apply, the overall aim of the agreement may differ from that of the single Member State (the aim of the latter could actually be just to take part to the negotiations of the agreement). Similarly, the overall aim of an energy measure (e.g. promoting the use of renewables) may be different from that of the Member States (e.g. defending their national interests). As a result, in both cases the choice of the legal basis is affected. The solution adopted by the Court in Opinion 1/2008 seems to give priority to the interests of the Member States over the pursuit of the Union's objective.

Article 194 TFEU seems to give priority to Member States' rights, it is not clear what may happen when used in conjunction with another legal basis. In fact, Article 194 TFEU does not make any explicit reference to Article 192.1 TFEU. Accordingly, is not clear if Article 192.1 TFEU would work as an exception, similarly to Article 192.2 (c) TFEU, or the choice of a dual legal basis would allow the caveat of Article 194.2 TFEU to apply also to measures pursuing environmental objectives. Once again, the question would thus be to what extent the Member States' energy rights can be affected. If the reasoning of AG Kokott applies, it seems that the extensive application of the caveat under Article 194.2 TFEU would be the case, because the vertical division of competences should be preserved against the choice of the legal basis. However, this approach may not serve the principle of conferral either: while for energy the Member States have kept some competence against the Union, in the environmental policy the competence is genuinely shared with the Union and no exception is made with regard to measures that "affect" a Member State's energy rights. Moreover, the lack of any reference to this provision in Article 194 TFEU does not even allow for a restrictive interpretation of its applicability.

In Opinion 1/2008, the Court not only took care of the Member States' interests, but it also adopted a purposive interpretation of the provision in order to ensure the effective implementation of the Treaties. In the case of the environmental and energy policies, this would mean allowing the joint use of Articles 192.1 and 194.2 TFEU as legal bases for

measures that affect the national energy rights, but the EU legislature should show in the measure the actual environmental aim of those provisions that affects national prerogatives.

Such interpretation, which may be difficult to explain in theory, could find a practical development in the differentiation of the legal bases within the same measure, so that while the act would be overall adopted on a dual legal basis, the single provisions would be based either on one or the other article of the Treaty. For example, in the pre-Lisbon context, the Renewable Energy Directive had been adopted on the basis of both Articles 95 and 176 EC, but only a spare number of provisions was specifically based on Article 95 EC[354]. Similarly, a measure having both energy and environmental objectives could base on Article 192.1 TFEU the measures that affect the Member States and that pursue and for which the environmental objective is prevalent. From a policy perspective, this would probably also allow a higher ease of the Member States in the negotiation process.

The very last point to be addressed when considering the joint application of Articles 194 and 192 TFEU is the possibility granted to the Member States by Article 193 TFEU to adopt "more stringent protective measures". Indeed, no reference to this provision is made in Article 194 TFEU and in some occasions[355] the EU legislature introduced a wording substantially identical to that of Article 193 TFEU in measures based exclusively on Article 194 TFEU, as to show the will of the Union to reach higher standards but also the tight margins of intervention that Article 194 TFEU allows. Indeed, the possibility for more "virtuous" Member States to adopt more stringent measures would somehow compensate the limits that the *caveat* of Article 194.2 TFEU imposes. It is hard to believe that this type of provisions could be inserted in any kind of measure, even those that have no connection with the protection of the environment. Hence, Member States would not be able to depart from the standards determined at EU level. Conversely, it is to believe that for measures having a dual legal basis, Article 193 TFEU would fully apply allowing a wider margin of manoeuvre also with regard to the more energy-related provisions. While this would partially compensate the fact that under the environmental legal basis only minimum harmonisation is possible, it would also enhance the creation of differentiated standards

[354] In particular, Articles 17 and 19 of the Directive, harmonizing the sustainability criteria for biofuels and bioliquids, thus facilitating trade between Member States.

[355] Article 1 of Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13–35 is drafted as follows: "*The requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures. Such measures shall be compatible with the Treaty on the Functioning of the European Union. They shall be notified to the Commission.*".

throughout the EU, which may also have important consequences on the overall functioning of the increasingly interconnected European energy market.

2.3.4 The more specific legal basis

As said above, Article 194.2 and 192.2(c) TFEU are incompatible, both because of the legislative procedures provided therein and the *caveat* of Article 194.2 TFEU. Clearly, in this case a choice should be made as to whether the measure predominantly pursues either an environmental or an energy objective, since, as we have seen above, in case of incompatibility only one of the two objectives can be chased.

3 The general principles of EU law as a guiding light in the choice of the legal basis.

The analysis conducted so far on Article 194 TFEU has shown two main concerns: the first is the relationship between the Union and the Member States, not only in terms of competence, but also of achievability of the objectives set for the Union; the second is the management of the delicate balance between the protection of the environment and the enhancement of the European energy market. While it is clear that the literal interpretation of the provision does not give much hope in the solution of these problems, it is submitted that a logical and teleological interpretation founded on the general principles of EU law may be useful. First, because it is Article 194 TFEU itself that refers to important principles of European law, such as environmental protection and solidarity between Member States. This allows to think that it was the intention of the drafters of the Treaties to give particular relevance to these principles and to propose a principle-oriented interpretation of the provision. Second, because it is settled case-law of the Court that, in order to ensure the correct application of the law, recourse to "*generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States*"[356] is necessary. In particular, through the logical interpretation the Court proposes a reading of the text within the context of the system, and it seeks the most reasonable solution in case the provision is ambiguous. In the teleological interpretation, instead, the Court assesses the intention of the parties of the Treaty and the *ratio legis* of the text and it gives an interpretation that allows the effective implementation of such intentions.

[356] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029, para. 27.

General principles of EU law[357] – as a mainly praetorian source of law – have a threefold function: (i) they allow the Court of Justice to fill normative gaps left either by the authors of the Treaty or by the EU legislator, in order to ensure the autonomy, effectiveness and coherence of the EU legal system; (ii) they serve as an aid to interpretation, given that both EU law and national law falling within the scope of EU law shall be interpreted in light of the general principles; (iii) they constitute grounds for judicial review, both of EU legislation and national law falling within the scope of EU law. In addition, they are important drivers to the creation of a common constitutional space and to the implementation of the European integration process. For the purposes of the present work only the first two functions are taken into consideration.

As per the "gap-filling" function, it operates in reason of the wide and comprehensive nature of general principles. It is indeed their very nature of principles that requires a higher level of abstraction, as compared to general rules, in order to be able to drive the action both of the judiciary and the legislature in any field, but, at the same time, be applicable on a case by case basis by the Court in its review of legislative acts. For this reason, it has been said[358] that they live somewhere in-between the *lege lata* and the *lege ferenda* and they concretely come into existence only when the judge applies them in the interpretation of a provision. Such flexibility represents both a strength and a weakness: it allows general principles to adapt to even very different contexts and times also very different, creating a sort of *fil rouge* in the interpretation of the law throughout time and space[359], but they may also fall against the application of a more specific rule that seems to be more effective in the *hic et nunc*.

In the EU legal system, the constitutional nature of the Treaties enhances the role of these principles, indeed the Treaty provisions are often drafted in general terms, using vague expressions and terms, lacking any official definition. While enhancing the overall flexibility

[357] For more general analysis of EU general principles see: Lorenzo Pace, 'I principi generali del diritto dell'Unione europea e il "viaggio attraverso i paesi della Comunità"' in Lorenzo Pace (ed), *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona* (2012); O. Wiklund and J. Bengoetxea, 'General Constitutional Principles of Community Law' in U. Bernitz and J. Nergelius (eds), *General Principles of European Community Law* (Kluwer 2000); J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: A contribution to legal theory and European Community Law* (Hart Publishing 1993); J. Bengoetxea, 'Review Essay on Xavier Groussot, General Principles of EC Law: The Wider European Law and Jurisprudence Debate' (2006) 45 Common Market Law Review 1279-1303; A. Massera, 'I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario' (2005) 4 Diritto amministrativo 707; Giuseppe Tesauro, *Diritto dell'Unione europea* (7 edn, CEDAM 2012); G. Della Cananea and C. Franchini, *I principi dell'amministrazione europea* (2 edn, Giappichelli 2013).

[358] Jan Mazak and Martin Moser, 'Adjudication by reference to general principles of EU law: a second look at the Mangold case law' in Maurice Adams and others (eds), *Judging Europe's judges The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2013), 70.

[359] In this sense they are instrument for the coherence of the European legal system.

of the system, this can also require the Court to take a more active role, sometimes close to that of a law-maker[360]. Nonetheless, since general principles represent constitutional standards of the Community legal order, their use is an integral part of the Court's methodology and it does not violate the division of powers. For this reason, many of the principles elaborated by the Court have now been inserted directly in the Treaty, formally obtaining the status of constitutional provisions. They thus become central also in the exercise of their second function, as interpretative tools of the law, notwithstanding the actual existence of a gap in the legislative body.

In the context of Article 194 TFEU the principles of proportionality and solidarity may fill the gap left by the drafters of the Treaty in the determination of the exact extent of the Union's powers for the pursuit of the objectives indicated in the same Article 194 TFEU. Similarly, the use of the environmental integration principle can fill the gaps left by the energy provision in the indication of the competences of the Union with regard to the environmental aspects of energy regulation.

Moving to the second function of the general principles of European law, these are used by the Court in order to ensure the consistent interpretation of all provisions of secondary EU law. In particular, the Court orders and systematizes a number of rules linked to each other for their nature, object and purpose pursued in order to allow the existing provisions to chase the objectives that the legislator had originally assigned to them[361].

While in the interpretation of secondary law general principles, together with the Treaty provisions, work as guidance and boundaries for the consistency of the system, in the interpretation of primary law they become the only instrument the Court can resort to in order to give effective meaning to unclear provisions. Indeed, the Court has no power to judge on the validity of these provisions and interpretation becomes a means of effectiveness. Member States, as masters of the Treaties should have created a self-contained legal system clear and applicable to any legal situation, but the evolution of both the society and the law require adjustments that cannot always be achieved through a revision of the Treaties. Moreover, constitutionalizing the Treaties has also determined a progressive abandonment of a functional approach, favoring instead a principle-oriented interpretation, which is usually proper to constitutional systems.

[360] For further analysis on the role of the Court, see: Takis Tridimas, 'The European Court of Justice and judicial activism' (1996) 21 European Law Review 199.
[361] Maria Clelia Ciciriello, *L'Unione Europea e i suoi principi giuridici* (Editoriale Scientifica 2010), 1.

The creative role of the Court is thus enhanced. It is reported that, in the light of general principles, the Court has interpreted Treaty provisions more liberally than the acts of the institutions, in particular with regard to core principles such as the right to judicial protection[362]. Nonetheless, constitutional principles allow an internal critique of positive law and its development and they promote the transparency of legal argumentation, becoming "*agents of universal reason against local rationalities*" [363]. As a consequence, although they do not take priority over the provisions of the Treaty they do influence its interpretation. While this can be criticized as a form of political intervention of the Court on matters that should be reserved to the legislative power, it seems that it actually ensures an adequate control on the implementation of the will of the drafters of the Treaties, consequently ensuring that the rule of law is observed.

As an instrument of interpretation and coordination between different provisions, it is submitted that they can be important tools in the clarification of the relationship between Articles 192 and 194 TFEU. Moreover, as their relevance has expanded as to guide the interpretation not only of legislative provisions, but also of the very objectives of the European Union, we believe that they are applicable in the process of choosing the correct legal basis for measures that pursue a twofold objective in order to understand whether and how such objectives shall be kept together in the same measure. In the following paragraphs, the principles of solidarity, environmental integration and proportionality will be thus analyzed.

3.1 The solidarity principle

The principle, or better the notion, of solidarity is something that, although frequently recalled in the context of EU law has not been clearly defined so far[364]. Nonetheless, it is one of the pillars of European integration and it helps in the process of "creating an ever closer union". In particular, it has a threefold function: it is a fundamental principle / value

[362] Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041; Case 294/83 *Parti Ecologiste Les Verts v Parliament (Les Verts)* [1986] ECR 1339. See: Takis Tridimas, *The general principles of EU law* (Oxford EC Law Library, 2 edn, Oxford University Press 2006), 52.

[363] Von Bogdandy, 'Founding principles of EU law: a theoretical and doctrinal sketch' (n. 144), 101.

[364] On the notion of solidarity in generals, see: Riccardo Maria Cremonini, 'Il principio di solidarietà nell'ordinamento europeo' in Stelio Mangiameli (ed), *L'ordinamento europeo I principi dell'Unione* (Giurffrè 2006), 435 ff.; Nathalie Karagiannis, *European Solidarity* (Liverpool University Press 2007); Ulla Boegh Neergaard, 'In search of the role of "solidarity" in primary law and the case law of the European Court of Justice' in Ulla Boegh Neergaard, Ruth Nielsen and Lynn M. Roseberry (eds), *The role of Courts in developing a European social model – Theoretical and methodological perspectives* (DJØF Publishing 2010), 97 ff.; Armin Von Bogdandy, *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo* (Editoriale Scientifica 2011); Armin Von Bogdandy, 'I principi costituzionali dell'Unione europea' (2005) 6 Federalismiit , 31 ff.

in the integration process, an objective to be pursued and, finally, an instrument of implementation of the EU's common objectives and policies.

If one looks back to the Schuman's declaration, it is possible to see that solidarity was one of the triggers for the States to cooperate in order to achieve common objectives. The founders interpreted solidarity as a very concrete driver for collaboration between Member States. Ever since then, it has thus been interpreted as one of the core moral values of the Community and the Union.

Solidarity, however, is also an important legal concept. Indeed, it is expressly mentioned in several provisions of the Treaty, to which, in turn, secondary legislation makes reference. In particular, it is indicated among the objectives of the EU in Article 3 TEU[365], according to which the Union shall promote economic, social and territorial cohesion. The instruments through which such objectives shall be pursued are listed in Articles 174 and 177 TFEU[366] and solidarity is expressed in the obligation for Member States to reduce "*disparities between the levels of development of the various regions and the backwardness of the least favoured regions*". The objective of the promotion of inter-state solidarity is mentioned also in Article 67 TFEU[367], which requires the Union to develop a common policy on asylum, immigration and external borders, by creating solidarity between Member States. Similarly, Article 80 TFEU[368] requires that the Union policies on asylum, immigration and border checks are framed in accordance with the principle of solidarity and the fair sharing of responsibility between Member States. Article 222 TFEU[369] contains a solidarity clause requiring both the Union and the Member States to act jointly in solidarity in cases of terrorist attacks. In addition, it refers also to civil protection and environmental and health

[365] According to Article 3, para. 3 third alinea TEU "[The Union] *shall promote economic, social and territorial cohesion, and solidarity among Member States*".
[366] Articles 174 and 177 TFEU do not directly mention the solidarity principle, however they are the normative expression of the objective mentioned in Article 3 TEU. Indeed, according to Article 174 TFEU "*the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion*" and it "*shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions*". Moreover, Article 177 TFEU provides that the policy above shall be achieved through Structural and Cohesion Funds.
[367] According to Article 67.2 TFEU, the Union "*shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals*" [emphasis added].
[368] Article 80 TFEU provides that "*The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle*" [emphasis added].
[369] Article 222 TFEU provides that "*The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster*". In particular, this obligation involves mutual assistance and protection, both civil and military, between the Member states and in favour of the attacked nation.

emergencies and obliges the Member States to 'act jointly in a spirit of solidarity' in case of natural or man-made disasters. The energy sector is the last field in which solidarity is mentioned in the Treaties. Article 122 TFEU[370] authorizes the Union to adopt solidarity mechanisms when a Member State faces severe difficulties in the supply of certain products, such as in the supply of energy. On the other hand, Article 194 TFEU requires the Union to attain the energy policy objectives "*in a spirit of solidarity between Member States*".

The examples mentioned above show how the concept is recalled in very diverse sectors of EU policy, which may lead to slightly different connotations. In particular, three main groups can be identified: (i) solidarity as a factor of economic and financial unity, (ii) solidarity as a factor of social cohesion and (iii) solidarity as a response to situations of crisis.

The notion of solidarity as an economic instrument dates back almost to the creation of the European Community, when the integration process was mainly driven by the will to create a well-functioning common market. In its early case law, the Court of Justice referred to solidarity as the cooperative action of the Member States for the functioning of the Community system[371]. This way, Member States had to comply with the market impositions of the European Community even when such action was thought to work against their national interests[372]. The Member States, by undersigning the Treaties, had declared themselves ready to bow to the Community's principles and rules and thus they had to work together for the implementation of the (economic) project designed in those Treaties.

Similarly, in *Commission v. United Kingdom*[373] the Court explicitly referred to solidarity as a duty "*accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order*"[374]. Accordingly, when the United Kingdom decided not to implement a Community regulation imposing uniform rules for speed-controls on the roads, was breaking, "*according to its own conception of national interest, the equilibrium between the advantages and obligations flowing from its adherence to the Community*"[375]. Accordingly, Member States as members of the Community had to accept

[370] Under Article 122 TFEU "*the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy*" [emphasis added].
[371] In *Commission v. France* the Court interpreted the notion of solidarity was regarded as loyalty, thus it was at the basis of the whole Community system. See: Joined cases 6/69 and 11/69 *Commission v France* [1969] ECR 00523, para. 16.
[372] Case 39/72 *Commission v Italy* [1973] EU:C:1973:13, paras. 24-25.
[373] Case 128/78 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Tachographs)* [1979] ECR 00419.
[374] Ibid, para. 12.
[375] Ibid.

the obligations and the benefits coming from it and all together work for the achievement of the economic objectives they had imposed to themselves by signing the Treaties[376].

With the recent debt crisis, the creation and functioning of the internal market took also some more purely financial connotations[377]. In fact, the events occurred starting from 2009 shook the Union at its roots and posed new questions on the type of relationships the Member States wanted to engage between each other in the pursuit of the European integration objective. As a consequence, from a philosophy according to which they were all on the same foot and they all had to contribute equally, they recognised that they were not all on the same foot – at least financially speaking – and thus solidarity was also needed for the stronger to help the weaker. The other two aspects of solidarity (instrument of social cohesion and mean for overcoming exceptional difficulties) started to operate together with the more purely economic dimension.

In *Pringle*[378] the Court was asked to rule on the competence of the Member States to adopt the European Stability Mechanism (ESM) as a response to the sovereign debt crisis and solidarity among Member States was at the centre of the discussion. The Court adopted a narrow interpretation of the notion of solidarity in this context: while Member States are legally obliged to follow a sound budgetary policy, financial assistance from other Member States cannot become a justification for economically weaker Member States not to conduct such policy. Accordingly, financial assistance is acceptable as long as it is provided for the ensuring the stability of the whole Euro zone[379]. Accordingly, solidarity in the financial sector cannot be enlarged as much as to become a sort of act of act of kindness, but it needs to be kept within the limits of the Union's good – especially when its implications affect the Union as a whole. Moreover, AG Kokott maintained that although solidarity did not impose a duty on the Member States to provide financial assistance, an interpretation of Article 125 TFEU according to which Member States would be prohibited to voluntarily provide financial assistance in case of a financial crisis would be contrary to the principle of solidarity as mentioned in Article 122 TFEU and thus applying to the whole EU economic

[376] Esin Küçük, 'Solidarity in EU law' (2016) 23 Maastricht Journal of European and Comparative Law 965-983, 980.
[377] For further analysis of solidarity in the context of financial crisis, see: Roberto Cisotta, 'Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi' (2015) 1 Il Diritto dell'Unione Europea 57-90; Peter Hilpold, 'Understanding solidarity within EU law: an analysis of the "Islands of Solidarity" with particular regard the Monetary Union' (2015) 34 Yearbook of European Law 257-285.
[378] Case C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECLI:EU:C:2012:756.
[379] Ibid, paras. 133-137.

policy[380]. This shows that while new economic scenarios may arrive, the role of solidarity remains that of fostering the integration process. In times of economic uncertainties, this means that economically stronger Member States must help the weaker in the view of maintaining the overall welfare of the Union, while making sure that all members work hard for the achievement of those objectives, each according to its own possibilities.

The social aspects of solidarity in the EU have been developed in two different contexts: the first relates to the coordination of the social policies of the Member States[381], while the second relates to the asylum and immigration policies of the EU. The first context has been identified also as "organic solidarity"[382], as it is usually characteristic of the relations between individuals living and operating in the same society. This type of solidarity is not created by the law or by the jurisprudence of the Court, but it rather stems from the identification of individuals with others. When taken at the regulation level, it develops in the elaboration of European cross-border social rights, encompassing the assistance of those in need, the creation of social goods to all members of the society and the contribution by the individuals to common public finances[383]. For example, in *Grzelczyk*[384], the Court maintained that the nationals of the state hosting an economically inactive migrant must show "certain degree of solidarity" to this individual, proving that inter-state solidarity comes first from within the society and only as a consequence it is developed at political and legal level. Nonetheless, in *Teixeira*, AG Kokott[385] extended this social obligation of "financial solidarity" also to the Member States, for granting housing assistance to a non-employed citizen of another Member State. Although the reference is to a state obligation, the objective of solidarity is clearly the creation of common spaces in the EU where people can move and reside freely.

The second context, instead, shows the intergovernmental aspects of solidarity. With this regard, it has been held that it is a manifestation of European integration and an expression

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[380] AG Opinion Case C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012] ECLI:EU:C:2012:675, 142-143.
[381] Extensive analysis of social solidarity can be found in: Jo Shaw, *Social Law and Policy in an Evolving EU* (Hart 2000); Grainne de Búrca, *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005);
[382] Malcolm Ross, 'Solidarity - a new constitutional paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting solidairty in the European Union* (Oxford University Press 2010).
[383] Hartwig and Nicolaides, 'Elusive Solidarity in an Enlarged European Union' (n. **Error! Bookmark not defined.**), 22.
[384] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para. 44. Similar concepts were also expressed in: Case C-85/96 *Martinez Sala* [1998] ECR I-2691; Case C-138/02 *Collins* [2004] ECR I-2703; Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.
[385] AG Opinion Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-01107, 82-85.

of the principle of sincere/loyal cooperation between Member States. Security can be experienced in the Union when bonds between Member States are created not only at political but also constitutional level. The fundamental role of solidarity in this context is given by its ability to adapt to the changes that may occur at political and social levels, while maintaining clear that integration is the final objective[386].

However, social solidarity is not an exclusively moral concept either: while a long-term perspective is in any case required, Member States acting in solidarity with others may find such behaviour beneficial for their economies. For example, they may believe that avoiding important disparities between Member States through market integration, may generate future financial returns and thus stronger Member States are incentivized in cooperating in order to get the related benefits[387]. Nonetheless, this shows a certain degree of individuality of the notion of solidarity, which cannot be valid *a priori* for all conditions and social environments, but that changes depending on the society it applies to. Accordingly, at EU level only a rather generic interpretation of solidarity is possible and its concrete declination needs to be left to the Member States.

Similarly, with regard to asylum and immigration law, the principle of solidarity operates within both its moral and economic dimension. Indeed, from the provisions of Articles 67 and 80 TFEU it clearly appears that, as a consequence of the EU fundamental values according to which migrants must be welcomed in the EU, the economic burdens of such reception need to be equally shared between Member States. In this context, the role of the EU as an institution is fundamental for implementing the necessary redistribution mechanisms to compensate the unequal costs possibly put on the individual Member States[388].

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[386] Egle Dagilyte, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme. ' in Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in EU law* (Elgar 2018), 71.
[387] Küçük, 'Solidarity in EU law' (n. 376), 973.
[388] The question of solidarity between Member States has growingly become a political argument, in particular following the adoption of the Dublin Regulation. These arguments are outside of the scope of the present work. However, more extensive analysis on the application of solidarity in the context of migration law can be found in: Jürgen Bast, 'Deepening supranational integration: interstate solidarity in EU migration law' in Andrea Biondi, Egle Dagilyte and Esin Küçük (eds), *Solidarity in EU law Legal principle in the making* (Elgar Publishing 2016); Alfredo Rizzo, 'Ricollocazione infracomunitaria e principio di solidarietà: un nuovo paradigma per le politiche d' asilo dell' Unione' (2017) 3 La comunità internazionale 397-419; Annalisa Geraci, '"There is not enough union in this Union". Principio di solidarietà e Sistema di Dublino alla prova del più imponente esodo di profughi dal secondo dopoguerra' (2016) 9 Federalismiit 29; Paolo Mengozzi, 'L'immigrazione e la giurisprudenza della Corte di giustizia dell'Unione europea' (2016) 3 Il Diritto dell'Unione Europea 587-602; Maria Irene Papa, 'Crisi dei rifugiati, principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'Unione europea' (2016) 3 Costituzionalismoit 41; Chiara Favilli, 'L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'"emergenza" immigrazione' (2015) 3 Quaderni costituzionali 785-788.

Lastly, solidarity has been used as a response to situations of crisis. Once again, the moral and economic aspects come into play. On one side, the obligation for Member States to intervene in case one of their peers faces extremely difficult situations seems to be the practical translation of the ultimate EU integration objective. In this sense, it has been defined as "insurance-type" solidarity[389], because EU Member States are committed to reciprocal aid in case of a risk that may have relevant repercussions on all the others; they are thus all potential givers and receivers of help. On the other side, the fact that Article 122 TFEU has been inserted in the Title on the economic policy of the EU gives to solidarity a strong economic connotation, which limits the application of the clause to situations that are completely outside of the control of the endangered Member State.

The legal connotation of solidarity remains to be defined. The academic literature agrees to qualify it as a fundamental value of the European Union. In fact, a value is a moral concept that pushes the behaviours of either the legislature or the people towards an aspired level[390]; as opposite to legal principles, values *recommend* a behaviour rather than *commanding* it. As seen above, solidarity has strong moral components especially in its social applications[391]. Moreover, Article 2 TEU clearly mentions it as a shared value of the European Union and the fact that it has been one of the drivers for European integration strongly qualifies it as a "*moral good which underlies the EU legal norms*"[392].

Nonetheless, in the European legal framework solidarity is not only the expression of altruistic values, but it is also the source of burden-sharing obligations between Member States. Accordingly, the moral values of social Europe are merged with both an actual obligation of helping any Member State that faces a situation of financial or organisational crisis and the self-driven interest of contributing to the European integration for actually enjoying the economic and organizational benefits that derive from it[393]. Hence, solidarity is something more than an underpinning value of EU law, it also participates in the creation of behavioural obligations for the Member States.

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[389] Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' Notre Europe Policy Paper <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok>.

[390] Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (Polity 1996), 255.

[391] See for example: European Commission, "European social policy - a way forward to the Union (White Paper) COM(94) 333 final, para. 3.

[392] Dagilyte, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme. ' (n. 386), 72.

[393] Fernandes and Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (n. 389).

Nonetheless, it has been argued that solidarity cannot be considered as a general principle of EU law because it does not fulfil the four conditions provided by the Court: (i) having constitutional status; (ii) having general application; (iii) being a tool for judicial interpretation of EU norms; (iv) being ground for judicial review. From the above, it is clear that solidarity fulfils the first criterion, since it is mentioned several times in both the TEU and the TFEU[394]. Similarly, its general application seems to stem from its insertion in Articles 2 and 3 TEU, as these provisions appear in the "Common provisions" Title and are also referred to in various sectoral provisions in the Treaties. The other two criteria entail a slightly more difficult consideration. In fact, with regard to judicial interpretation, the case law cited above shows that the Court has certainly used the notion of solidarity for interpreting EU law provisions imposing obligations on the Member States. However, it seems that - so far - the Court has not used solidarity as a gap-filler where EU legislation is absent. This does not exclude the possibility of a future use and its nature as a general principle. Indeed, it seems that, as Article 3 TEU imposes on the Union the obligation of promoting solidarity among Member States and the TFEU further recalls it in several and diverse provisions, there is sufficient legal ground for saying that the Court is entitled to use it in its interpretation of EU law – also in the function of gap-filler – as a concretisation of the rule of law. Lastly, the enforceability of solidarity is something on which the academic literature doubts and that is not proven by the Court case law. Indeed, although in several occasions applicants have tried to found their pleas in law on the breach of the principle of solidarity, the Court has never based its decision on this concept[395]. Nonetheless, with regard to intergovernmental solidarity, and in particular in the fields of immigration and asylum law[396], the Court seemed to be more confident in using the concept of solidarity, hence showing that while it may not create direct obligations on the individuals, it is indeed a legal instrument for judging the behaviour of Member States.

Although solidarity may not fulfil all the four criteria established by the Court, some authors have also held that a general principle of EU law does not only stem from a judicial

[394] Some commentators held that the sole inclusion of the principle in the Treaty is not enough for making it a general principle of EU law. In particular, the fact that it is mentioned in the second paragraph of Article 2 TEU would exclude its justiciability and it would limit its nature to that of a fundamental value of the European Union. See: Dagilyte, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme. '. Nonetheless, another part of the academic literature sees all the principles listed in Article 2 TEU as founding principles, constitutive of legal obligations and creating legal consequences in case they are breached. See: Armin Von Bogdandy, 'Founding principles' in Jürgen Bast and Armin Von Bogdandy (eds), *Principles of European Constitutional law* (Hart Publishing 2010), 22.

[395] Joined cases C-63/90 and C-67/90 *Portugal and Spain v Council* [1992] ECR I-5073C-336/09P *Poland v. Commission* [2012] ECLI:EU:C:2012:386.

[396] Joined cases C-411/10 and C-493/10 *N.S.* [2011] ECR I-865

recognition and it does not only respond to the criteria elaborated by the Court, but it can also be recognised from the legal writing, the opinions of the Advocates General and the acts of the EU. As a consequence, "*if a notion embodies a value that underlies one or preferably more areas of EU law, there is a good case for arguing the existence of a general principle of law*"[397]. In this sense, the growing importance gained by this concept in the last few years (especially after the adoption of the Lisbon Treaty), not only at political but also at legal level, together with the very diverse sectors to which it has been linked in the Treaties, suggest that solidarity should be considered as a general principle of EU law, which determines legal obligations (at least) for the Member States. Indeed, it is on the basis of the principle of solidarity that important decisions and pieces of legislation have been adopted in the context of the monetary Union, the migratory crisis and the creation of an energy Union, imposing judicially enforceable behaviours on the Member States and pursuing the final objective of effective political and legal integration.

In the energy sector a strong interpretation of solidarity plays a major role. In fact, for long time Member states have not been able to coordinate national interests for the development of a common energy policy. As a consequence, they have preferred national approaches involving differentiated uses of resources and international cooperation looking outside the EU boundaries in matters of security of supply. As mentioned above, this approach is confirmed by the *caveat* of Article 194.2 TFEU; however, the explicit reference to solidarity in both Articles 122 and 194 TFEU (unprecedented in the Treaties) may now play as a game changer in the European energy policy.

Article 122 TFEU refers to solidarity as a corrective mechanism to the failure of the markets to achieve security of supply. It is thus a provision that allows the EU to oblige *ex post* Member States to take action in cases in which one of them faces important crises, such as that of 2006 for the supply of gas from Russia and Ukraine[398]. The reference to the solidarity principle in Article 194 TFEU is even more important for the development of the energy policy, as it imposes a cooperation between Member States at a preventive level, already in the elaboration of policies. However, identifying a univocal notion of solidarity is difficult in this context too. Indeed, depending on the approach of the Member State and on the factual circumstances, at least four different approaches to energy solidarity can be proposed: (i) charity solidarity, for which unconditional support is given to a Member State without asking

[397] Sacha Preschal and Magdalena E. De Leeuw, 'Transparency: A General Principle of EU Law?' in Ulf Bernitz, Joakim Nergelius and Cardner Cardner (eds), *General principles of EC law in a process of development* (Kluwer Law International 2008), 203.
[398] Talus, *EU energy law and policy a critical account* (n. 13), 280-281.

anything in return; (ii) economic solidarity, for which both the EU and the Member States have to transfer resources to "poorer" EU countries in order to develop their interconnections to the grid; (iii) solidarity based on reciprocity, for which Member States have to reciprocally help each other in case of difficulties; (iv) solidarity as way to optimise energy resources within the EU in the context of energy transition. For this reason, it has been suggested that the general and open-ended reference to solidarity in the energy chapter does not add much to the content of the provision, remaining a political rather than legal reference. Accordingly, the use of solidarity as ground for judicial review of energy legislation would be difficult and it would mainly play at the policy-making level[399].

In our opinion, the reference to solidarity in Article 194 TFEU should not be considered only as a political statement, but instead as both an objective that the Union is obliged to pursue by reason of the powers it has been conferred by the Member States and as a principle guiding the action of the EU. This stems from the considerations made above on the legal nature of solidarity. On the one hand, Article 3 TEU formally makes solidarity one of the objectives of the Union, which shall thus be chased in any sectoral action, energy included, on the other hand, the reference included in Article 194 TFEU further strengthens its nature as general principle of EU law, transversally applicable to all sectors and even more where the Member States – through the Treaties – have explicitly required its application by making reference to it.

Moreover, if one looks at the sectoral objectives mentioned in Article 194 TFEU it is evident that they can be effectively chased only with a solidaristic approach of all Member States. With particular regard to the development of renewable energies and the energy transition process, a collective approach is needed. The imposition of an overall EU renewables target proves such approach. Moreover, the fact that in the Renewable Energy Directive national targets were imposed on each Member States for reaching the European objective is a concrete example of how the efforts of one Member State build an overall European strength. In this sense, the creation of a sort of "energy specialisation" of Member States has been proposed[400]: depending on the national characteristics – both geography and resources wise – each Member State would develop the exploitation of one or a number of resources. In this way, the energy identity would be protected, but it would also be functional to the creation of a common European project. Moreover, the creation of cross-border infrastructure projects could further create economies of scale through the correction of existing structural

[399] Ibid.
[400] Andoura, *Energy solidarity in Europe: from independence to interdependence* (n. 61).

imbalances in the sustainable use of resources between different Member States. Finally, renewable energies would also benefit from shared organisational models and regulatory approaches among Member States, in particular with regard to the planning and financing of cross border infrastructures or of infrastructures that serve several Member States.

Clearly, these approaches develop a *de facto* solidarity between Member States, which finds its external manifestation at the political level. However, *de jure* solidarity does not necessarily come from constitutional provisions or immanent principles, but it can also be reached through the consistent creation of a normative grid that imposes to the Member States behaviours that are *de facto* solidaristic. As a consequence, in the event of a referral to the Court, the latter, seeing in these provisions the legal and theoretical pattern of the notion of solidarity as provided by the Treaties, would be in the position of using the provisions of the Treaty for enforcing or extensively interpreting the obligations stemming from secondary legislation.

Interpreting solidarity as a general principle of EU law would also play an important role for avoiding any possible abuse by Member States of the protection of their national energy rights in order to limit the EU competence in this sector. Indeed, if the Member States themselves have imposed to the Union the pursuit of solidarity among Member States as one of its objectives, they need to stick to such decision even when it may limit their national interests.

3.2 The principle of environmental integration

According to Article 11TFEU "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*". The principle had been introduced in the Treaty by the Single European Act, in a less precise formulation, as "*Environmental protection requirements shall be a component of the Community's other policies*". The more forceful version introduced by the Lisbon Treaty not only refers to the implementation of EU policies, but it also extends to the entire Treaty.

As a general principle of EU law, the integration principle performs an "enabling" and a "guidance" function. Indeed, it broadens the objectives of the other powers laid down in the Treaty and confers upon the Union the competence to take measures that ensure environmental protection in any field of EU action ("enabling function"). Moreover, it guides the interpretation of other policy fields, so that they are read in light of the

environmental objectives ("guidance function")[401]. However, it is also important to understand what exactly has to be integrated and what its strength is. The provision refers to "environmental protection requirements", which seems to include the environmental policy objectives under Article 191.1 TFEU. It also seems to refer to the principles included in Article 191.2 TFEU and in particular the precautionary principle and the principle that preventive action shall be taken. This wide interpretation of the integration principle imposes on the EU institutions an obligation to assess and integrate all the relevant environmental aspects in all other EU policies.

Moreover, it has an important role as guidance for the choice of the legal basis. As seen above, in cases such as *Chernobyl*[402] and *Titanium Dioxide*[403] the Court made it clear that when the measure pursues environmental objectives, but they are not its main purpose, the environmental integration clause is a sufficient legal basis[404]. As a consequence, it broadens the objectives pursued by other powers in the Treaty without putting into question the doctrine on attributed powers and the overall consistency of the EU legal system[405].

The above is particularly relevant for the energy policy and the development of renewable energies. As noted, the determination of the main aim and content of these measures is contentious, but a preference for either "environment" or "energy" can affect the policy's outcomes significantly. Nonetheless, the role of the principle is also helping the judicature and the legislature in the attempt of giving effect to the intentions of a specific rule as well as to the objectives of the Treaty by emphasising the *effet utile* of such rule[406]. In this sense, the single rule cannot be isolated from the general purposes of the Treaties, thus not only the effectiveness for a specific purpose must be taken into consideration, but also for the protection of the environment.

Accordingly, the rule should apply to Article 194 TFEU. Indeed, "promoting the development of renewable forms of energy" is one of the aims of the European energy

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[401] Jan H. Jans, 'Stop the integration principle?' (2010) 33 Fordham International Law Journal 1533-1547, 1540. See also: Maria Cristina Cavallaro, 'Il principio di integrazione come strumento di tutela dell'ambiente' (2007) 2 Rivista italiana di diritto pubblico comunitario 467-483.
[402] Case C-70/88, *Parliament v Council (Chernobyl)* (n. 362).
[403] Case C-300/89, *Commission v Council (Titanium dioxide)*.
[404] For example, before the adoption of the SEA, many measures in the field of the environment were adopted under the Common Agricultural Policy by way of the environmental integration principle.
[405] The Union is formally compelled to ensure the consistency of its system under Article 7 TFEU, which reads as follows: "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". Accordingly, Article 11 TFEU shall be read in conjunction with Article 7 TFEU.
[406] Martin Wasmeier, 'The integration of environmental protection as a general rule for interpreting Community law' (2001) 38 Common Market Law Review 159-177, 162.

policy. As a consequence, this new legal framework seems to require the Union to adopt new renewable energy policies under this legal basis, which is now the natural provision for their development. Nonetheless, the environmental purposes of these measures – that until the adoption of the Lisbon Treaty were considered predominant – should still be chased. The extension of the objectives provided in Article 191 TFEU through the integration principle thus ensures the protection of the environment at a level as high as it would be achieved under Article 192 TFEU, but without the problems that the choice of dual legal basis raises and that have been analysed above. The *effet utile* of Article 194 TFEU is also preserved as well as the consistency of EU action[407].

What is left to interpretation is whether the environmental integration principle can have any effect on the *caveat* of Article 194.2 TFEU and whether it would allow the EU legislature to have wider margins in the interpretation of the competences reserved to the Member States. If a purposive approach is adopted towards the interpretation of the Treaties, the principle of environmental integration should allow the same level of environmental protection to be achieved through all sectoral policies. Accordingly, if under Article 191 and 192 TFEU some actions are allowed in the pursuit of the environmental objectives, they should be equally allowed under another, more appropriate legal basis[408]. Moreover, Article 194 TFEU explicitly places the energy policy in the frame of the protection of the environment, consequently strengthening the operation of the integration principle.

Such interpretation would in any case leave out all the measures that have *significant* effects on the Member States' energy rights: it seems that since Article 194 TFEU makes a direct reference to the provision of Article 192.2 (c) TFEU and that also under Article 192 TFEU the latter is construed as an exception, it would be misleading claiming that such measures can be adopted in accordance with Article 194 TFEU just because of the environmental

[407] In this sense it has been suggested that since "*environmental objectives are expressly or even indirectly included* [in the energy policy]*, and although no priority between the Union's environmental policy and its energy policy exists, it is certainly clear that energy provisions entail more environmental aims than the environmental provision defining energy related goals*". See: María Dolores Sánchez Galera, 'The Integration of Energy and Environment under the Paradigm of Sustainability threatened by the Hurdles of the Internal Energy Market' (2017) 26 European Energy and Environmental Law Review 13-25, 17.

[408] It has been noted how it has been in the area of the development of renewable energies that most efforts to integrate environmental concerns into energy policy have been made, even before the introduction of the specific legal basis. For this reason, it has been said that in this sector the integration of the environmental objectives is almost automatic, since the promotion of renewable energy and the protection of the environment are compatible objectives. The true test of integration lies however in the extent to which a policy area and its objectives are adjusted in order to help pursue environmental objectives and adhere to environmental principles. In this sense the author noted that with regard to the energy policy, the integration aspects have been more formally emphasized rather than actually implemented through new or further efforts. See: Nele Dhondt, 'Integration of environmental protection into the EC energy policy' (2004) 4 The yearbook of European environmental law 247-302.

integration principle. Conversely, it seems correct to interpret in the sense that measures significantly affecting Member States' rights are only justified if they pursue environmental objectives and for this reason they need to be adopted in accordance with the environmental legal basis.

These arguments could be slightly modified on the basis of the rank in the legal hierarchy given to the integration principle. Indeed, Article 11 TFEU does not clearly say whether the application of the principle should be given priority over the pursuit of other EU objectives[409]. This question is particularly relevant when a conflict exists between equally important EU objectives, of which one is the protection of the environment (e.g. the protection of the environment and the functioning of the internal market). Some authors[410] suggested that priority should not be given. Indeed, the objective of the integration principle is to ensure that the protection of the environment is at least taken into consideration in the elaboration and implementation of policies in any sector of EU action, but it is not a means for resolving conflicts between objectives. In this case, other general principles, such as proportionality and equal treatment, apply in conjunction with the integration principle.

Other commentators[411], instead, have suggested that the environmental objectives enjoy a superior position with respect to those exclusively mentioned in sectoral policies, because of their (indirect) insertion among the general objectives of the European Union through the environmental integration principle. In particular, the provision of Article 11 TFEU read in conjunction with Article 3 TEU would emphasise the essential nature of the protection of the environment and consequently establish its priority in the implementation of the Treaties. These authors, however, also maintain that in the end it is a matter to be resolved on a case by case basis, because not all measures with a possible impact on the environment shall be

[409] For example, while it is considered as the primary tool for achieving environmental sustainability, it also determines a reconsideration of economic objectives and of other policy objectives of the Treaty in light environmental objectives, but at the same time it may also require that environmental exigencies are exploited in order to achieve economic objectives. For example, it has been suggested that the correct exploitation the energy market is where competition, security of supply and sustainability of the energy sector should meet. Accordingly, in order to build a functioning European energy market, it is necessary to exploit the European environmental leadership of the Union in order to create new opportunities for most innovative industry sectors. See: Stefano Amadeo, 'Articolo 11 TFUE' in Antonio Tizzano (ed), *Trattati dell'Unione europea* (Giuffrè 2013), 409-410.

[410] Jan H. Jans and Hans H. B. Vedder, *European environmental law* (Europa Law Publishing 2008), 23.

[411] T. Schumacher, 'The environmental integration clause in Article 6 of the EU Treaty: prioritising environmental protection' (2001) 3 Environmental Law Review 29-43, 38-39. In the context of EU competition law, this approach is also endorsed by Kingston. In particular, the Author supports a systematic reading of the environmental integration principle, which includes environmental considerations even at the level of initial policy formulation (Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 European Law Journal 780-805, 789). See also: Giorgio Monti, 'Article 81 EC and public policy' (2002) 39 Common Market Law Review 1057.

caught by the environmental integration clause, but only those that are relevant for the implementation of the sustainable development objectives.

The energy policy objectives are considered compatible with the protection of the environment, accordingly the operation of the environmental integration principle should be almost automatic. This should in principle mean that no balancing of interests is needed, since they should all be pursued at the highest level possible. In fact, the correct interpretation of the EU energy competence is also relevant for determining the role of the environmental integration principle with respect to the pursuit of other objectives. If the purposive approach is undertaken, interpreting the environmental integration principle as hierarchically overarching may be useful, because it would allow the pursuit of the environmental objectives in the context of the energy policy. As a consequence, the scope of EU action in this sector would be enlarged as well, because – as seen above – the EU has been conferred wider powers for the pursuit of its environmental objectives.

However, some authors maintained that, following the adoption of the Lisbon Treaty, the environmental integration principle has lost part of its strength, and now it should not be interpreted as overarching anymore[412]. However, this interpretation cannot be upheld, in particular with regard to the possibility of applying the environmental integration principle to Article 194 TFEU. Its consequence would thus be that the development of the European energy policy should only be limited to the pursuit of energy objectives, with a much lower focus on the protection of the environment. The operation of Article 194 TFEU would be limited, as well as the extent of the EU's competences. With regard to the development of renewable energy policies, the possibility would still exist of interpreting them as part of the environmental policy, consequently voiding Article 194 TFEU of part of its purpose.

Moreover, the applicability of the environmental integration principle should not be limited to the solution of conflicts between contrasting objectives. Indeed, as a principle of general application in the context of the Treaties, it should be allowed to have a general role in the promotion of the transversal environmental objectives. Accordingly, it should also work as a tool for the interpretation and the development of sectoral policies that also entail pursuing transversal objectives. The example of the promotion of renewable energies is in this sense appropriate. In fact, this policy can be considered as chasing both energy and environmental objectives, but the drafting of Article 194 TFEU may not allow the European institutions to

[412] Jans, 'Stop the integration principle?' (n. 401), 1547; Mariachiara Alberton and Massimiliano Montini, 'Le novità introdotte dal Trattato di Lisbona per la tutela dell'ambiente' (2008) 2 Rivista giuridica dell'ambiente 505-515; Lee, 'The environmental implications of the Lisbon Treaty' (n. 67).

achieve the environmental objectives at the same level they would be able to under Article 192 TFEU, because the extent of the EU energy competence is more limited. However, as the environmental and the energy objectives do not conflict, the application of the environmental integration principle should in principle not be possible. Nonetheless, as it is a principle of general application and it can thus apply to any provision of the Treaties, it should apply also in this case, consequently allowing the adoption of the energy measure under its sectoral legal basis, while also allowing the pursuit of the environmental objectives at the same level they would be pursued under the environmental legal basis.

3.3 The principle of proportionality

The principle of proportionality is one of the most important principles in EU law and it is enshrined in Article 5.4 TEU, which provides that the content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaty. It has three main functions: (i) it governs the exercise by the Union of its legislative competence; (ii) it is used as a ground for review of EU measures; (iii) it is used as a ground for review of national measures affecting one of the fundamental freedoms[413]. Depending on the function it is exercising, the proportionality principle also protects different interests: in the first case, it balances the Union's against the national interest, in the second and third case, it has to balance a private against a public interest. Nonetheless, in all these cases the principle pf proportionality works as an instrument of integration and its flexibility allows its application in any field of EU jurisdiction.

For the purposes of the present thesis, only the effects of the proportionality test on the exercise of the Union's competences and the review of EU acts will be analysed. Indeed, in the difficult relationship between Articles 194 and 192 TFEU as legal bases for renewable energy measures, the issues that need to be resolved regard the extent of the Union competence and the correct balance between energy and environmental objectives.

Firstly, the proportionality principle is a tool for limiting the intensity of Union intervention in order to protect national regulatory autonomy. In particular, it does not give clear statements on EU level competence, but it rather complements the principles of direct effect and supremacy, consequently preserving the correct functioning of the EU legal order as such. It can restrict not only the substance but also the form of Union action. Moreover, it is

[413] Tridimas, *The general principles of EU law*, 137.

a principle which is directed primarily at the EU institutions and it is designed to influence the legislative process *ex ante*, at the stage of the preparation of legislation.[414]

The first subparagraph of Article 5.3 TEU provides that the Union shall take action "*in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States*", but can be better achieved at Union level. The provision represents a specific application of the principle of proportionality, aiming at protecting the residual power of the Member States in the field of shared competences[415]. Any EU action shall be "appropriate" to achieve the proposed objectives and "indispensable", i.e. it should not be replaceable by measures that have less restrictive effects on the powers of the Member States. Importantly, in case the Member States are only partially capable of attaining the objectives imposed by the Union, the latter must encourage them in implementing their own actions, by supporting and obliging them to take action and – if needed – by taking supplementary action.

The first subparagraph of Article 5.4 TEU limits the action of the Union to "*what is necessary to achieve the objectives of the Treaties*"[416]. The principle thus provides protection for the Member States from the Union imposing obligations or burdens that are not proportionate with their aim and thus unreasonably affect their interests. In particular, but not exclusively, reference can be made to the protection, afforded by Article 4.2 TEU, of the national identities of the Member States, which requires freedom for the latter in regulating their essential functions, including the territorial integrity of the State and national security.

More commonly, an EU action may be challenged by a Member States because it is allegedly exceeding the competences of the Union with respect to the objectives contained in its legal basis. In this sense, it has been held that once a measure is founded on a certain legal basis, it is unlikely to go beyond the objectives *of the Treaties* without trespassing the boundaries set by the legal basis in question, thus being *ultra vires*. Conversely, the principle of proportionality would work as a limit to the respect of the objectives set by *that action*, that

[414] Takis Tridimas, 'Proportionality in Community law: searching for the appropriate standard of scrutiny' in Evelyn Ellis (ed), *The principle of proportionality in the laws of Europe* (Hart Publishing 1999), 81.
[415] This aspect of the principle of proportionality is incorporated by implication in the principle of subsidiarity, however subsidiarity comes into play at an earlier stage than the principle of proportionality and it is usually linked with the *existence* of EU competence, while proportionality is linked to the *exercise* of such competence. Moreover, the principle of subsidiarity only applies when the EU competence is not exclusive, while proportionality applies to any kind of EU competence.
[416] The Protocol originally annexed to the EC Treaty of Amsterdam contained detailed guidance on how the EU institutions had to apply the proportionality principle. It required that Union action shall be as simple as possible and that the internal organization of the Member States shall be respected. Moreover, it also provided that alternative policy options should be left to the Member States in order to achieve the objectives of the measures.

specific legal basis[417]. However, it is submitted that limiting the operation of the principle to the attainment of the objectives expressed in the specific legal basis would also limit the operation of the Treaties themselves. Indeed, as seen in the previous paragraph with regard to the principle of environmental integration, there are objectives in the Treaties that are not expressed in one sectoral legal basis, but that in any case need to be pursued in all actions. Accordingly, the role of the proportionality principle is to confine the Union action to the limits overall imposed by the Treaties and, as a consequence, by the Member States.

Even before the adoption of the Lisbon Treaty, the Court has traditionally accepted that the principle of proportionality can be invoked not only by individuals but also by the Member States. In one case, it clarified that proportionality cannot be considered as amounting to a "principle of minimum intervention", according to which the Community intervention on the sovereignty of the Member States should be limited to the minimum[418]. Similarly, in the development of its jurisprudence the Court has shown to be reluctant to intervene, unless the applicant Member State has shown that the measure manifestly goes beyond the objectives of the Treaty.

In the *Organization of Working Time Directive* case[419], the United Kingdom challenged the directive 93/104 on grounds of breach of the proportionality principle, alleging that the Council had exceeded the Union competences, which, according to Article 118a EC Treaty, were limited to minimum harmonization. According to the British Government, the same level of protection could have been achieved by less restrictive measures like conducting some risk assessments on working hours. The Court adopted a generous approach too in the assessment of the compatibility with the principle of proportionality of EU measures. Before conducting the appropriateness and indispensability test, it clarified that "*the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion*"[420]. Consequently, it held that the Council had not breached the proportionality principle, because the measure was suitable since it

[417] Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011), 145.
[418] Case 28/84 *Commission v Germany* [1985] ECR 3097
[419] Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755 (n. **Error! Bookmark not defined.**). See: Piet Van Nuffel, 'Working Time Directive (UK v. Council)' (1997) 3 Columbia Journal of European Law 298-309.
[420] Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, para. 58.

improved the health conditions of workers, and it was necessary since the Council had not committed any manifest error in considering that the same objectives could not be achieved by less restrictive measures. The necessity test was passed in particular because of the several derogations provided for by the directive. In the end, the Court annulled one provision of the Directive (the Sunday rest clause) because the Council had not sufficiently explained the reason why rest on Sunday was better for the workers' health than other weekdays.

In this case the Court showed how it wants to keep its scrutiny on proportionality to the strictly legal grounds, without entering into political arguments. In doing this, it seems that it did not really scrutinize the reasoning of the Council, but it assumed the necessity of the measure from the objectives declared by the institution in the preambles. With the aim of fostering EU integration, the Court adopted an expansionist approach to the EU competence and, as in the assessment on the choice of the legal basis, in order to avoid political decisions, it risks to become a branch of the legislative power, simply giving for granted what it states in its acts. Indeed, the limitation to the "manifestly inappropriate" approach is well established in the Court's jurisprudence on Community competence.

Similarly, in the *Deposit guarantee*[421] case, Germany challenged a directive on deposit guarantee schemes on the ground that it went beyond what was necessary to achieve the objectives. Interestingly, in this case the German government made a political use of proportionality, invoking it to procure a solution that had been previously rejected in the negotiations of the measure within the Council. In fact, what it proposed was an alternative legislative choice rather than grounds of illegality. The Court rejected the argument of the German government, holding that it was for the legislature to conduct the assessment on which are the most effective instruments for reaching the objectives of the measure and that its intervention is justified only in case it appears "manifestly incorrect" or "wholly disproportionate". In this sense, it recognized that the policy area concerned may involve political, economic and social choices in which the legislator is called to undertake complex assessments and the legislator needs to be given wide discretion. On the other side, the case also shows how the Member States may be prone to make recourse to the Court when the choices and the compromises made at political level are not optimal for the protection of the national interests.

[421] Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-02405, paras. 82-84. See also: Case C-210/03 *Swedish Match* [2004] ECR I-11893, para. 48.

Such cases show how the principle of proportionality may be a difficult argument on which relying for the annulment of EU measures that allegedly do not respect the attributed competences. Indeed, in those cases basing a case on the choice of the legal basis or the principle of subsidiarity could lead to better results for Member States[422]. Nonetheless, they also show the importance of a correct assessment of proportionality in the elaboration phase. If the Court only relies on the sufficient and correct justification given by the adopting institution, it is for this institution and the Member State to correctly negotiate the limits to which the measure can push and make sure that the reasons for adopting it are as good as possible, in order to overcome possible future judicial challenges.

Moreover, the soft assessment of proportionality by the Court and its preference for challenges of the legal basis also shows that, in cases where the competence of the European Union is challenged, it is not under the proportionality principle that the suitability of the measure to achieve the objectives of its legal basis must be assessed. Indeed, as long as a legal basis is considered correct and thus the Union competence exists, the scrutiny to be conducted under the proportionality principle must be aimed to verify whether such action correctly pursues the objectives *of the Treaty*. As we have seen, choosing one Treaty provision as legal basis does not exclude the pursuit of other objectives and while in the determination of the founding provision for the measure only the main aim must be taken in consideration, in the assessment of proportionality all of them become relevant. In fact, proportionality is not a stand-alone concept, but it must be coordinated with other relevant principles of EU law, such as conferral and consistency, in order to allow that also the EU measures are not stand-alone acts, but are integrated in the overall legal framework[423].

With regard to the energy policy, running a correct assessment of proportionality may prove fundamental for the Member States and the institutions in order to keep the balance between national and European interests. In this regard, the European Commission has stated that the transnational relevance of problems regarding the development of renewable energy requires

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[422] Tridimas, 'Proportionality in Community law: searching for the appropriate standard of scrutiny' (n.414), 84.

[423] A similar approach has been adopted by AG Geelhoed in *Austria v European Parliament and Council*. In that case the Republic of Austria was seeking annulment of Regulation (EC) No 2327/2003 on grounds that it was violating the principle of proportionality. The Advocate General, in reviewing the proportionality of the measure, held that the objectives of the measure need to be assessed. The Government of Austria maintained that the main purpose of the measure was environmental, but the legal basis on which it had been adopted was Article 71 EC on Transport. According to the AG Opinion, the choice of the legal basis together with the environmental integration principle allowed the Community legislature to strike a balance between free movement and he protection of the environment, accordingly the proportionality of the measure needs to be assessed on both these components of the measure and it cannot be selectively based on only one of them. See: AG Opinon Case C-161/04 *Republic of Aurstria v. European Parliament and Council of the European Union* [2006] ECR I-07183.

action to be taken at EU level[424]. Accordingly, at least in the context of the adoption of the Renewable Energy Directive in 2009, the question on "indispensability" had been answered in the affirmative. At the time, the measure passed the "appropriateness" test as well; it was stated that while targets had been imposed by the EU, implementation and the choice of means for renewable energy promotion had been left to the Member States[425]. Such statement was indeed correct for the context in which it had been made, since the directive had been adopted on the basis of Article 192 TFEU, which does not limit the EU competence in respect of the Member States energy rights. In the new Lisbon framework, giving for granted the transnational nature of energy issues and thus the necessity of the EU intervention, the appropriateness of such intervention should be assessed more carefully, and it would probably find more restraints from the Member States. In particular, it is now fundamental not to assess the proportionality having exclusive regard to the objectives contained in Article 194 TFEU, but it is necessary to enlarge the spectrum of the analysis to the pursuit of the aims of the Union *per se*. Submitting this, particular reference is made to the objectives of the environmental policy that should in this case be taken into account and equally pursued.

The second function of proportionality is the review of EU measures, in order to balance the interest of an individual against the public interest. As long as the choice of the legal basis and the development of an EU policy are concerned, it is clear that a private interest is not involved yet. Such issue may only arise once the measure is implemented and individuals may claim the infringement of one of their rights. Nonetheless, the Court of Justice has developed some general standards of scrutiny that may come to hand for the creation of new measures and the application of which at earlier stages of the legislative process may avoid future challenges before the Court. These are very similar to those that we have explained above with regard to the issue of the Union competence, but here the pursuit of the EU objectives is measured against the individual interest.

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[424] European Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM(2008) 19 final, Brussels, 23.1.2008, p. 10.

[425] For example, instead, within the Directive on greenhouse gas emission allowance trading, the establishment of a common framework was deemed necessary to eliminate barriers within the internal market, subject, however, to the condition that only those elements necessary for the proper functioning of the instrument should be regulated at EU level and that as far as possible decisions on implementation are left to the Member States (See: European Commission, Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM/2001/0581 final, p. 17). Moreover, the case law of the Court on this shows how the question of proportionality became relevant in the assessment of the measure and in its implementation, giving rise to a number of cases, which consequently led to an increase in the intervention of the Union with harmonizing measures.

Any EU measure must use means that correspond to the importance of the aim and are necessary to its achievement. A twofold test is thus applied: a test of suitability and a test of necessity. The first looks at the relationship between means and end, and it requires that the former are suitable and sufficiently likely to achieve the latter. The second test regards the balance between different interests: the Court verifies whether the pursuit of an interest has any adverse effect on another interest equally worth legal protection and if such effects are justified by the importance of the aim pursued. No other less restrictive means able to reach the same results must be available. In fact, then, there is another, third test used by the Court: the proportionality *stricto sensu* test. Even if there are no less restrictive alternatives, the measure shall not have an excessive effect on the applicant's interests. By applying these tests, the Court reviews both the legality and the merits of legislative and administrative measures.

In this regard the review of the Court is only "marginal"[426], while it frequently defers to the expertise and responsibility of the adopting institution. In *Fedesa* the Court elaborated the concept of "manifestly inappropriate" as a limit to its review in both aspects of the proportionality test, suitability and necessity. Importantly, what the Court assesses in these kinds of measure are the effects of the measure. To the contrary of the analysis of the choice of the legal basis, where only the main aim is relevant, here the Court requires consistency between aim and effect, in particular if the latter affects an individual right. The decision of the legislature to adopt a certain measure must be determined on the basis of its foreseeable effects at that given moment: when the objectives can only be achieved with that measure and those effects cannot in any way be diminished, then the measure is appropriate. Clearly, however, it is not relevant whether the Union has *in fact* achieved its objectives, because the review is not in any way an *ex post* assessment on efficacy. Although undoubtedly proportionality entails a certain level of discretion, the Court seems to give more importance to the assessment of appropriateness, which ultimately only amounts to the ability of the measure to reach the objectives, and not to that of necessity, that is instead the centre of the proportionality test, because it evaluates whether the adverse effects of the measure can be justified or not[427]. Clearly, this ensures leeway to the institutions and justifies the

[426] Henry G. Schermers and Denis F. Waelbroeck, *Judicial protection in the European Communities* (Kluwer Law International 2001), p. 397.
[427] See for example: Case C-122/00 *Omega Air and Others* [2002] ECR I-2569 and Joined Cases C-154 and C-155/04 *The Queen ex parte of Alliance for Natural Health v. Secretary of State for Health* [2005] ECR I-06451.

superficiality with which the institutions argument the respect of proportionality in the preambles of their measures.

The adoption of EU measures in the energy sector may raise questions of proportionality mainly because of the wide and varied objectives that this policy pursues and for the strong national interests that are connected to this field of action. In particular, the promotion of renewable energies merges the development and the integration of the energy market with the protection of the environment. Whether this latter objective is pursued because a dual legal basis has been chosen or by way of environmental integration according to Article 11 TFEU is not relevant, because in both cases its pursuit may lead to policy choices that also have an economic component.

But can this potential conflict affect the freedom of the Union to develop its energy policy under Article 194 TFEU and force it to give them an exclusively environmental purpose in order to have wider margins of maneuver? Looking at Article 194.2 TFEU, it could, because - as already explained - it seems that the Member States' rights cannot be affected, unless an environmental objective requires (and thus justifies) the action. Nonetheless, this kind of reasoning reminds of the one that the Court applies in the review of the proportionality of national measures restricting, for example, the free movement of goods in the internal market. In those cases, the Court has constantly ruled that the protection of the environment can represent a sufficient justification for limiting one of the four freedoms. For example, when assessing the obligation for electricity supply undertakings to purchase electricity coming from renewable sources, the Court held that it is compatible with Article 34 TFEU since "it is useful in protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases" and, moreover, because environmental protection must be integrated into other policies and environmental protection was among the objectives of the measure[428]. A similar approach should be adopted also in the interpretation of Article 194 TFEU and in the assessment of the proportionality of renewable energy measures. Indeed, *mutatis mutandis*, the interests of the Member States are comparable to those of the undertakings that are affected by the free movement restrictions and more invasive energy measures should be equally considered justified by the objective of the protection of the environment, thus proportionate and compatible with the provisions of the Treaty.

Clearly, as for internal market measures, such policy choices shall be adequately substantiated in order to be safe from any possible Court's review. In fact, as seen, in its

[428] Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-02099, paras. 72-81.

assessment the Court highly relies on the examination of the institution's reasoning, the decision-making process and the interpretation of the Treaty provisions that empower the EU legislative action.

Such interpretation would also limit the possibility for the Member States to use their national interests, and in particular the differences – in terms of resource availability, geographical structure and economy – existing among them, in order to block brave actions by the Union. In this sense, in the recent case *Poland v. Commission*, the Court has clarified that "*the legislature does not have to take into consideration the particular situation of a Member State where the EU measure has an impact in all Member States and requires that a balance between different interests involved is ensured, taking into account of the objectives of the measure*"[429]. In particular, in that case, the government of Poland had brought up the issue also during the negotiations of the measure, but the Commission had not taken it into consideration.

Lastly, it seems that all the above could also pass the possible scrutiny of the Court, given the wide margins of discretion it leaves to the Union legislature in developing its policies and the equally wide interpretation of "objectives of the measure" that it has given so far in its case law.

Overall, it seems to us that the principle of proportionality and its assessment should not be seen as something very far from the choice of the legal basis and only left to the review of the Court, but it should rather be considered as a complementary tool to the principles developed for the choice of the legal basis. Indeed, while the latter take into consideration the objectives of the measure with regard to the existence of the EU competence, the principle of proportionality puts that objectives in the context of the Treaty and in relation with the effects that their pursuit can have both on the individuals and the Member States. Accordingly, the two assessments should always conducted together and the boundaries of the proportionality principle as a tool for assessing competence, EU measures or national measures should not be rigidly separated, but should instead be used in order to reach better and safer (from judicial scrutiny) legislation.

[429] Case C-5/16, *Republic of Poland v European Parliament and Council of the European Union*, para. 167.

4 Conclusion

This chapter has tried to assess how the formulation of Article 194 TFEU and its tight links with the protection of the environment can affect the choice of the legal basis in cases where both energy and environmental objectives need to be pursued.

It has been firstly shown that the Court has developed a four step analysis for the review of the choice of the legal basis: (i) the determination of the aim and content of the measure, (ii) the identification of the predominant aim of the measure; (iii) in case two or more objectives are indissolubly linked, the choice of a dual legal basis; (iv) in case the procedures provided for the two legal basis are incompatible, the most democratic shall be chosen.

The case law of the Court is in this regard abundant and well established, however it has been shown that in some contexts these criteria may not be perfectly suited. In particular, it has been noted the tendency of the Court to excessively rely on the indications of the adopting institutions for the objectives of the measure, which may give rise to some political speculation. Moreover, the Court has increasingly endorsed the use of the dual legal basis, loosening the strictness of its review on the compatibility of the legislative procedures, while allowing new combinations in the roles of the adopting institutions.

The latter issue has been particularly relevant with regard to measures that also pursue transversal objectives and – mainly – the protection of the environment. Indeed, while the Treaty provides for a sectoral legal basis, EU measures of the most diverse nature increasingly contain environmental protection provisions. For this reason, the question with which the Court and the legislature are confronted is whether such environmental objectives can be effectively pursued through their integration into other policies or instead the use of the specific, sectoral legal basis is always needed.

Such question is particularly evident in the energy field. Indeed, a measure pursuing both the environmental and energy objectives may be either based on Article 194 TFEU, or on Article 192 TFEU or on both of them. The choice clearly depends on the connotation that the adopting institution gives to the objectives of the measure, but it has also relevant consequences on the extension of the Union's powers and on the applicable legislative procedure. Given the caveat of Article 194.2 TFEU, only the use of the sectoral environmental legal basis would allow the Union to affect the Member States' energy rights. Moreover, in case the legislature decides to apply the dual legal basis, it is uncertain whether the larger powers of the environmental policy would be extendable also to the energy legal basis or the caveat would cover the entire measure. As a consequence, the conclusion

achievable by only applying the jurisprudence of the Court on the choice of the legal basis is that the powers of the Union under Article 194.2 TFEU are limited to strictly energy connected action and that the use of Article 192 TFEU is the only option for widening them.

However, a correct use of solidarity, environmental integration and proportionality in the interpretation of Article 194 TFEU would allow wider margins of action to the Union also in the pursuit of both energy and environmental objectives.

In this sense, the principle of solidarity as a core value and objective of the European Union is fundamental in the implementation of the energy policy. Indeed, the growingly interconnected nature of the energy markets and infrastructures, together with the inter-dependency of the Member States in the production of energy clearly call for joint action. While so far differences among Member States have brought nationalistic approaches to the energy regulation, the central role of solidarity in the integration process should instead require Member States to work together for the achievement of a common objective, which is both economic and environmental. In this sense the creation of common overall targets, for example in the renewable sector, is a good example of the Union pushing the Member States to contribute all together to the functioning of the European energy market.

Together with the solidarity principle, also the environmental integration principle should play a major role. Indeed, it is among the obligations of the Union under the Treaties to integrate the environmental objectives in all its policies. It has thus been shown that a purposive and integrated approach should be taken in the interpretation of Article 194 TFEU, so that the overall objectives of the Union – and not only those of the sectoral provision – should be pursued. In this sense, since the environmental integration requires that the objectives of Article 191 TFEU are transposed to other Union's policies, if for environmental purposes some EU actions are allowed, the same actions should be allowed also under other sectoral policies. In this sense, the pursuit of environmental objectives would allow to adopt measures that affect a Member State's energy right also using Article 194 TFEU as legal basis. The caveat would thus only apply to measures "significantly affecting" a Member State's energy right, since this is considered as an exception even under Article 192 TFEU.

Lastly, the importance of the principle of proportionality has been considered. Firstly, in its function of principle guiding the correct exercise of the Union's competences. In particular, a more thorough assessment of proportionality at the moment of the adoption of the measure would be beneficial for the energy policy. Once again, such assessment should not be done with regard only to the objectives of the sectoral policy, but to the overall objectives of the

Treaty, allowing the fluidity of objectives and policy that is proper of the post-Lisbon system. Secondly, the principle of proportionality as an instrument for reviewing EU measures has been analysed. In this regard, it has been held that the variety of objectives pursued by the energy policy should call for an application of the proportionality principle similar to that used in internal market issues. The EU legislator should thus assess whether the objective of protecting the environment is a sufficient justification to the affection of the Member State's energy rights. Moreover, it would be a complementary tool to the instruments for the choice of the legal basis and the determination of the main purpose of the measure.

V. THE EUROPEAN POLICY FOR THE DEVELOPMENT OF RENEWABLE ENERGIES: CONSTITUTIONAL PRINCIPLES IN ACTION?

Summary: 1 Introduction – 2 The integration of energy and environment in the European Commission's practice: rhetoric or action? – 3 Directive 2009/28 on the promotion of renewable energy sources: flexibility through the imposition of binding targets – 4 The recast Renewable Energy Directive (2018/2001/EU): the bench-test for EU energy and environmental policies – 5 Conclusion

1 Introduction

Probably in no other field of EU law as the energy one, policy and law are so tightly connected. As mentioned several times along this thesis, the regulation of energy involves a diverse range of interests: secondary legislation relies not only on the Treaties but also on policies and international commitments and the law is often the result of changing policies, forces and actors. The role of the Member States is still fundamental, but the European Commission strives for the achievement of ambitious European objectives.

The close relation between energy and environment makes things even more difficult. Regulatory objectives are pulled by two opposing forces: the intrinsic super-nationality of environmental matters and the strong nationality of energy policies. At EU level, the fight against climate change and for the reduction of Greenhouse Gas (GHG) emissions is the foremost example.

In 2016, the Union's energy mix was split as follows: petroleum products (including crude oil) were around 35%; natural gas, around 23%; solid fuels, around 15%; nuclear energy and renewable energy, around 13% each. Moreover, the energy produced in the EU was only 46% of its total share, while 54% was imported, making the Union highly dependent on third countries for its energy supply[430]. However, according to the European Commission, the energy sector produces the lion's share of man-made Greenhouse Gas emissions and for this reason improving energy efficiency, switching to renewable energy sources and substituting coal (and oil) with gas are necessary actions for the decarbonisation of the Union[431]. This clearly shows that although the primary objective may seem pretty environmental, the action the Commission wants to undertake is very energy-related.

[430] Eurostat, 'Where does our energy come from?' 2016) <http://ec.europa.eu/eurostat/cache/infographs/energy/bloc-2a.html> accessed 09 July 2018.
[431] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy Roadmap 2050, COM(2011) 885 final.

Indeed, while the fight against climate change and the rational use of natural resources are two of the objectives of the EU environmental policy, the development of renewable energy sources and the security of energy supply are core objectives of the energy policy. It is evident how the issue concerns both the protection of the environment and the fight against climate change, but also the choice of energy sources and the integration of the energy markets, in order to avoid – as much as possible – energy dependency from third countries.

The European Commission has progressively raised the ambition of its policy statements and proposals, launching communications that aimed at combating climate change, while fostering the creation of a European energy market, of which renewable energies should be an important share. In 2008 the aim of the Commission was achieving 20% share of renewables by 2020[432] and in 2014 it was achieving 27% share by 2030[433] in order to reduce greenhouse gas emissions by 85-90% by 2050[434]. As a consequence, the Renewable Energy Directive (Directive 2009/28/EC) was adopted and it imposed obligations and objectives until 2020. In November 2016, the European Commission published a proposal for a revised Directive on the promotion of renewable energies[435] setting new targets and obligations for the period after 2020 and until 2030. Directive (EU) 2018/2001 (the "Recast Renewable Energy Directive") has been finally adopted in December 2018 after almost two years of difficult negotiations[436]. When the first policy proposal came out in 2009 the constitutional framework was lacking any reference to energy and it did not include an explicit competence attributed to the Union for such policies. To the contrary, the 2016 proposal has come under a new constitutional framework in which the energy competence has been formally attributed to the Union, but the effectiveness of which is debatable and where the Member States retain important slices of power.

The objective of the present chapter is thus to analyse the European energy policy in the context of its constitutional framework, in order to assess whether and how much the former is influenced, limited or enhanced by the latter. In particular, the aim is to compare the EU

[432] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 20 20 by 2020 Europe's climate change opportunity, COM(2008) 30 final.
[433] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final.
[434] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy Roadmap 2050, COM(2011) 885 final.
[435] Proposal for a Directive of the European Parliament amd of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final.
[436] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, PE/48/2018/REV/1, OJ L 328, 21.12.2018, p. 82–209.

policy before and after the adoption of the Lisbon Treaty, in order to assess whether Article 194 TFEU has actually been a driver for the development of the renewable energy policy in the EU, or it has instead been a limit.

The European renewable energy policy as elaborated by the Commission in its policy documents will be analysed first. Directive 2009/28/EC in the context of the pre-Lisbon constitutional framework will then be assessed. Lastly, the Recast Renewable Energy Directive as the first post-Lisbon legislative act on renewables will be addressed and it will be compared with the previous policy, in order to understand the influence of the Treaty provisions on the elaboration of policies.

2 The integration of energy and environment in the European Commission's practice: rhetoric or action?

Before analysing the details of the legislative provisions concerning the development of renewable energies in the EU, it is necessary to introduce the policy context in which they have been adopted. Indeed, the activity of the European institutions is often supported by a number of acts, political statements and policy strategies that, despite not being legally binding, give an interesting overview of the mechanisms that ultimately affect the content of the legislative provisions.

The promotion of renewable energies in the EU has been one of the objectives of the Community since the beginning of 2000s[437]. Ever since, any EU renewable energy policy document has made clear that the development of renewable energies is important for the Union for three reasons: (i) the use of renewable energies replaces fossil fuels and directly contributes to the reduction of greenhouse gas emissions, thus (indirectly) to the protection of the environment, (ii) the use of renewable energy reduces the consumption of fossil fuels, thus it improves the trade balance and it diversifies the supply of energy in Europe and (iii) production of renewable energy depends on the development and improvement of new technologies and lowers costs, thus it also produces employment and production benefits.

In the first years of 2000, while strongly believing that only a European integrated strategy could actually allow the penetration of renewables in the Community energy market, the

[437] In 2001 the first Renewable Energy Directive was adopted, but before it the European Commission delivered two important communications: Communication from the Commission "Energy for the future: renewable sources of energy. White paper for a Community Strategy and Action Plan", COM(1997)599 final and Communication from the Commission to the Council, the European Parliament, the Economic and Socila Committee and the Committee of the Regions on the implementation of the Community Strategy and Action Plan on Renewable Energy Sources, COM (2001) 69 final. See on this: Susanna Quadri, *Lineamenti di diritto internazionale delle fonti di energia rinnovabile* (Editoriale Scientifica 2008), 56 ff.

Commission highlighted the need for Member States to be free to decide their own specific objectives within the wider European framework and develop their own national strategies to achieve them. Indeed, important discrepancies existed among Member States on their level of development of renewables and these technologies were not sufficiently deployed as to impose on all Member States binding targets or obligations in general. The objective of 12% for the contribution by renewable energy sources of energy to the European Union's consumption by 2010 was indicative and considered as a policy tool, giving a political signal and impetus to action. Accordingly, Member States were encouraged to increase the deployment of RES according to their own potential, by defining their own strategies, also through support schemes to be introduced in order to foster the choice of renewable energies rather than traditional sources by economic operators. The link between renewables and environment was perceived as important, but it was more a question of developing new slices of the energy market. Moreover, climate change was not yet perceived as a global issue, although it was a subject for discussion at political level.

Whereas the Communication from 1997 was "*a first attempt to identify a possible combination or renewable technologies that could allow the EU to reach the overall target*"[438], in the second half of 2000s the renewable energy policy took top rank importance in the Commission's programmes. Another important aspect of such policies had been added to those previously mentioned: the European Union had taken a leadership role at international level in the protection of the environment and in the development of renewable energies[439], accordingly it needed to backup such political statements with actual policy action. The Commission launched its proposal "An Energy Policy for Europe"[440] in January 2007, but the details for the renewable energy strategy were already included in the Roadmap of 2006[441]. The uneven development of renewables that had been registered throughout the Union under the previous, very much voluntary, national policies, together with the increasing importance acquired by the fight to climate change and the reduction of GHG emissions had pushed the Commission to call for a change[442]. In particular, for renewable

[438] Communication from the Commission "Energy for the future: renewable sources of energy. White paper for a Community Strategy and Action Plan", COM(1997)599 final, 10.
[439] In this sense, it had been particularly relevant the signature of the Kyoto Protocol.
[440] Communication from the Commission to the European Council and the European Parliament "An Energy Policy for Europe", COM (2007)12 final.
[441] Communication from the Commission to the Council and the European Parliament "Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future", COM (2006) 848 final
[442] The Green Electricity Directive of 2001 contained reference values to be taken into account by the Member States when setting their national targets. These targets were however indicative. While this had been initially welcomed by the Member States as well as by various stakeholders, over the years it showed to be a weak

energies to be "*a cornerstone in the overall EU policy for reducing CO2 emissions*", it held that "*an overall legally binding EU target of 20% of renewable energy sources in gross inland consumption by 2020* […] *to be reflected in mandatory national targets*" was desirable for an effective renewable energy policy, and "*Member States should have flexibility to promote the renewable energies most suitable to their specific potential and priorities*" [443]. Interestingly, the growing importance of the environmental protection factors in the renewable energy policy pushed the Commission to even assess whether such policy could still be considered as a part of the energy strategy, or it should instead be definitively considered as part of the climate policy, driven, for example, by the ETS[444] policies. The outcome was that a separate and ambitious renewable energy policy was actually needed, and binding targets were equally needed in order to guarantee stability in the growth of the sector[445]. Indeed, while environmental aspects were getting growing importance, behind climate change commitments there was also a growing economic sector that played a major role in the European economy and that still needed support and coordination for its development.

In March 2007 the European Council endorsed this approach[446]. In particular, the Presidency Conclusions stressed the importance of creating an integrated climate and energy policy "*fully respecting Member States' choice of energy mix and sovereignty over primary energy sources and underpinned by a spirit of solidarity amongst Member States* [and chasing the following objectives:] *increasing security of supply; ensuring the competitiveness of*

policy choice, because it slowed down any possible progress and it also weakened investors and industry, that had no clear plans and priorities for future investments.

[443] Communication from the Commission to the Council and the European Parliament "Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future", COM (2006) 848 final, 10.

[444] The EU ETS is one of the cornerstones of the European Union's action for the reduction of emissions of manmade greenhouse gases. The system works by putting a limit on overall emissions from covered installations. It works on the 'cap and trade' principle. The overall volume of greenhouse gases that can be emitted for a multi-year phase by the power plants, factories and other companies covered by the system is subject to a cap set at EU level. Within this cap, companies receive or buy emission allowances which they can trade. Emission allowances are the 'currency' of the EU ETS, and the limit on the total number available gives them a value. Each allowance gives the holder the right to emit one tonne of CO2, the main greenhouse gas. The EU ETS was launched on 1 January 2005. The first trading period ran for three years to the end of 2007 and was a 'learning by doing' phase to prepare for the crucial second trading period. The second trading period began on 1 January 2008 and ran for five years until the end of 2012. The EU ETS system is now in its phase 3 that will end in 2020. The applicable legislation is contained in Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 5.6.2009, p. 63–87.

[445] Tom Howes, 'The EU's new Renewable Energy Directive (2009/28/EC)' in Sebastian Oberthu ̈ and Marc Pallemaerts (eds), *The new Climate Policies of the European Union Internal legislation and Climate diplomacy* (VUBPress 2010), 122.

[446] Council of the European Union, Brussels European Council 8/9 March 2007 - Presidency Conclusions, 7224/1/07 REV 1.

European economies and the availability of affordable energy; promoting environmental sustainability and combating climate change"[447]. Moreover, the European Council noted that "*Member States' choice of energy mix may have effects on the energy situation in other Member States and on the Union's ability to achieve the three objectives of the* [Energy Policy for Europe]"[448]. For this reason, "*taking into consideration different individual circumstances, starting points and potentials, it endorse*[d] *a binding target of a 20 % share of renewable energies in overall EU energy consumption by 2020* […]. *From the overall renewables target, differentiated national overall targets should be derived with Member States' full involvement with due regard to a fair and adequate allocation taking account of different national starting points and potentials, including the existing level of renewable energies and energy mix* […], *leaving it to Member States to decide on national targets for each specific sector of renewable energies*"[449]. Clearly, thus, the heads of State of all EU Countries were agreeing on the fact that stronger action from the EU was needed and that they were available to commit to national binding targets in order to achieve the European one.

As a result, the Commission issued the Communication "20 20 by 2020 – Europe's climate change opportunity"[450], which translated into a policy strategy the agreements reached at political level in 2007. The Communication accompanied a number of legislative acts, which are usually referred to as the "2020 Energy Package". The three main measures adopted under the package were: (i) a revised EU ETS Directive, (ii) a revised Renewable Energy Directive (the abovementioned Directive 2009/28) and (iii) the Energy Efficiency Directive. The package was huge and characterized by very diverse measures and legislative approaches, although the Commission clarified that the overall targets were a reduction of at least 20% in GHG emissions by 2020 and a 20% share of renewable energies in EU energy consumption by 2020. The principles governing the implementation of the policy were: the effective achievement of the proposed targets through a system of economic incentives, but also mechanisms for monitoring and compliance; an equal share of efforts among Member

[447] Ibid, 11.
[448] Ibid.
[449] Ibid, 21.
[450] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 20 20 by 2020 Europe's climate change opportunity, COM(2008) 30 final.

States, reflecting the different starting points and potentials; low costs of implementation while enhancing competitiveness both at EU and international level[451].

The Communication gave also particular relevance to the development of renewable energies, recognising their central role in the fight to climate change. The new approach to this energy sector was thus much more focused on its environmental aspects than before. Indeed, the environmental protection requirements justified also national interventions in the creation of an EU-wide internal energy market through the grant of state aid to support renewable energy projects[452]. However, the Commission made also clear that the efforts imposed on the Member States had been determined taking into consideration the efforts already made by those Member States that had achieved a certain increase in their share of renewable energy and to the national GDPs. Moreover, the right of Member States to determine their own energy mix was ensured by the fact that they were free to choose on which source of energy to put emphasis by setting out a national action plan. Finally, flexibility mechanisms on the production of renewables were put in place: the effort for the achievement of the overall EU target should not be met within the national borders, but Member States could support others from their territory to others'.

At the time of its adoption, most commentators[453] agreed on the fact that the 2020 Energy Package was probably an overly ambitious project, in which, for the sake of commitments

[451] For an in-depth analysis of the Package, see: Barbara Pozzo, 'Le politiche ambientali dell'Unione europea' in Giuseppe Bronzini, Fausta Guarriello and Valeria Piccone (eds), *Le scommesse dell'Europa Diritti, istituzioni, politiche* (Ediesse 2009) and Barbara Pozzo, 'Le politiche comunitarie in campo energetico' (2009) 6 Rivista giuridica dell'ambiente 841-876.

[452] This approach has been somehow endorsed also by the Court in several occasions. First, with the famous *Preussen Elektra* decision (Case C-379/98, *PreussenElektra AG v Schleswag AG*), which was given under the old Renewable Energy Directive 2001/77/EC, but also later in *Alands Vindkraft* (Case C-573/12, *Ålands vindkraft AB v. Energimyndigheten*) and *Essent* (Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV (Essent)* [2008] ECR I-05497) cases. In all these judgments the Court somehow played with the notion of State aid in order to allow support mechanisms to the development of renewables. To the contrary, the Commission's practice in the control of national support measures to renewables project has generally been stricter, although the General Block Exemption Regulation (Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78) and the Guidelines on Environmental aid (Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55) provide that – under certain conditions – state aid granted for the purpose of the protection of the environment is justified. For further analysis on the topic see: Phedon Nicolaides, 'The legal differences and economic similarities of various methods of supporting green electricity under state aid rules' (2014) 35 European Competition Law Review 227; Volkmar Lauber, 'The European Experience with Renewable Energy Support Schemes and Their Adoption: Potential Lessons for Other Countries' (2011) 2 Renewable Energy Law and Policy Review 120; Leigh Hancher and Francesco Maria Salerno, 'State aid in the energy sector' in Erika Szyszczak (ed), *Research handbook on European State Aid Law* (2011).

[453] Kati Kulovesi, Elisa Morgera and Miquel Muñoz, 'Environmental integration and multi-faceted international dimensions of EU law: unpacking the EU's 2009 climate and energy package' (2011) 48 Common Market Law Review 829-891; Marjan Peeters, 'Instrument mix or instrument mess? The administrative

and ambitions taken at international level, the EU had exceeded in the variety of instruments used, while losing effectiveness and enforceability. Indeed, the adoption of the Package was an important step forward in the integration of environmental protection and development of an EU energy policy, tackling at the same time three fundamental objectives: (i) environmental protection, (ii) economic integration and (iii) security in the energy supply. This however also determined higher complexity in the legislative framework, which in turn led to inconsistencies between the approaches to governance in the different instruments. For example, while the two directives on ETS and Renewables set binding targets both at national and EU level, the Energy Efficiency Directive[454] – which was adopted a bit later – gave much more flexibility to the Member States by only establishing indicative targets. Moreover, the instruments that were apparently constraining the Member States to targets set at EU level were also actually imposing on them incredible administrative and political burdens. The Commission seemed indeed to forget that imposing a target also involved the adoption of implementation measures, determining the adaptation not only of national legislation, but also of national markets and political wills to the newly adopted European framework. As a consequence, the formally stricter approach adopted by the Commission was actually hiding a still quite high level of flexibility[455], that was probably far from the harmonization wished by some academics[456].

Nonetheless, from a political perspective the package was an important signal towards the progressive achievement of a shared European energy strategy in which Member States were ready to adapt their national energy policies to the growing internationality of energy issues. From an international perspective, such ambitious policy was the result of the expectations grown within the European institutions of taking on a leadership role in the Copenhagen Climate Change Conference that was held in December 2009. The initial objective of the summit was to reach an agreement imposing binding commitments in the reduction of GHG emissions for all developed countries. Eventually the final agreement did not even remotely

complexity of the EU legislative package for climate change' in Marjan Peeters and Rose Uylenburg (eds), *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar 2014).

[454] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56.

[455] With regard to the Renewable Energy Directive, this was particularly evident for the authorization procedures for the construction of new plants and for the determination of the state support schemes for the development of renewables. On one side, the Member States had to face some resistances from national political and business groups and, on the other side, they were free to choose among a number of support schemes and this enhanced the differentiation between countries and markets, consequently also reducing the possibilities for the development of an actual energy market.

[456] Rusche, *EU Renewable electricity law and policy. From national tagets to a common market.* (n. 263), 184.

meet such expectations: it provided that deep cuts in global emissions "will be required" and that countries would take action to maintain the global temperature increase below 2°C. Moreover the final text did not mention a long-term vision on emission reductions for 2050, nor did it include medium-term targets for 2020[457]. Despite the failure at international level, the Union did not give up its role as global leader in the fight against climate change, but instead it kept "leading by example", being the most advanced geographic area in the fight to climate change and in the development of renewable energies.

Although today it is possible to affirm that the 2020 Strategy was a story of success and that it actively contributed to the development of renewable energy in the Union, already in 2011, the Commission started working on new strategies and new objectives in order to achieve the ultimate goal of decarbonizing the Union energy system. The Communication "Energy Roadmap 2050"[458] addressed the issue of developing an effective strategy also for the period after 2020. In this case, while the overall objective of the Commission was environmental – reducing GHG emissions and combating climate change – the instruments for its achievement were strictly related to the development of the European energy market. Accordingly, the strategy proposed by the Commission was to increase the number of investments in the energy sector (infrastructures, research and development etc.), while lowering the electricity prices, so as to decrease costs and reduce financial support (in particular in the renewable energy sector). In this sense, trade between Member States and imports from outside the EU could reduce costs in the medium to long-run. In another Communication[459], the Commission reported that when "*recognising that renewable energy will form the heart of any future low carbon energy sector, the EU introduced a comprehensive and robust supportive legislative framework. The challenge is now to move from policy design to implementation at national level, with concrete action on the ground.* [… I]*t is important to recognise the financing for renewable energy as growth-enhancing expenditure that will provide greater return in the future. It is equally important to ensure the quality of the expenditure, applying the most efficient and cost-effective financing instruments. As with energy infrastructure, there is a need for European action, to speed up*

[457] See: Daniela Vincenti, 'EU looks beyond 'weak' Copenhagen climate deal', 2009, <https://www.euractiv.com/section/development-policy/news/eu-looks-beyond-weak-copenhagen-climate-deal/> accessed 26 July 2018.
[458] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy Roadmap 2050, COM(2011) 885 final.
[459] Communication from the Commission to the European Parliament and the Council "Renewable Energy: Progressing towards the 2020 target", SEC(2011) 129 final, 14.

the efficient delivery of renewable energy production and its integration into the single European market".

The Commission was thus progressively showing that although the ultimate objective of the development of renewable energies was the protection of the environment, renewables were also the expression of a specific market sector which was characterized by some peculiarities requiring specific attention and regulation. As a consequence, in its Communication, the protection of the environment was no more the centre of such policies, but it was rather becoming a consequence of their implementation. This was also reflected in the changes in the constitutional law of the EU, with the progressive recognition of a dedicated title in the Treaties.

In 2013, the Commission published a progress report on the implementation of the Renewable Energy Directive[460]. On one side, it acknowledged the important progresses achieved by the Member States and the Union in the development of the share of renewables; on the other side, it also highlighted some important barriers that were slowing down the progress towards the achievement of the 20% GHG reduction target. The main issue was identified in the impossibility to make the European energy market work: market failures such as fragmented markets, low levels of competition, and significant external costs related to climate change, environmental pollution, security of supply, and technological innovation, although compensated by direct and indirect EU interventions, were still blocking a number of investments in the energy sector. Moreover, administrative barriers – such as administrative uncertainty and slow administrative procedures – were still present in most Member States, raising the costs of renewable energy. Furthermore, the Commission reported that the integration of renewable energy for generating electricity into the market was equally difficult. Some of the major renewable energy sources – mainly wind and solar power – have inherently different characteristics from conventional sources in terms of cost structure, dispatch ability and size, thus require further investments for the adaptation both to the market and to the infrastructure. Lastly, some Member States deviated from their own national renewable energy action plans, consequently reducing clarity and certainty for investors. All these factors convinced the Commission about the need for a review of the policy instruments adopted until then, so as to ensure not only the achievement of the targets for 2020, but also for the following period. Indeed, the provisions of Directive 2009/28

[460] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewable energy progress report, SWD(2013) 102 final.

stopped at 2020, while further objectives had been established until 2050 in the Energy Roadmap.

The Green Paper "A 2030 framework for climate and energy policies"[461] thus followed. The Commission acknowledged the issues highlighted by the 2013 Progress Report and on this basis, it built some new policy guidelines. As compared to 2008, some changes had to be recognised in the European economic structure. From a more general perspective, the financial crisis had importantly hit the EU economy and, as a consequence, the investments in the energy market had been affected as well. From a sectoral perspective, the early investments in the renewable energy sector had allowed important developments in this market: some technologies (especially solar and wind production) had become more mature and their costs had consistently reduced. However, the decrease of the state investments through the support schemes following the economic crisis had reduced the speed of this development and private investors were now more insecure about entering the market.

As a consequence, while in 2008 the Commission was writing its policy on an almost blank page, with the only objective of showing the strong EU commitment in the fight to climate change through the development of a modern and secure energy market, in 2013 the task of the Commission had become much more difficult. The existence of a quite developed renewable energy market together with the changed economic and financial conditions required the Commission to *first* ensure the safeguard and the development of the energy market and *then* contribute to the fight to climate change. In this sense, the reduction of GHG emissions had become a – desired – consequence to the development of the European energy sector.

Four points can be identified as explicative of the abovementioned changes and they all represent the central elements of the new proposed framework. The first and probably most evident is the move from a policy built on dual targets – both at EU and national level – to imposing only one overall EU target with no predetermined binding objectives for the Member States. At the time the Green Paper was published there was a big discussion on whether this choice could be considered viable or not. The Commission addressed the various options by arguing that "*the shape of a possible renewables target will depend on (i) whether a target is considered necessary to ensure increased shares in renewables post 2020* […]*; and (ii) if and how this can be achieved without undesirable impacts of*

[461] Green Paper - A 2030 framework for climate and energy policies, COM(2013) 169 final.

renewables support schemes on energy markets and energy prices and public budgets"[462]. This shows on one side, the importance gained by the energy markets, but on the other side also the decreased confidence of Member States in EU driven energy policies that could impact on their public budgets and established support schemes. Indeed, in the Communication "A policy framework for climate and energy in the period from 2020 to 2030", the Commission clarified that "*in the future, the benefits of renewable energy must be exploited in a way which is to the greatest extent possible market driven. […] The Commission proposes, therefore, that this should be the EU's target for the share of renewable energy consumed in the EU. While binding on the EU, it would not be binding on the Member States individually but would be fulfilled through clear commitments decided by the Member States themselves which should be guided by the need to deliver collectively the EU-level target and build upon what each Member State should deliver in relation to their current targets for 2020*"[463]. Moreover, "*increased flexibility for Member States must be combined with an increased emphasis on the need to complete the internal market in energy. Different national support schemes need to be rationalised to become more coherent with the internal market, more cost-effective and provide greater legal certainty for investors. Attainment of the European target for renewables would be ensured by a new governance framework based on national plans for competitive, secure and sustainable energy prepared by the Member States*"[464].

Two considerations can follow. First, from an environmental perspective, abandoning the binding national targets for an overall Union target is worrying. Imposing concrete objectives to the Member States has proven effective for pushing *all* the Member States to increasing their share of renewables and reaching a level which is adequate for the state itself, but also for the Union as a whole. While the protection of the environment – and the reduction of GHG emissions – cannot be limited to a specific territory and it is the final result that matters, ensuring a level environmental playing field in all Member States is equally important both for the environment and the correct functioning of the Internal Market. Moreover, binding targets ensure higher enforceability, as they provide a certain objective to be referred to so as to assess the suitability of national policies in the achievement of the agreed target.

[462] Ibid, 8.
[463] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final, 6.
[464] Ibid, 7.

Second, from an energy market perspective, the use of a single target shows the increased attention of the Commission for the development of such market. It would ensure market integration, cost efficiency and undistorted competition, together with a more natural distribution of energy throughout the Union, consequently reducing the issues with the stability of the grid connection that had been reported under the implementation of the 2020 targets. The volatility and unpredictability inherently tied with, for instance, solar and wind energy make the stabilization of the grid particularly burdensome. Member States had employed national subsidies as a means to warrant conventional, fossil-fuel generators in order to back-up in case of an unforeseen stop in the generation of electricity from renewables. As a consequence, the fraction of non-subsidized electricity in the market was diminishing as renewables made their way, to such an extent that competitive markets were becoming a minor part of the total market.

Many commentators had cold reactions to this new proposed framework. Not only environmental activists were worried about a possible stall in climate change action[465], but also policy experts[466] maintained that not only the target *per se* was not ambitious enough, but also that it was not sufficiently backed by strong monitoring and enforcing bodies. On its side, the Commission explained such approach with a market-oriented vision of the climate action, according to which regulatory and market flexibility would actually ensure better results[467]. It seems that the Commission's plan was to somehow exploit the possible reductions in the shares of electricity produced from renewable sources put into the grid in order to enlarge the slice of competitive markets that had been almost nullified due to the incredible number of subsidies and state interventions connected to the development of renewables. Such approach seems to be overly optimistic or – to the least – taking into consideration only part of the problem. While the markets may be able to autonomously reintroduce competitiveness, they are certainly not able to tackle climate change issues. Accordingly, while such policy may reach positive results in the short term, it is not sure

[465] Arthur Neslen, 'EU sets out 'walk now, sprint later' 2030 clean energy vision' (*Euractiv.com,* 23 January 2014) <https://www.euractiv.com/section/science-policymaking/news/eu-sets-out-walk-now-sprint-later-2030-clean-energy-vision/> accessed 29 Agoust 2018.

[466] David Buchan and Malcolm Keay, 'The EU's new energy and climate goals for 2030: under-ambitious and over-bearing?' (2014) The Oxford Institute for Energy Studies ; David Buchan, Malcolm Keay and David Robinson, 'Energy and climate targets for 2030: Europe takes its foot off the pedal' (October 2014) The Oxford Institute for Energy Studies .

[467] European Commission, *2030 climate and energy goals for a competitive, secure and low-carbon EU economy* (IP/14/54 22 January 2014).

whether it could be equally effective in the long term, when the 2050 targets will need to be achieved – in a way or another[468].

Moreover, in this process the Commission would act as a guide, not imposing anything on the Member States but helping them in building affordable and effective national plans that ensure the achievement of the European target. While putting a thick layer of "European spirit" on the energy policy, the European Commission was actually opening the door to resistances by the Member States on the way each of them should achieve this common target[469]. However difficult it may be to accept a binding target for the Member States, negotiations take place only once and are then definitively set. Otherwise, allowing the Commission's continuous monitoring on the implementation and development of national plans by the individual Member States involves much higher political and regulatory efforts and general uncertainty about the results that can be achieved.

The second reform put forward by the 2030 Climate strategy was increasing the coherence of policy instruments contained in the package, so that a balance could be found "*between concrete implementing measures at EU level and Member States' flexibility to meet targets in ways which are most appropriate to national circumstances, while being consistent with the internal market*"[470]. The attention of the Commission was once again on the stability and competitiveness of the energy market: the reduction of national subsidies to fossil fuels and the creation of a more globalized energy market were the core points of the new strategy.

Thirdly, the Commission focused on fostering the competitiveness of the EU economy through the development of energy and climate policies, with particular regard to the creation of a low carbon economy. While wholesale energy prices had increased moderately in the EU, end-user prices of electricity had increased more significantly, with the result that the EU was losing competitiveness with the US on the energy prices. The Commission was thus proposing: (i) full implementation of the internal market legislation, in order to keep prices in check and meet targets cost-effectively; (ii) enabling the exploitation of indigenous oil and gas resources, in order to reduce import dependence; (iii) further diversification of energy supply routes in order to improve competition on energy markets.

[468] See: David Buchan, 'Why Europe's energy and climate policies are coming apart?' (July 2013) The Oxford Institute for Energy Studies .
[469] Rafael Leal-Arcas and Stephen Minas, 'Mapping the International and European Governance of Renewable Energy' (2016) 35 Yearbook of European Law 621–666, 654.
[470] Green Paper - A 2030 framework for climate and energy policies, COM(2013) 169 final, 9-10.

Lastly, the Commission stressed the importance of taking into consideration the differences existing between the Member States. In particular, the Commission noted that under the 2020 Strategy, the possibility for Member States to create cooperation mechanisms between them in order to overcome difficulties in meeting their national targets had been left almost completely unexploited. Even in this case, while acknowledging the partial failure of the past distribution methods, the Commission was instead evaluating the possibility of coupling differentiated targets with trading mechanism, in order to ensure a cost efficient meeting of the targets. Once again, it was proposing a market-based solution to the issues of green energy markets.

Interestingly, most of the climate discourse connected to the EU energy policy was left to its external dimension and – in particular – to the negotiations of the Paris Agreement. The European Union was again committed to uphold a leading role in the negotiations of the agreement that should have set the future international policy on climate change. This commitment was already visible in the Green Paper on the 2030 framework, where the Commission stressed "*the crucial need to engage further with third countries, and for the Durban Platform to deliver an agreement by 2015 on post 2020. This is all the more important given that the EU represents only 11% of global GHG emissions and that this share is decreasing so that effective international action is required to tackle climate change*"[471].

At COP 21 in Paris, on 12 December 2015, the Parties to the UNFCCC (United Nations Framework Convention on Climate Change) reached an agreement on the fight to climate change and the actions and investments needed for a sustainable low carbon future[472]. The Paris Agreement's aim was to take ambitious efforts to fight climate change and adapt to its effects, with enhanced support to assist developing countries to do so. In particular, it should tackle the threat of climate change by keeping a global temperature rise below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius. The Agreement requires all Parties to draft "nationally determined contributions" (NDCs) in which they describe their commitments for the achievement of the

[471] Ibid, 11.

[472] Paris Agreement (Dec. 13, 2015), in UNFCCC, COP Report No. 21, Addenum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1. For further analysis on the Paris Agreement, see: Silvia Manservisi, *Energie rinnovabili e pianificazione energetica sostenibile. Profili europei ed internazionali* (Jovene 2016), 6 ff. and Massimiliano Montini, 'L'accordo di Parigi sui cambiamenti climatici' (2015) 4 Rivista giuridica dell'ambiente 517-528.

Agreement's climate objectives. Moreover, all Parties shall report regularly on their emissions and on their implementation efforts[473].

The European Union is a party of the Agreement together with its Member States by virtue of their shared competences in the field of the protection of the environment. Moreover, the principle of "sincere cooperation" obliges both the EU and the Member States to a full mutual respect, that – in the field of external action – means that "*there is a prohibition for a Member States to distance itself from an agreed Union strategy by taking action within an international organization that could potentially bind the Union*"[474]. For this reason, the Union *and* the Member States submitted a joint INDC, in which they set their joint contribution to the World's climate[475]. However, according to Article 4(16) of the Paris Agreement "*parties, including regional economic integration organizations and their member States, that have reached an agreement to act jointly under paragraph 2 of this Article shall notify the secretariat of the terms of that agreement, including the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions*", moreover, according to paragraph 18 of the same Article "*if Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Agreement, each member State of that regional economic integration organization individually, and together with the regional economic integration organization, shall be responsible for its emission level as set out in the agreement communicated under paragraph 16 of this Article*"[476]. However, this approach is apparently at odds with the EU internal legal framework. As seen, the Commission has clearly abandoned the application of single national targets, and the internal

[473] For an overview of the historical passages that brought from the Kyoto Protocol to the adoption of the Paris Agreement, together with its political and legal issues, see: Stefano Nespor, 'La lunga marcia per un accordo globale sul clima: dal protocollo di Kyoto all'accordo di Parigi' (2016) 1 Rivista trimestrale di diritto pubblico 81-121.

[474] Geert de Baere, *European Union Law* (Oxford University Press 2014).

[475] The INDC was submitted on the 6th of March 2015; see http://www4.unfccc.int/ndcregistry/PublishedDocuments/European%20Union%20First/LV-03-06-EU%20INDC.pdf. Also in the Kyoto Protocol, the EU was a party with its Member States and had committed to an overall EU target. However, at the time, the internal regulation of climate change was different, and the Member States were legally obliged to achieve certain targets by a given period. According, the internal enforceability of the targets was ensured, consequently also allowing the respect of international commitments. Nonetheless, such strategy raised some concerns among academics, because the existence of an overall EU target may have pushed some Member States to rely on the over-compliance of other Member States in order to offset their own failures. This would make the Union fall under the non-compliance and face the consequences provided for the Kyoto Protocol. However, once again the existence of clearly determined national target at EU level somehow protected the EU from exposing itself to an international failure, by applying preventive remedies at internal level. This would probably not be possible under the new regime and the commitments under the Paris Agreement. See:

[476] Emphasis added.

action of the Union for the reduction of GHG emissions shall be aimed at an EU-wide cap[477]. As opposed to the Kyoto Protocol[478], the Paris Agreement does not provide for penalties or legal consequences in case of non-compliance with the objectives stated in the INDC. Article 15 provides that "*A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established. The mechanism* […] *shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties*". Accordingly, the possible lack of cooperation of the Member States in the pursuit of their emissions objectives should not have evident consequences on the credibility of the EU at international level. Nonetheless, the fact that the Agreement provides that each Member State shall be held responsible for its failure to achieve its targets may require some additional structure in the European internal organisation of the fight to climate change. The new ETS Directive, adopted in the beginning of 2018, despite making continuous reference to the Paris Agreement and the EU's commitments, neither provides for any target for the Member States nor for specific monitoring and enforcing systems to evaluate the progress of each Member State. In addition, the policy statements of the European Council with regard to the fight to climate change seem to put a lot of emphasis on the ETS framework, while EU renewable-energy commitments will be weakened[479]. It thus seems that the EU Commission intends to limit the progress of all those policies that support ETS in the reduction of GHG emissions, in favour of market-based instruments that give much more flexibility to the Member States.

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[477] Marjan Peeters, 'An EU law perspective on the Paris Agreement: will the EU consider strengthening its mitigation effort?' (2016) 6 Climate law 182-195, 184.

[478] Article 18 of the Kyoto Protocol provided that "*The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol*". Under this Article, the Kyoto Protocol Compliance Mechanism was adopted. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. The former aims to provide advice and assistance to Parties in order to promote compliance, whereas the enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments. In particular, each type of non-compliance required a specific course of action. For example, in case the enforcement branch determined that the emissions of a Party exceeded its assigned amount, it should declare that that Party is in non-compliance and require it to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of 30%. In addition, it shall require the Party to submit a compliance action plan and suspend the eligibility of the Party to make transfers under emissions trading until the Party is reinstated. See: Procedures and mechanisms relating to compliance under the Kyoto Protocol, Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3.

[479] Notably, the ETS framework falls under the EU's climate change action, which is enshrined in the environmental competence of the EU.

The discrepancies existing between the EU commitments within the Paris Agreement negotiations and the 2030 Energy Framework were partially addressed in the period immediately following the adoption of the Agreement. Indeed, the latter was taken as the starting point for fostering the adoption and implementation of a new set of EU laws on climate change and energy. Although some Member States, historically dependent on fossil fuels regarded with some suspicion the commitments of the Paris Agreement, the majority of them reacted favourably[480] to the EU Commission's communication "The road from Paris"[481]. According to the Commission, the top priority in the post-Paris climate policy would be to adopt binding policies on climate change, and in particular to revise the Emission Trading System in the light of the new international agreements. Moreover, the Commission would present the necessary policy proposals to adapt and update the EU's regulatory framework as designed in 2014, in order to put energy efficiency first and to foster renewable energy's role.

Already in July 2015, the European Commission had presented a legislative proposal to revise the EU Emissions Trading System (EU ETS) for the period after 2020, increasing the pace of emissions cuts[482]. Moreover, in July 2016 it proposed amendments to the Effort Sharing Regulation, in order to introduce binding annual greenhouse gas emission targets for Member States also for the period following 2020. The negotiations of both proposals took almost three years and in 2018 they were both adopted by the Council. The adoption of these two pieces of legislation marks an important step forward in the implementation of the Paris Agreement and also a change in the approach of the Member States to long-term binding targets. Indeed, when endorsing the proposed 2030 Climate Policy framework in October 2014, the European Council had cautiously referred to the participation of the Member States "*in this effort, balancing considerations of fairness and solidarity*" [483]. As opposed, the newly adopted Regulation[484] provides that the Member States are bound to new national limits of GHG emissions for the period between 2021 and 2030, depending on their

[480] Environmental Council, Outcome of the 3452nd Council meeting, 4 March 2016, 6792/16.
[481] Communication from the Commission to the European Parliament and the Council - The Road from Paris: assessing the implications of the Paris Agreement and accompanying the proposal for a Council decision on the signing, on behalf of the European Union, of the Paris agreement adopted under the United Nations Framework Convention on Climate Change, COM(2016) 110 final.
[482] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, COM(2015) 337 final.
[483] European Council, Conclusions of 23-24 October 2014, EUCO 169/14.
[484] Regulation 2018/842 of the European Parliament and of the Councilof 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26–42.

emissions levels in 2005 and adjusted according to their actual economic and technological capabilities to further develop the system.

Such development shows, on one side, the achievements of the European Union in the international context: its eagerness to become the leading organization in the fight to climate change was as strong as to push even further the internal commitments that had been elaborated for the period following 2020[485]. On the other side, however, it also shows the ease with which the big political statements contained in the policy frameworks can change depending on a number of factors that can be considered more political than scientific or legal[486]. Nonetheless, the update of the European policy on ETS is important for the future of the European environment and can be inscribed in the growing centrality of the environmental policy in the EU[487].

In November 2016, the Commission put forward a new communication ideally building on the adoption of the Paris Agreement: "Clean Energy for all Europeans"[488]. Despite the bold title, it immediately appeared that the international negotiations on climate change did not have the same results on the energy policy as it had been for ETS. Indeed, while the Commission acknowledged that the implementation of the Paris Agreement largely depends on a successful transition to a clean energy system, it did not propose any substantial change to the 2030 Framework. The overall EU binding target of 27% of energy production from renewable energy sources remained unchanged. In order to achieve this target, "*Member States will pledge contributions through the integrated national energy and climate plans that form part of the governance proposal to collectively achieve the EU target. The peer pressure provided by regional consultations on the plans and the possibility of the Commission to make recommendations, together with the overall policy framework set by the other pieces of legislation in this package, should encourage Member States to pledge high, without allowing any free-riding. In case the Commission detects that there could be a gap, both on the ambition and implementation levels, in particular as regards renewables*

[485] Marcin Stoczkiewicz, 'The Climate Policy of the European Union from the Framework Convention to the Paris Agreement' (2018) 15 Journal for European Environmental and Planning Law 42-68.
[486] For insights on these processes and, in particular, on the role of the European Council's conclusions in the development of EU environmental and energy policies, both internal and externa, see: Sigrid Boysen and Moritz von Unger, 'Regulating eu Climate and Energy Matters through Conclusions: The Limits of Consensus' (2015) 12 Journal for European Environmental and Planning Law 128-155.
[487] Steinar Andresen and others, 'The Paris Agreement: Consequences for the EU and Carbon Markets?' (2016) 4 Politics and Governance 188-196.
[488] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Clean Energy For All Europeans", COM(2016) 860 final.

and energy efficiency, it can take the necessary measures to avoid and fill any such emerging gap"[489].

The first impression given by the Communication was that the Commission wanted to build on the results obtained through the implementation of the 2020 Package and the future results that the new ETS policy would bring, but it was not actually convinced that the deployment of renewable energy sources could play a central role in the fight against climate change. Indeed, many commentators[490] reaffirmed that the 27% target was not sufficiently ambitious and that, while leaving wider discretion margins to the Member States, it would also require much more compliance and enforcement attention from the Commission. However, it does not come as a surprise. The economic, political and legal context has been constantly changing from the adoption of the 2020 energy framework to 2016: the economic crisis has created an unfavourable context for new investments in the energy sector, consequently pushing some national governments to reclaim control over their energy mixes. Moreover, the changed Treaty provisions and the substantially weakened EU competence in the energy sector has further limited any possible strength in the Commission's proposals[491].

The uncertainty on upcoming times is also evident in the Commission's own words: it argues that the EU should become "number one in renewables", but the uneasy question of its implementation at national level is only partially addressed and, while affirming that "*the target level will be reviewed in the future in line with the EU's international commitments*", it does not explain how and when such assessment will be undertaken[492].

The above shows however that the Commission is increasingly separating energy policies from environmental ones, notwithstanding the equally growing intersections between the two. While the environmental policy in general and the climate action more specifically have seen the Commission fighting for preserving the leading international role of the Union, even if to the detriment of nationalistic sentiments of the Member States, the EU energy policy is slowly back-stepping in favour of national competences and prerogatives. The EU role of "leader by example" in the international *fora* still exists, but the advancement of other

[489] Ibid, 7.
[490] Penelope Crossley, 'The role of renewable energy law and policy in meeting the EU's energy security challenge' in Rafael Leal-Arcas and Jan Wouters (eds), *Research handbook on EU energy law and policy* (Edward Elgar Publishing 2017), 483.
[491] Israel Solorio and Pierre Bocquillon, 'EU renewable energy policy: a brief overview of its history and evolution' in Israel Solorio and Helge Jörgens (eds), *A guide to EU renewable energy policy - comparing europeanization and domestic policy change in EU Member States* (2017), 35.
[492] Marco Siddi, 'The EU's Energy Union: A Sustainable Path to Energy Security?' (2016) 51 The international spectator - Italian Journal of International Affairs, 131-144, 139.

international players together with weaker policies may determine its future step back. In this sense, the policy is probably the consequence of the change undergone by the Treaties with the Lisbon reform. Acknowledging the existence of an EU energy competence was certainly positive, but the lack of coordination with other sectors of competence – namely the protection of the environment – also determined the progressive creation of parallel policies, which, although substantially interconnected, formally never meet each other.

The several legislative proposals – also known as "Winter Package" – that were launched by the Commission together with the 2016 Communication were finally all adopted in December 2018. As a consequence, the actual results of their transposition and implementation are still hardly predictable at the time of writing this thesis. Nonetheless, as it will be seen further in this chapter, the long interinstitutional negotiations allow us to have a quite clear picture of the new political context in which the Commission is operating and will operate in the upcoming years.

3 Directive 2009/28 on the promotion of renewable energy sources: flexibility through the imposition of binding targets.

In this changing political environment, the reference framework for the development of renewable energies in Europe has been so far Directive 2009/28/EC (RED)[493]. The Directive adopted following the 2020 Energy Package will remain applicable until negotiations for the new Renewable Energy Directive proposed in 2016 will come to an end and it will be finally adopted.

A brief analysis of the main characteristics of this legislative act are important for our analysis for two reasons: (i) it has been adopted before the entry into force of the Lisbon Treaty, when the European Union did not have any explicit competence in the energy sector. For this reason, it is based on Article 192.1 TFEU and pursues a predominantly environmental objective; (ii) it is the expression of a more proactive policy approach by the Commission and of the political and economic situation prior to the recent financial crisis[494].

[493] 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 Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.

[494] According to Amabili, the RED is the result of a long legal process that has allowed the adoption of specific and binding targets for the Member States, defeating their reluctance to give up part of their national sovereignty in a delicate sector such as energy. See: Fabio Amabili, 'L'energia sostenibile' in Roberto Giuffrida and Fabio Amabili (eds), *La tutela dell'ambiente nel diritto internazionale ed europeo* (Giappichelli Editore 2018), 377.

As part of the 2020 Package, the RED shall be placed in the context of the implementation of the Kyoto targets. Indeed, the development of renewables is considered a tool for reducing both greenhouse gas emissions and oil imports from outside the Union[495]. However, the climate-related energy measures are not only meant for the protection of the environment, but they are also pursuing security of the energy supply in Europe. The RED thus moves in a very complex regulatory scenario and it tackles three main issues: (i) the fight to climate change and the protection of the environment; (ii) the regulation of the internal energy market and (iii) ensuring the functioning of the EU energy sector, with particular regard to a secure and equal development of grids throughout Europe. Moreover, in drafting the Directive, the Commission was also concerned by the need of respecting the energy prerogatives of the Member States, giving them sufficient discretion in the national regulation of the energy sector[496].

The Commission proposed an overall EU binding target together with national binding targets on the share of renewables, coupled with substantial discretion for the Member States in the methods for achieving these targets. In this sense, the use of Article 192.1 TFEU as the legal basis and the use of the legislative techniques proper of the environmental sector – namely a framework directive only imposing minimum harmonization and subject to the environmental guarantee of Article 193 TFEU – were the best regulatory option in that historical moment[497].

The structure of the Renewable Energy Directive reflected the abovementioned policy objectives. The pursuit of the climate change objectives is addressed in the first articles of the Directive. According to Article 3, Member States shall ensure to meet the national target by 2020, by introducing measures that ensure that the energy share equals or exceeds the indicative trajectory formulated by the Commission. Moreover, Member States are required to adopt a national renewable energy action plan, setting out Member States' national targets

[495] Recital 1 RED.

[496] During the negotiations of the 2020 Package, Member States were divided on the binding nature of renewable energy goals. For example, the UK and France supported legally binding targets, but put as conditions that the nuclear sector counted for green power. To the contrary, Poland and Italy were against binding and ambitious targets, because they would have reduced European competitiveness. Moreover, while the Commission's president Barroso supported a strong European intervention as a driver for European integration, some Directorates General in the Commission were backing the idea of a loosen EU legislative action. For more policy insights, see: Alexander Bürgin, 'National binsing renewable energy targets for 2020, but not for 2030 anymore: why the European Commission developed from a supporter to a brakeman' (2015) 22 Journal of European Public Policy 690-707.

[497] According to Article 1, the Directive "*establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport*".

and adequate measures to achieve them[498]. The indicative trajectory designed by the Commission and the national action plans allow the Commission to run an effective *ex ante* control on national policies. Indeed, such instruments allow proactive and continuous dialogue between the Commission and the Member States, which can adjust their national policies *in itinere,* with no need to wait for an infringement procedure in case they are not fit for the achievement of the proposed target. In this sense, the Commission recognized that the different starting point, the renewable energy potential and the energy mix of each Member State may vary[499]. The Commission has also *ex post* control powers. In case a Member State performs below this trajectory, it has to submit an amended national action plan to the Commission in the following year with adequate and proportionate measures to implement the trajectory within a reasonable time frame. In case the Member State does not comply with this obligation, the Commission can start an infringement procedure against it, which may also end up in some economic sanctions by the ECJ. Evidently, the possible imposition of economic sanctions does not ensure the final fulfilment of its obligations by the Member State, but it can be considered a sufficient deterrent to short falling behaviours.

While the national action plans allowed overall flexibility in building national policies, further flexibility was given in the achievement of the targets by two other instruments: (i) statistical transfers and (ii) joint projects between Member States or between Member States and third countries.

According to Article 6, Member States were entitled to agree on and make arrangements for the statistical transfer of a specified amount of energy from renewable sources from one Member State to another Member State. This instrument was based on a statistical notion of energy, according to which a Member State that was overproducing energy from renewable sources and was thus exceeding its national target can transfer part of its energy to another Member State, which was instead struggling in achieving its share. The energy was not physically transferred, but it was mathematically taken from one and added to the share of another Member State. Clearly, this approach allowed further flexibility, in particular for those Member States that could find some difficulties in achieving their targets. Moreover, it can be seen as an early implementation of the solidarity principle as introduced by Article 194 TFEU[500]. Indeed, a Member State that was more advanced in the development of its renewable energy policy could support another one that found it more difficult. This would

[498] Article 4 RED.
[499] Recital 15 RED.
[500] Peeters, 'Governing towards renewable energy in the EU: competences, instruments, and procedures' (n. **Error! Bookmark not defined.**), 51.

ensure the overall achievement of targets in the production of energy from renewable sources because the transferring Member State would get some revenues from the sale of the overproduced energy to the other Member State and the struggling Member State would meet its targets at a lower price. The risk would however be that less advanced Member States were not sufficiently pushed to actually implement renewable energy policies, because they could always rely on more active Member States that can sell their excessive production.

According to Articles 7-10, Member States could cooperate among them on all types of joint projects relating to the production of electricity, heating or cooling from renewable energy sources, possibly involving private operators, but also cooperate with one or more third countries for the same objectives. These provisions worked in the direction of the creation of an integrated renewable energy market in which the cooperation between Member States was not only statistical – as for the transfers – but also financial, technological and structural, in order to build common projects that could contribute to the achievement of the targets of all involved actors[501].

The achievement of the targets should be pursued in the context of the creation of the internal energy market. Accordingly, the directive included provisions that should help the development of the market for renewables – namely, the introduction of support schemes and the coordination of the administrative procedures by the Member States.

In the preambles to the Directive, the Commission acknowledged that Member States have differentiated potentials in the production of energy from renewable sources and that the development of this market sector would require high investments both in research and development and it also involves environmental and social costs that are unlikely to be internalized in the energy prices. For this reason, it also allowed public support from the Member States, in order to let the energy prices reflect these external costs[502]. Interestingly, however, the Commission also maintained that a harmonization of the support schemes was not possible, given the different renewables potentials of Member States and their consequent need for control over the effect and costs of support schemes at national level.

The reasons behind these policy choices are linked to the development of the renewable energy market at the time, which was still a work in progress. The implementation of the

[501] For a detailed analysis of the cooperation mechanisms under the RED, see: Agime Gerbeti, 'L'attuazione a livello europeo delle disposizioni sui meccanismi di cooperazione previsti dalla Direttiva 2009/28/CE sulla promozione delle energie rinnovabili' (2013) 1 Rivista giuridica dell'ambiente 125-134.
[502] Recitals 22-27 RED.

previous Renewable Energy Directive 2001/77 had been unsatisfactory, and the market was still highly underdeveloped. Moreover, Member States were still reluctant to shift their decision-making power at EU level and all of them had different opinions on the optimal support scheme. As a consequence, the Commission preferred to depart from the approach adopted in other sectors of climate change regulation – for example ETS, where the 2009 reform introduced common allocation procedures for auctioning and free allocation to be determined by the European Commission – and followed a bottom-up approach. This way Member State could experiment and adapt their support schemes to national exigencies.

The downside of this approach is that a number of different support schemes have proliferated in the EU, consequently affecting the reliability of the EU market in general. Indeed, investors are now asked to move through very different legal frameworks that are not easily intelligible. This has also led to some speculation, because investments have been higher in countries where support schemes were more favourable[503].

Another important aspect in the integration of the renewable energy market is the coordination of administrative procedures for granting permits for the construction of new energy plants. Article 13 RED provided that "*Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products, are proportionate and necessary*". In particular, administrative procedures had to be clearly coordinated and defined, comprehensive information on procedures had to be available and rules governing authorisation, certification and licensing should be objective, transparent

[503] The Commission tried to tackle this issue in its State Aid policy. First, in the Communication "Delivering the internal electricity market and making the most of public intervention", the Commission invited Member States to update their support schemes in line with the technological progresses in the renewables sector – in particular wind and solar. Accordingly, support schemes should be limited to what necessary in order to make renewable energies competitive, by progressively phasing out the intervention of the state with the reduction of production costs. Accordingly, support schemes should not come in the form of direct injections from the state, but instead in the form of feed in premiums and other support instruments, such as quota obligations, which force producers to respond to market prices (Communication from the Commission Delivering the internal electricity market and making the most of public intervention, COM(2013) 7243 final).
The Communication was followed by the adoption of the Commission's Guidelines on State aid for environmental protection and energy 2014-2020. Through an instrument of soft law, the Commission tried to harmonize the criteria according to which aid is granted to the production of renewable energy in the Member States. The underlying criterion for determining the compatibility of the aid is its necessity and proportionality with regard to the final objective of protecting the environment. Member States are required to abandon "Feed-in Tariff" scheme and adopt "Feed-in Premiums", which add to the general market price of energy, instead of establishing a price for renewables autonomous from that of energy from other sources (Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55).

and proportionate. Far from harmonising administrative procedures throughout the Union, these provisions required some intervention from the Member States on their national administration and their quite wide wording raised some problems in their interpretation.

The meaning of Article 13 RED has been addressed by the ECJ in the case *Azienda Agrozootecnica Franchini*[504]. The case was a preliminary reference by the Italian administrative court regarding the total prohibition of windmills in a nature conservation area, protected under the Habitat Directive. The national measure was considered to be an even more protective measure than required by the Habitat Directive, as allowed under Article 193 TFEU. The Court of Justice analysed the proportionality issue, as required by Article 13 RED: a measure in the field of renewable energy shall not exceed what is appropriate and necessary for the attainment of the objectives of the legislation. According to the Court, "*a total ban on the construction of new wind turbines in areas forming part of the Natura 2000 network, deriving from a legislative provision, is not contrary to the objectives of streamlining and reducing administrative barriers and, in principle, constitutes a sufficiently transparent and objective procedure*"[505]. Hence, a substantive barrier to a renewable energy project is not *per se* a violation of article 13 RED and has to be tested against other relevant interests – in this case, natural habitats protection. Indeed, according to the Court "*Article 194(1) TFEU states that European Union policy on energy must have regard for the need to preserve and improve the environment*"[506], thus no priority can be established for the energy objectives of Directive 2009/28 with respect to the protection of the environment in general and – in this case – as provided for by the Habitats Directive[507].

The decision of the Court is interesting for two reasons. First, the decision clarified that, although Article 13 RED gave some guidance as to the content of procedural requirements for the authorization of new plants under national law, it was not a substantive provision and the conformity of national provisions had to be determined on a case by case basis. Indeed, the case showed that also substantive requirements for renewable energy projects had to comply with the proportionality and necessity requirements of Article 13 RED. Second, the decision showed that the objectives of developing renewable energies always had to be pursued in the respect of environmental protection requirements and that they could not be

[504] Case C-2/10 *Azienda Agro-Zootecnica Franchini Sari, Eolica di Altamura Srl v. Regione Puglia* [2011] ECR I-06561.
[505] Ibid, para. 63.
[506] Ibid, para. 56.
[507] Federica Persano, *L'energia tra diritto internazionale e diritto dell'Unione europea: disciplina attuale e prospettive di sviluppo* (Giuffrè Editore 2012), 149.

given priority *a priori*. This point is particularly interesting as Directive 2009/28 was an environmental measure, since it was adopted under the EU environmental competence, but the Court interpreted it in light of Article 194 TFEU. While it is indeed true that under the TFEU energy policy should be developed with regard to the need to preserve the environment, *maybe* if the Court had considered Directive 2009/28 as an environmental measure – as it was at the time of its adoption – the result would have not been so clear-cut. Both the RED and the Habitat Directive pursue the ultimate objective of protecting the environment, thus the two legislative provisions are not *per se* conflicting, but their objectives need to be tested against each other. Does the protection of endangered species justify a total ban of wind turbines in Natura 2000 protected areas? And from the other side, do the reduction of GHG emissions and the development of renewable energies justify the construction of a plant in a protected area? Are there compromise solutions? A total ban is probably a "*sufficiently transparent and objective procedure*", but it may not be substantially proportionate. Unfortunately, the Court left to the national court to resolve the question on the substantial proportionality of the measure.

Lastly, the RED also addressed the question of access to and operation of the grids and the connected issue of security of energy supply. According to Article 16, Member States had to take measures in order to facilitate transmission and distribution of renewable energy in the grid infrastructure. The issue has been particularly contentious in the implementation of the Directive, in consideration of the instability of renewable energy due to its reliance on natural and uncontrollable factors.

Overall, the implementation of the Directive has proven successful: the overall share of renewable was around 16.4% of gross final energy consumption in 2015 and the targets for 2020 are expected to be achieved[508]. These data allow the EU to keep its role as leader and example in the renewable energy sector in the international context. For this reason, it can be said that the purely environmental and climate change objectives of the Directive have been achieved. This is interesting not only from a policy but also from a legal perspective. If one considers that the RED had been proposed as an instrument of environmental policy and had been adopted under Article 192.1 TFEU, it is possible to affirm that the legal framework in which it has been inserted had been appropriately chosen.

[508] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewable Energy Progress Report, COM(2017) 57 final.

However, the implementation of the RED has also highlighted the high regulatory complexity that surrounds the development of renewable energies. Indeed, while the overall environmental target has been achieved, difficulties are still present in the market and technological development of the sector. This shows that nowadays a policy on renewable energies cannot be considered as purely environmental, but instead it has much more energy-related issues and it needs to be treated as such. The environmental benefits deriving from the use of renewable energies cannot be the sole policy driver; instead, they need to be a (positive and wished) consequence of an energy policy.

In this sense, the introduction of Article 194 TFEU should be in principle beneficial. Recognising the existence of an EU energy competence should allow the Commission and the other institutions to introduce coherent and ambitious policies that let the EU energy sector develop. Unfortunately, the formulation of this new article and all the questions that we have raised throughout this thesis do not encourage any positive forecast. Instead, one may wonder whether, notwithstanding Article 194 TFEU, a good energy policy on renewables could still be better formulated under the old Treaty provisions. Moreover, the situation is further complicated by the new economic and political circumstances, that put Member States on the defensive with respect to EU intrusions in their national policies. Accordingly, the proposed new renewable energy directive will be an important test on the efficacy of the new Treaty provisions and the Commission's policy formulations.

4 The Recast Renewable Energy Directive (2018/2001/EU): the bench-test for EU energy and environmental policies

As a response to the issues stemmed from the implementation of Directive 2009/28 and following the new commitments undertaken with the Paris Agreement, in November 2016 the Commission issued a proposal for the recast of Directive 2009/28[509]. The recast Directive 2018/2001/EU on the promotion of the use of renewable energies ("Recast Directive")[510] was finally adopted on 21 December 2018 and entered into force on 24 December 2018.

The first and foremost innovation with respect to its predecessor is the existence of a legal basis for energy policy in the Treaties. Indeed, in its proposal the Commission rightly used Article 194.2 TFEU as the sole legal basis for the act. In the explanatory memorandum attached to the directive, the Commission made very clear that Article 194 TFEU gives to

[509] Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final.
[510] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (n. 436).

the Union competence for adopting legislative acts on the promotion of renewable energy and it is thus the correct legal basis. Nonetheless, the Commission underlined once again the importance of the promotion of energy produced from renewable sources for the protection of the environment and the fight against climate change, together with a sustainable development. Moreover, the fact that Directive 2009/28 did not provide anything for the period after 2020 required an EU intervention so as to ensure that the 2030 commitments – as also reaffirmed in the Paris Agreement – are met. Hence, the Commission stressed the important relationship existing between energy and environment in the context of climate change mitigation, but it was also very firm in drafting an energy-driven policy.

Together with the new legal basis, the Commission has also chosen a new policy approach with regard to national energy targets. As announced in the 2030 Energy Package, the Recast Directive sets an EU wide 32% binding target and no targets at national level. According to the explanatory memorandum, "*The continuation of unchanged policies would also seriously risk undermining the realisation of the Union's political ambition for world leadership in renewable energy.* […] *At the same time, and in the absence of an updated regulatory framework, there is a risk that greater differences within the EU will arise, whereby only the best performing Member States will continue the increasing trajectory in renewables' consumption, while those who are lagging behind will not find any incentive to increase their production and consumption of renewable energy. Moreover, this concentration of the efforts in a few Member States would be more expensive and further distort the internal energy market*"[511]. The Commission thus recognized the problems that have been described in the previous paragraph on the implementation of Directive 2009/28 and it moved from there for the elaboration of the Recast Directive. It thus seems that abandoning binding targets for Member States does not entail further flexibility for national governments, but it would instead enhance the role as controller of the Commission, that would act as a driver and a coordinator of national energy policies.

The reference made by the Commission to its support and coordination role raises again doubts on the actual competence of the Union in the energy sector that have been expressed in the previous chapters of this thesis[512]. Apparently, "*the Union's 2030 target can thus be best achieved through a partnership with Member States combining their national actions supported by a framework of measures as outlined in this Proposal*"[513] and "coordinated"

[511] Ibid, 2-3.
[512] See paragraph III.4.2 above.
[513] Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final, 3 [emphasis added].

by the Energy Union Governance. The future EU renewable energy policy should thus move from policies elaborated at national level and adjusted and coordinated at EU level in order to achieve an overall EU target. Doubts can be raised as to whether these measures should enhance the integration of the EU energy market, while avoiding that less developed national regimes are definitively left behind. It seems instead that those who argued that the introduction of Article 194 TFEU will bring to a substantial renationalization of EU energy policies[514] are right. This is relevant also because Member States will have the "*option of achieving the EU-level target by supporting the deployment of renewable energy in other Member States*"[515], thus substantially delegating to peers the achievement of the EU target. Indeed, with the Recast Directive the Commission tried to streamline the cooperation between Member States through the creation of joint projects. This can be seen as a tentative implementation of the solidarity principle in the energy sector; principle that, however, is not mentioned in the directive.

The structure of the Recast Directive is very similar to the previous one, but there are some innovations in the introduction of two provisions on "self-consumers"[516] and "energy communities"[517] and more detailed provisions on the exploitation of biofuels.

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[514] Rusche, *EU Renewable electricity law and policy. From national tagets to a common market.* (n. 263), 206 ff.

[515] Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final, 7.

[516] According to the definition contained in Article 2(14) of the Recast Directive, a "renewable self-consumer is "*a final customer operating within its premises located within confined boundaries or, where permitted by a Member State, within other premises, who generates renewable electricity for its own consumption, and who may store or sell self-generated renewable electricity, provided that, for a non- household renewables self-consumer, those activities do not constitute its primary commercial or professional activity*". Moreover, Article 21(2) of the Recast Directive provides that "*Member States shall ensure that renewables self-consumers, individually or through aggregators, are entitled: (a) to generate renewable energy, including for their own consumption, store and sell their excess production of renewable electricity, including through renewables power purchase agreements, electricity suppliers and peer-to- peer trading arrangements* […]*; (b) to install and operate electricity storage systems combined with installations generating renewable electricity for self-consumption without liability for any double charge, including network charges, for stored electricity remaining within their premises; (c) to maintain their rights and obligations as final consumers; (d) to receive remuneration, including, where applicable, through support schemes, for the self-generated renewable electricity that they feed into the grid, which reflects the market value of that electricity and which may take into account its long-term value to the grid, the environment and society*".

[517] Article 22(2) of the Recast Directive provides that "*Member States shall ensure that renewable energy communities are entitled to: (a) produce, consume, store and sell renewable energy, including through renewables power purchase agreements; (b) share, within the renewable energy community, renewable energy that is produced by the production units owned by that renewable energy community, subject to the other requirements laid down in this Article and to maintaining the rights and obligations of the renewable energy community members as customers; (c) access all suitable energy markets both directly or through aggregation in a non-discriminatory manner*". For an early assessment of this provision, see: Maciej M. Sokoøowski, 'European Law on the Energy Communities: a Long Way to a Direct Legal Framework' (2018) April European Energy and Environmental Law Review 60-70.

With regard to the provisions addressing climate change issues, Article 3.1 provides for an EU binding overall target of 32% for 2030. Differently from Directive 2009/28, the Recast Directive does not require that Member States elaborate a National Action Plan. In fact, provisions regarding the Integrated National Energy and Climate Action Plans are now included in the Regulation 2018/1999/EU on the Governance of the Energy Union and Climate Action ("Energy Governance Regulation")[518]. According to Article 3 of the Energy Governance Regulation, every ten years each Member State shall notify to the Commission an integrated national energy and climate plan (NECP) containing – *inter alia* – (i) a description of the description of national objectives, targets and contributions relating to the dimensions of the Energy Union, which include the EU renewables target, (ii) a description of the planned policies and measures in relation to such objectives, targets and contributions. These objectives and targets shall comply with the provisions of Article 4 of the Energy Governance Regulation, which in particular requires Member States to indicate "*a contribution to* [the European] *target in terms of the Member State's share of energy from renewable sources in gross final consumption of energy in 2030, with an indicative trajectory for that contribution from 2021 onwards*". By 2022, the indicative trajectory shall reach a reference point of at least 18 % of the total increase in the share of energy from renewable sources, by 2025, the indicative trajectory shall reach a reference point of at least 43 % and of at least 65% of the total increase in the share of energy from renewable sources between that Member State's binding 2020 national target and its contribution to the 2030 target by 2027. By 2030, the indicative trajectory shall reach at least the Member State's planned contribution so as to add up to the Union's binding target for 2030.

Pursuant to Article 9 of the Energy Governance Regulation, one year before, the NECP shall be preceded by a draft NECP, including the same information as the final version. The first draft NECP was due by the 31st of December 2018, according to Article 9 of the Energy Governance Regulation, while the final version of the NECP shall be submitted to the Commission by the 31st of December 2019[519].

[518] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, PE/55/2018/REV/1, OJ L 328, 21.12.2018, p. 1–77.

[519] As of 25 February 2019, all Member States have submitted their draft NECP to the Commission (see: https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/governance-energy-union/national-energy-climate-plans?pk_campaign=ENER%20Newsletter%20March%202019)

The obligation to submit the NECPs is integrated by the obligation for Member States to "*report to the Commission on the status of implementation of its integrated national energy and climate plan by means of an integrated national energy and climate progress report covering all five dimensions of the Energy Union*" every two years[520]. These "Integrated national energy and climate progress reports" shall include – *inter alia* – information on the progress accomplished towards reaching the objectives, targets and contributions set out in the NECP. Moreover, Article 20 of the Energy Governance Regulation sets specific requirements for the reporting on renewable energy, which include information on the implementation of (i) the indicative or estimated trajectories for the overall and sectoral share of renewable energy in final energy consumption from 2021 to 2030, (ii) implemented, adopted and planned policies and measures to achieve the national contribution to the 2030 binding Union target for renewable energy.

The aim of the Commission is thus to be constantly updated on the policies and measures that Member States adopt so as to achieve the overall European target and to be in a position of correcting their trajectories in case the target seems not to be achievable. In fact, according to Article 9, the Commission shall assess the draft NECPs and may issue country-specific recommendations to Member States addressing the level of ambition of objectives, targets and contributions, as well as the national policies and measures, if it concludes that "*the objectives, targets and contributions of the Member States are insufficient for the collective achievement of the Energy Union objectives and in particular, for the first ten-year period, for the Union's binding 2030 target for renewable energy* […], *it shall – as regards the Union's target for renewable energy –* […] *issue recommendations to Member States whose contributions it deems insufficient to increase their ambition in order to ensure a sufficient level of collective ambition*"[521]. These recommendations shall be taken into due account by the Member States.

Moreover, by 31 October 2021 and every two years thereafter, the Commission shall assess the NECPs with regard to the progress made at Union level towards meeting the objectives of the Energy Union as well as at national level with respect to the national targets, and to the overall impact of the policies and measures of the NECPs on the operation of the Union climate and energy policy measures. In particular, for renewable energy, the Commission shall assess the progress made in the share of energy from renewable sources in the Union's

[520] Article 17 of the Energy Governance Regulation.
[521] Article 31(1) of the Energy Governance Regulation.

gross final consumption on the basis of the indicative Union trajectory to reach the Union's 2030 renewable energy target of at least 32 % in 2030[522].

If, on the basis of its assessment of the NECPs, the Commission concludes that "*the objectives, targets and contributions of the integrated national energy and climate plans or their updates are insufficient for the collective achievement of the Energy Union objectives and, in particular, for the first ten-year period, for the Union's 2030 targets for renewable energy and energy efficiency, it shall propose measures and exercise its powers at Union level in order to ensure the collective achievement of those objectives and targets*"[523]. In addition, if the Commission finds that the progress made by each Member State towards meeting its objectives, targets and contributions and implementing the policies and measures set out in its NECP is insufficient, it shall issue recommendations to the Member State[524]. Similarly, if the Commission finds that the progress made at Union level towards meeting the objectives of the Energy Union is insufficient and the Union is at risk of not meeting the objectives of the Energy Union it may issue recommendations to all Member States to mitigate such a risk[525]. However, in case of insufficient national measures in the area of renewable energy, the Commission shall propose measures and exercise its power at Union level in addition to those recommendations so as to ensure the achievement of the Union's 2030 target for renewable energy. Finally, if the Commission concludes that a Member State has fallen below one or more of its national reference points in 2022, 2025 and 2027, it shall ensure that additional measures are implemented within one year so as to cover the gap compared to its national reference point[526].

According to Article 34 of the Energy Governance Regulation, in case a Member State receives recommendations from the Commission, it shall (a) take due account of the recommendation *in a spirit of solidarity* between Member States and the Union and between Member States; (b) set out, in its integrated national energy and climate progress report made in the year following the year the recommendation was issued, how it has taken due account of the recommendation.

Overall, the Energy Governance Regulation has introduced many more reporting obligations for the Member States, which are now required to maintain a constant dialogue with the Commission on the developments of their energy policies. With regard to the control powers

[522] Article 29 of the Energy Governance Regulation.
[523] Article 31(3) of the Energy Governance Regulation.
[524] Article 32(1) of the Energy Governance Regulation.
[525] Article 32(2) of the Energy Governance Regulation.
[526] Article 32(3) of the Energy Governance Regulation.

of the Commission, the Energy Governance Regulation has set two systems: (i) the issue of recommendations, in case the objectives set by the Member States are not sufficiently ambitious and (ii) the proposal of measures and exercise of its powers in case there is a risk of not achieving the overall European energy target. As per the recommendations, it seems that the powers of the Commission are quite soft. Indeed, while the Member State has to take into due account the recommendation of the Commission, the sole following obligation is for it to address such recommendation in a report the year after. Accordingly, it is not clear whether the Commission has any substantial power of starting an infringement procedure against the Member State that is not sufficiently ambitious, because the relevant obligation here is to report to the Commission and not to comply with the recommendation; moreover, in none of the provisions of the Energy Governance Regulation or of the Recast Directive it is specified that the nationally set renewable energy target is binding on the Member State. Accordingly, it is impossible for the Commission to ask the Member State to comply with the objectives that it has decided itself. On the other hand, what "proposing measures and exercising its powers" means is not clear either. It is possible to argue that the Commission is entitled to propose alternative measures to the Member States alternative measures that would ensure the achievement of the overall EU target, but it's not clear if the exercise of its powers would allow it to start an infringement procedure against the Member State and on what grounds. It is in fact possible to assume that until 2030 the Commission can only forecast the achievability of the target through modelling scenarios, but it cannot enforce any recommendation, measure or alternative solution until the overall target – the only one that is actually binding – has not been achieved in 2030. Interestingly, the Energy Governance Regulation refers to the principle of solidarity in its Article 34. In this sense the Regulation seems to underline the importance of a collective approach to the achievement of the energy objectives, although it seems to be a bit too optimistic, as it is not coupled with enforceable obligations.

Moreover, flexibility mechanisms are still provided by the Recast Directive. The regulation of statistical transfers and joint projects has remained substantially unchanged with respect to the previous directive, except for the fact that the calculation of the renewable energy produced or exchanged through these methods counts for the overall EU target, instead of the single national targets[527]. It thus seems that flexibility for Member States has been even enhanced by this new directive. It is not clear however how these mechanisms should support the work of Member States towards higher shares of renewables. Indeed, while in the old

[527] Articles 8-12 of the Recast Directive.

directive the flexibility mechanisms had been introduced in order to mitigate the burden imposed on Member States by the binding targets, in this case it is not clear which burden they should actually mitigate. As a consequence, one may actually wonder whether their only function is to make the directive comply with the limitations of EU competence introduced by Article 194 TFEU.

From an internal energy market perspective, the Recast Directive adds something both on support schemes and administrative procedures. According to Article 4, support schemes shall be subject to State aid rules – that after the adoption of the 2014-2020 Guidelines are now harmonized. In order to ensure the stability of the energy market and so as to ensure reliability of investment in renewables, the Recast Directive now provides that "*Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support*"[528]. This new provision is particularly important in order to ensure that the legitimate expectations of citizens and companies are respected and that the markets can function adequately[529].

In addition, Member States shall also publish a long-term schedule anticipating the expected allocation of support, covering, as a reference, at least the following five years, or, in the case of budgetary planning constraints, the following three years. Moreover, as in the Directive 2009/28, Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures are proportionate and necessary, but they shall also ensure that "*their competent authorities at national, regional and local level include provisions for the integration and deployment of renewable energy, including for renewables self-consumption and renewable energy communities, and the use of unavoidable waste heat and cold when planning, including early spatial planning, designing, building and renovating urban infrastructure, industrial, commercial or*

[528] Article 6 of the Recast Directive.

[529] The provision would have been particularly relevant in the Italian context, where in 2014 the legislative decree 91/14 suddenly modified (and reduced) the conditions and modalities according to which the renewable energy plants located in Italy could receive support (by way of a feed-in tariff) by the State. Particularly striking was the fact that the legislative decree, adopted in June 2014, was enforceable as of June 2014, thus producers saw their supports cut without any notice. On 20 November 2018, the Italian administrative tribunal (TAR Lazio) referred the case to the Court of Justice for interpretation and the case is now lodged at the ECJ as case C-798/18 Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others. The questions asked by the national administrative Court mainly refer to the compatibility of the national legislation with the general principles of EU law of legitimate expectations, legal certainty, loyal cooperation and *effet utile*, together with Directive 2009/28 and the provisions on State aid.

residential areas and energy infrastructure"[530]. In this sense, the Recast Directive does not only require that administrative procedures are manageable by citizens and investors and that ensure the correct functioning of the market, but it also requires a much higher coordination of its provisions with those included in the Energy Efficiency Directive[531] and in the Energy Performance of Buildings Directive[532] and that relate to renewables. Clearly, this should play as a further stimulus to the development of renewables and shows a new holistic approach to clean energy (which was indeed one of the objectives of the Clean Energy Package).

Moreover, Article 16 provides that "*Member States shall set up or designate one or more contact points. Those contact points shall, upon request by the applicant, guide through and facilitate the entire administrative permit application and granting process. The applicant shall not be required to contact more than one contact point for the entire process. The permit-granting process shall cover the relevant administrative permits to build, repower and operate plants for the production of energy from renewable sources and assets necessary for their connection to the grid*". The single administrative contact point shall make available a manual of procedures for developers of renewable energy production projects and shall provide that information also online, addressing distinctly also small-scale projects and renewables self-consumers projects. Lastly, the permit granting process shall not exceed a period of two years.

Overall, the Recast Directive seems to go in the direction of an actual recognition of the existence of a market for renewable energies and it gives some further space for its integration. Indeed, the directive acknowledges the progresses that have been made with respect to 2009 and it recognizes self-consumers and energy communities that, although actually existing in the market, had been so far neglected by EU regulations. These developments are also in line with the introduction of Article 194 TFEU, which in principle should allow for an integrated regulation of the energy sector, without having to resort to other legal bases. However, the new constitutional provision has also given space to the fears

[530] Article 15 of the Recast Directive.
[531] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56 as amended by Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency, PE/54/2018/REV/1, OJ L 328, 21.12.2018, p. 210–230.
[532] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13–35 as amended by Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, PE/4/2018/REV/1, OJ L 156, 19.6.2018, p. 75–91.

that had come up under the previous framework: Member States have now a formal instrument for limiting – or even blocking – the action of the European Union in the energy sector. As a consequence, the new autonomy of the energy policy may actually push the Commission and the EU institutions to lower their policy targets and be subjected to the pressures coming from nationalist Member States. This has particularly been visible with the proposed Renewable Energy Directive, where the Commission has not pushed further in imposing binding obligations on the Member States, but instead it has relied on the natural evolution of the markets and the national experiences built under the implementation of the previous framework in order to advance its renewable energy policy. In our opinion, the use of Article 194 TFEU has certainly given a positive legal signal on the importance of the new provision for future energy policies (and it is probably the reason why the Commission has chosen this instead of other options), but it has also lowered the ambition of the policy objectives.

The adoption of the Recast Directive has been preceded by long negotiations that have been going on since its publication in November 2016. For the purpose of the present work, it is interesting to notice that both the choice of the legal basis and the overall EU target have been a matter for discussion, both in the Council and the European Parliament. As per the legal basis, the Council proposed in November 2017 the addition of Article 192.1 TFEU as joint legal basis[533]. In addition, the Council added that the Directive "*pursues the environmental objectives of preserving, protecting and improving the quality of environment, of protecting human health and of a prudent and rational utilisation of natural resources through the development of new and renewable forms of energy. As regards this Directive both sets of objectives are indissociably linked while none is secondary or indirect to the other*". The purpose of the Council was thus to justify the introduction of the additional legal basis with a wording that could be safely reviewed by a possible decision of the ECJ.

Similarly, the European Parliament also proposed the addition of Article 191 TFEU as additional legal basis. Interestingly, it also asked an opinion to the Committee on Legal Affairs of the Parliament, which firmly rejected the possibility of adding the environmental legal basis to the proposed directive. According to the Committee, Article 194 TFEU is a specific legal basis for energy-policy measures. "*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)*

[533]General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), ST 8697 2017 REV 3 - 2016/0382 (COD).

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"[534]. Moreover, "*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*"[535].

The fact that both the Council and the Parliament proposed the introduction of a second environmental legal basis is relevant, because it shows how the interpretation on the nature of renewable energy policy is still uncertain. Indeed, while the Commission showed the will to insert it completely in the energy regulatory framework, the other institutions and the Member States showed that they still considered it as part of the environmental policy.

The discussion on the overall EU target is also very much connected to the interpretation of the renewable policy as environmental. Indeed, while in its first draft proposal the Commission had maintained the 27% target present in the 2030 Energy Package, the European Parliament fought for a rise of this target up to 35%. In June 2018, during the last trialogue the European Institutions agreed on an overall EU target of 32%[536]. This is an important achievement for the renewable energy policies, although it has not been accompanied by stronger obligations on the Member States or further control powers for the Commission.

5 Conclusion

The EU policy on renewables has undergone important changes in the past 20 years. It has been started as a very indicative strategy, in which Member States were substantially free to determine their targets and the methods through which achieving them. The leading role that the European Community took in the international context in the fight to climate change and its consequent commitments pushed the Commission to adopt more ambitious regulations

[534] Committee on Legal Affairs of the European Parliament, 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)), 7.
[535] Ibid, 9.
[536] Dave Keating and Frédéric Simon, 'EU strikes deal on 32% renewable energy target and palm oil ban after all-night session' *Euractivecom* (14 June 2018) <https://www.euractiv.com/section/energy/news/eu-strikes-deal-on-32-renewable-energy-target-and-palm-oil-ban-after-all-night-session/>.

and policy frameworks in the field of renewable energies, which were considered as a determinant factor in the reduction of GHG emissions. As a consequence, the policy elaborated by the Commission was enshrined in the environmental action of the Union. The lack of the energy competence and the reference to the use of natural resources contained in Article 192 TFEU allowed the elaboration of an ambitious policy. At the time of the adoption of the 2020 Package first, and the Directive 2009/28 then, the Union was able to strongly influence both international and national policies and Member States were keen on embracing these ambitious policies, although it would mean making important efforts in terms both financial and regulatory.

The implementation of the 2020 Package has shown good results in terms of achievement of the EU targets, but it has also shown more and more that the regulation of the energy sector is difficult and that it involves many more issues than the "simple" reduction of GHG emissions. Over the years the market of renewables has developed and it has slowly become an important sector of the European economy. However, given the focus that had been given by the Commission on the environmental aspects rather than the market ones, this market is now far from being integrated and, to the contrary, very different national regulations with regard to support schemes have determined difficulties in the investments in this sector.

In addition, the financial crisis and the changed political situation have determined further difficulties in regulating this sector at EU level. Member States have become increasingly jealous of their regulatory powers in the energy sector, and the support to EU policies has decreased.

Last but not least, the adoption of the Lisbon Treaty and the introduction of the energy competence under Article 194 TFEU has further contributed to the renationalisation of energy competences. Indeed, while having been formally attributed a competence in the energy sector, the Union is now facing a substantial limit in its action, since its policies cannot affect in any way the energy rights of the Member States.

Notwithstanding these issues, in November 2016 the Commission presented a huge reform of the energy sector for the period between 2021 and 2030. Among other acts, it also included a proposal for the recast of Directive 2009/28. The Recast Directive is based on article 194 TFEU, as a signal of the will of the Union to actually made good use of its new competence. However, Recast Directive shows increased prerogatives left to the Member States and lower attention to the environmental aspects of the regulation of renewable

energies. This is symptomatic of the growing relevance of the sector for the internal market, but also of the fear of Member States of allowing EU intrusions in their national systems.

In conclusion, now that the directive has been finally adopted, its transposition and implementation will tell us whether Article 194 TFEU has really been a development for the EU regulatory framework on energy, in particular when it comes to its connection with the environmental action.

VI. CONCLUSION

This thesis has tried to assess the coherency of the constitutional framework of the European Union with regard to energy and environment and the effects of such framework on the development of EU energy policies having environmental aspects.

The historical background described in the Second chapter has shown that the European energy policy was not built in a day, but it is rather the result of a difficult process made of important legislative solutions, but also of political compromises between the instances of the Union against those of Member States. In particular, the energy policy had been initially conceived as mainly linked to the development of the internal market, and it thus focused on the liberalization of the energy market and the creation of a solid electricity infrastructure connecting the European countries. However, the growing importance that the Union has gained in the protection of the environment and in the fight to climate change in the international context pushed the European institutions to also acknowledge the fundamental role of energy in the reduction of Greenhouse Gas Emissions and sustainability in general. For this reason, a number of legislative acts aiming at both the protection of the environment and the regulation of energy in Europe were adopted.

In this context, the constitutional framework played a major role. For great part of its history, the European Community and Union have operated in the energy sector although the Treaties did not provide for any specific enabling provision in this sense. Measures were adopted either pursuant to the Internal Market provisions or pursuant to those in the environmental title or also pursuant to the flexibility clause, depending on the more specific objective that was identified from time to time. The adoption of the Lisbon Treaty and the introduction of Article 194 TFEU was thus a fundamental innovation, because it finally formally empowered the Union to adopt energy measures and it gave constitutional relevance to the energy objectives. However, the wording of this provision is not clear, and many doubts arise as to its interpretation. In particular, two main issues have been identified: (i) the real nature and scope of the new energy competence and (ii) how Article 194 TFEU should coordinate with other relevant provisions in the Treaty and, most importantly, with Article 192 TFEU, which is the legal basis for environmental measures.

The Third chapter has thus been dedicated to the analysis of the EU energy competence. Under Article 4 TFEU energy is listed as one of the sectors in which the European Union enjoys shared competence with the Member States. Accordingly, the Member States should in principle be entitled to adopt national measures in this field only as long as the Union has

not exercised its own competence. The second paragraph of Article 194 TFEU provides however that any EU measures in the energy sector shall not affect the Member States' energy rights, without prejudice to Article 192.2(c) TFEU. This *caveat* clearly imposes relevant limits to the exercise of the competence of the European Union to the point that it is possible to doubt as to whether such competence is truly shared, and which is its relationship with the environmental competence, in particular with regard to the adoption of measures that pursue objectives common to both the environmental and energy titles.

In fact, on one side, the analysis of the *travaux préparatoires* both of the Lisbon Treaty and of the Treaty adopting a Constitution for Europe – where energy competence was firstly proposed – showed that there was actually the intention of the Member States to limit the energy competence, which had been that far interpreted as a creeping competence of the Union. In particular, the *caveat* in the second paragraph of Article 194.2 TFEU seems to suggest that the energy competence has actually more points in common with complementary competences rather than shared competences. The language used is similar to that of parallel competences. Indeed, in such category of competences national and EU powers can be exercised in parallel, the pre-emption principle does not apply, and Member States are more tightly bound by their loyal cooperation obligations. As a result, Member States can continue legislating in the same areas in which the Union has intervened, and the power of the European institutions is limited to coordinating national policies.

On the other side, the way the energy objectives are drafted, together with the safeguard for the provisions under Article 192.2(c) TFEU, suggest that the powers of the Union are further limited in those areas of energy in which also environmental aspects are taken into consideration (e.g. the promotion of renewable energy). Not only the objectives are limited to the "promotion" of those aspects of the energy sector, but also Member States' energy rights can be "significantly affected" by EU measures, when they are adopted in the pursuit of environmental objectives. However, given the limits imposed by the conferral principle, according to which the Union cannot broaden its competence beyond what has been explicitly conferred in the Treaties by reason of the objectives pursued, the Union is not entitled to pursue its energy objectives with the degree of competence conferred under other Treaty provisions – namely the environment title. As a result, it must be maintained that only the environmental competence of the European Union allows and justify it in case it affects the Member States' energy rights, while it is completely excluded from this possibility under Article 194 TFEU.

The most direct consequence of such difficult interpretation of the energy competence is the possibility for the European institutions of not being able to fully pursue its energy objectives. In particular, it seems that the formal introduction of a new energy competence has paradoxically created a situation for the Union more unfavourable than the previous. In fact, while in the previous constitutional regime the European institutions were free to adopt energy measures under other (generally broader) competences, it is must now resort to Article 194 TFEU, as the more specific provision for the pursuit of the energy objectives.

In particular, the increasingly important role of the European energy policy in the fight to climate change tightens the link between energy and environmental provisions. In this perspective, a further issue arises: the choice of the correct legal basis. Indeed, it is undeniable that policies on energy efficiency or renewable energies have an environmental component. It is however unclear whether such component is sufficiently important to possibly justify the adoption of measures in this field under the environmental competence. The adoption of such measures is one of the objectives of Article 194 TFEU, but it also convers some of the objectives of Article 191 TFEU. As a result, these measures could be in theory also adopted under the environmental competence or, alternatively, choosing a dual legal basis.

In Chapter four the interaction between Articles 192 and 194 TFEU as possible legal bases for energy measures has been analysed starting from the case law of the European Court of Justice on the choice of the legal basis. The criteria elaborated by the Court have shown that problems could arise when a measure pursues both energy and environmental aims and it could affect Member States' energy rights. In these cases, the use of dual legal basis is possible, but, given the *caveat* of Article 194.2 TFEU, the impact on the energy rights should be justified by the pursuit of the environmental objectives. As a consequence, the majority of the energy policy objectives (namely, ensuring the functioning of the energy market, ensuring security of energy supply and promoting the interconnection of energy networks) would be excluded, because they have no environmental aspect. Moreover, if the proposed measure *significantly* affects national energy rights, it could not be adopted under a dual legal basis because Articles 194.2 and 192.2(c) TFEU provide for incompatible legislative procedures (namely, the ordinary and the special legislative procedure, with unanimity in the Council). As a consequence, such measure could only be based on Article 192 TFEU.

Such interpretation is however unsatisfactory, because it voids Article 194 TFEU of much of its scope, since it is clear that some of its objectives also have an environmental component, which should not in any case justify the recourse to another legal basis. For this reason, the Union should be allowed to pursue these objectives under the energy competence while maintaining its powers as wide as possible. It has been thus submitted that the general principles of EU law should apply here as to guarantee that the scope of the Treaties is safeguarded. It has thus been shown that the principle of solidarity is fundamental in the implementation of the energy policy. The interconnection of energy markets and infrastructures, together with the inter-dependency of the Member States in the production of energy clearly call for their joint action and support. In particular, the combination of energy and environmental objectives is an additional reason for the collaboration among Member States. Indeed, while the regulation of the energy sector has usually been a reason for nationalist approaches and fragmentation, the protection of the environment is a much more generally perceived exigency that can move Member States to solidaristic approaches. In this sense the creation of common overall targets, for example in the renewable sector, is a good example of the Union pushing the Member States to contribute all together to the functioning of the European energy market.

Together with the solidarity principle, also the environmental integration principle should play an equally important role. Indeed, it is among the obligations of the Union under the Treaties to integrate the environmental objectives in all its policies. It has thus shown that a purposive and integrated approach should be taken in the interpretation of Article 194 TFEU, so that the overall objectives of the Union – and not only those of the sectoral provision – should be pursued. In this sense, since the environmental integration requires that the objectives of Article 191 TFEU are transposed into other Union's policies, the actions allowed under the environmental sectoral provisions should also be allowed under other sectoral policies. In this sense, the integrated pursuit of environmental objectives would in principle allow the Union to adopt measures that affect a Member State's energy right even pursuant to Article 194 TFEU. The applicability of the *caveat* of the second paragraph of Article 194.2 TFEU would thus be limited to measures "significantly affecting" a Member State's energy right, as this is considered as an exception even under Article 192 TFEU.

Lastly, the applicability of the principle of proportionality has been assessed. As a guiding principle for the exercise of the Union's competences, its better assessment when adopting energy measures would be beneficial. Such assessment should in any case not be done with regard only to the objectives of the sectoral policy, but to the overall objectives of the Treaty,

allowing the fluidity of objectives and policy that is peculiar to the post-Lisbon system. Secondly, the principle of proportionality should also apply in the review of EU measures. In particular, the variety of objectives pursued by the energy policy triggers a proportionality assessment similar to that used in internal market issues. The EU legislator should thus assess whether the objective of protecting the environment is a sufficient justification for the affection of the Member State's energy rights. Moreover, it would be a complementary tool to the instruments for the choice of the legal basis and the determination of the main purpose of the measure.

Overall, the use of general principles of EU law would thus allow the European institutions to overcome the difficulties that stem from the unclear wording of Article 194 TFEU and ensure its effective implementation. In fact, it would be contrary to the spirit of the Treaty to limit the development of EU energy policy because of the inconsistencies in the letter of the law. It would be coherent with the creation of an energy competence to allow the Union to adopt as much energy legislation as possible under this legal basis, instead of resorting to other, less appropriate, provisions or being limited in the development of these policies, to the detriment of the future functioning of the Union.

All the issues described above are somehow reflected also in the actual policies implemented by the European institutions. In particular Chapter five has analysed the developments of the EU policy on renewables, showing how it followed the changes and issues that from time to time were present at constitutional level and incorporating them in its texts.

It started as a very indicative strategy, in which Member States were free to determine their targets and the methods through which they would achieve them. However, the role of the European Community in the fight to climate change and its international commitments pushed the Commission to adopt more ambitious regulations and policy frameworks in the field of renewable energies, considered as a central in the reduction of GHG emissions. As a consequence, these policies have been enshrined in the environmental action of the Union for long time, due to the lack of the energy legal basis. Nonetheless, at the time of the adoption of the 2020 Package first, and the Directive 2009/28 then, the Union was able to strongly influence both international and national policies and Member States were keen on embracing these ambitious policies, although it would mean making important efforts in terms both financial and regulatory.

The implementation of the 2020 Package showed good results in terms of achievement of the EU targets, but it has also shown that regulating the energy sector is difficult and that it

cannot be treated as a separated aspect of the European action, but it must be constantly linked with other policies. Over the years the market of renewables developed, and it has slowly become an important sector of the European economy. However, because its environmental aspects had been prioritized over the others, this market is now far from being integrated and the very different national support schemes have determined difficulties in the investments in this sector.

In addition, the financial crisis and the changed political situation have determined further difficulties in regulating this sector at EU level. Member States have become increasingly jealous of their regulatory powers in the energy sector, and the support to EU policies has decreased. Moreover, the relevant limits to the Union competence introduced by Article 194 TFEU have contributed to the renationalisation of energy competences to a certain extent.

In December 2018, the European Union has finally adopted the Recast Directive on renewable energies. It is the first directive having both environmental and energy objectives to be adopted by the European institutions under the new energy legal basis. This shows the intention of the institutions to underline the importance of Article 194 TFEU as the sole possible legal basis for measures that have energy objectives. However, it is also an expression of the problems that this provision brings. In fact, to the contrary of its predecessor, the Recast Renewable Energy Directive allows more discretion to the Member States as to the implementation and it seems that the environmental considerations are now secondary with respect to the need to integrate these energy sources in the market in a fair and proportionate manner.

Overall, it can be submitted that the difficult evolution of the European energy policy has allowed important innovations and measures to be adopted, which have all contributed not only to the creation of an internal energy market but also to the protection of the European environment and the fight to climate change. However, the changes in the constitutional framework connected to this evolution have also shown a progressive mistrust of Member States towards European energy policy. As a result, while the European Union has formally acquired new competences in this sector, it has actually lost or seen reduced some of its powers. This is particularly relevant with regard to those policies, such as the promotion of renewable energies, that cover both environmental and energy aspects. The Union is thus now in the odd situation for which – because of the poor formulation of Article 194 TFEU – it must adopt its energy measures under this provision, but it consequently sees its powers limited. On the other side, it cannot stick to the previous regime either, as the use of Article

192 TFEU is not allowed for energy measures, exactly because of the introduction of the energy competence. Nonetheless, the need to coordinate environmental and energy objectives is essential in the present times and it is equally essential to allow the Union to take as ambitious measures as possible in this field. For this reason, the only possibility is to use traditional instrument of interpretation and crosscutting general principles of law for interpreting Article 194 TFEU. Indeed, contrary to sectoral provisions, the general principles of law such as solidarity, environmental integration and proportionality are generally agreed upon and allow the coherent application of the Treaties, going beyond the simple text of the law in order to implement the overall objectives of the Union.

BIBLIOGRAPHY

Books

Andoura S, *Energy solidarity in Europe: from independence to interdependence* (Notre Europe Jacques Delors Institute 2013)

Andoura S, Hancher L and Van der Woude M, *Towards a European Energy Community: A Policy Proposal* (Notre Europe 2010)

Bassanini F and Tiberi G, *Una costituzione per l'Europa. Dalla Convenzione europea alla Conferenza intergovernativa* (Il Mulino 2003)

Bengoetxea J, *The Legal Reasoning of the European Court of Justice: A contribution to legal theory and European Community Law* (Hart Publishing 1993)

Cannizzaro E, *Il diritto dell'integrazione europea. L'ordinamento dell'Unione* (Giappichelli Editore 2014)

Ciciriello MC, *L'Unione Europea e i suoi principi giuridici* (Editoriale Scientifica 2010)

Corrias L, *The Passivity of Law. Competence and Constitution in the European Court of Justice* (Springer Netherlands 2011)

Craig P, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press 2013)

Curti Gialdino C, *I vizi dell'atto nel giudizio davanti alla Corte di giustizia dell'Unione europea* (Giuffrè Editore 2008)

Daintith T and Hancher L, *Energy Strategy in Europe: The Legal Framework* (Walter de Gruyter & Co 1986)

de Baere G, *European Union Law* (Oxford University Press 2014)

de Búrca G, *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005)

Della Cananea G and Franchini C, *I principi dell'amministrazione europea* (2 edn, Giappichelli 2013)

Guastaferro B, *Legalità sovranazionale e legalità costituzionale : tensioni costitutive e giunture ordinamentali* (Giappichelli 2013)

Habermas J, *Between facts and norms: contributions to a discourse theory of law and democracy* (Polity 1996)

Holland M, *European Integration: From Community to Union* (Pinter Pub Ltd 1994)

Ippolito F, *Fondamento, attuazione e controllo del principio di sussidiarietà nel diritto della Comunità e dell'Unione europea* (Giuffrè Editore 2007)

Jans JH and Vedder H, *European environmental law after Lisbon* (Europa Law Publishing 2012)

Jans JH and Vedder HHB, *European environmental law* (Europa Law Publishing 2008)

Karagiannis N, *European Solidarity* (Liverpool University Press 2007)

Krämer L, *Casebook on EU Environmental Law* (Hart Publishing 2002)

Lenaerts K, *Le juge et la Constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen* (Bruylant 1988)

Lenaerts K and Van Nuffel P, *European Union Law* (3rd edn, Sweet & Maxwell 2011)

Manservisi S, *Energie rinnovabili e pianificazione energetica sostenibile. Profili europei ed internazionali* (Jovene 2016)

Marletta M, *Energia. Integrazione europea e cooperazione internazionale* (Giappichelli 2011)

Nowak B, *Energy Policy of the European Union. Chosen legal and political aspects and their implications for Poland* (WAiP 2009)

O'Keeffe D and Twomey PM (eds), *Legal issues of the Maastricht Treaty* (Wiley Chancery Law 1994)

Patterson W, *Transforming electricity: the coming generation of change* (Nature 1999)

Persano F, *L'energia tra diritto internazionale e diritto dell'Unione europea: disciplina attuale e prospettive di sviluppo* (Giuffrè Editore 2012)

Pescatore P, *The law of integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities.* (Sijthoof 1974)

Quadri S, *Lineamenti di diritto internazionale delle fonti di energia rinnovabile* (Editoriale Scientifica 2008)

Reins L, *Regulating Shale Gas, The Challenge of Coherent Environmental and Energy Regulation* (Edward Elgar Publishing 2017)

Roggenkamp MM and others, *Energy Law in Europe. National, EU and International Regulation* (Oxford University Press 2007)

Ronse T, *Les compétences de l'Union Européenne* (Commentaire J Mégret, Editions de l'Université de Bruxelles 2017)

Rusche TM, *EU Renewable electricity law and policy. From national tagets to a common market.* (Cambridge University Press 2015)

Sbrescia VM, *Le competenze dell'Unione Europea nel Trattato di Lisbona* (Edizioni scientifiche italiane 2008)

Schermers HG and Blokker NM, *International Institutional Law. Unity in diversity.* (4th edn, Martinus Nijhoff Publishers 2003)

Schermers HG and Waelbroeck DF, *Judicial protection in the European Communities* (Kluwer Law International 2001)

Schrijver N, *Sovereignty over natural resources: balancing rights and duties* (Cambridge University Press 1997)

Schutze R, *European Constitutional Law* (Oxford University Press 2016)

Shaw J, *Social Law and Policy in an Evolving EU* (Hart 2000)

Talus K, *EU energy law and policy a critical account* (Oxford university press 2013)

Tesauro G, *Diritto dell'Unione europea* (7 edn, CEDAM 2012)

Tridimas T, *The general principles of EU law* (Oxford EC Law Library, 2 edn, Oxford University Press 2006)

Von Bogdandy A, *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo* (Editoriale Scientifica 2011)

Weiler J, *Il sistema comunitario europeo. Struttura giuridica e processo politico* (Il Mulino 1985)

Wheaton H, *Reports of cases argued and adjudged in the Supreme Court of the United States*, vol 4 (John Conrad and Company 1835)

Zambrano V, *Il principio di sovranità permanenente dei popoli sulle risorse naturali tra vecchie e nuove violazioni* (Giuffrè Editore 2009)

Contributions in edited books

Amabili F, 'L'energia sostenibile' in Giuffrida R and Amabili F (eds), *La tutela dell'ambiente nel diritto internazionale ed europeo* (Giappichelli Editore 2018)

Amadeo S, 'Articolo 11 TFUE' in Tizzano A (ed) *Trattati dell'Unione europea* (Giuffrè 2013)

Amadeo S, 'Articolo 192 TFUE' in Tizzano A (ed) *Trattati dell'Unione europa* (Giuffrè 2013)

Amadeo S, 'Articolo 193 TFUE' in Tizzano A (ed) *Trattati dell'Unione europea* (Giuffrè 2013)

Azoulai L, 'Introduction: the question of competence' in Azoulai L (ed) *The Question of Competence in the European Union* (Oxford University Press 2014)

Bast J, 'Deepening supranational integration: interstate solidarity in EU migration law' in Biondi A and others (eds), *Solidarity in EU law Legal principle in the making* (Elgar Publishing 2016)

Battista J, 'Articolo 194' in Gialdino CC (ed) *Codice dell'Unione europea operativo TUE e TFUE commentati articolo per articolo* (Edizioni Simone 2012)

Bermann GA, 'Competences of the Union' in Tridimas T and Nebbia P (eds), *European Union Law for the Twenty-first Century Rethinking the New Legal Order*, vol 1 (Hart Publishing 2004)

Biondi A, 'Le competenze normative dell'Unione' in Rossi LS (ed) *Il progetto di Trattato-Costituzione Verso un nuova architettura dell'Unione Europea* (Giuffrè Editore 2004)

Blumann C, 'Rapport introductif général' in Blumann C (ed) *Vers une politique européenne de l'énergie* (Bruylant 2012)

Bradley KSC, 'Powers and procedures in the EU constitution: legal bases and the Court' in Craig P and de Búrca G (eds), *The evolution of EU law* (Oxford University Press 2011)

Cannizzaro E, 'L'intéraction entre objectifs politiques et compétences matérielles dans le système normatif de l'Union européenne' in Neframi E (ed) *Objectifs et compétences dans l'Union européenne* (Bruylant 2013)

Chaumont CM, 'La signification du principe de spécialité des organizations internationales' *Mélanges offerts à Henri Rolin* (Éditions A. Pedone 1964)

Cremona M, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Craig and De Búrca (eds), *The Evolution of European Law*, 2nd edn (Oxford University Press, forthcoming 2011)

Cremona M, 'A reticent Court? Policy objectives and the Court of Justice' in Cremona M and Thies A (eds), *The European Court of Justice and external relations law: constitutional challenges* (Hart Publishing 2014)

Cremonini RM, 'Il principio di solidarietà nell'ordinamento europeo' in Mangiameli S (ed) *L'ordinamento europeo I principi dell'Unione* (Giurffrè 2006)

Crossley P, 'The role of renewable energy law and policy in meeting the EU's energy security challenge' in Leal-Arcas R and Wouters J (eds), *Research handbook on EU energy law and policy* (Edward Elgar Publishing 2017)

Dagilyte E, 'Solidarity: a general principle of EU law? Two variations on the solidarity theme. ' in Biondi A and others (eds), *Solidarity in EU law* (Elgar 2018)

de Búrca G, 'Europe's *raison d'être*' in Kochenov D and Amntenbrink F (eds), *The European Union's shaping of the International Legal Order* (Cambridge University Press 2014)

de Búrca G and De Witte B, 'The delimitation of powers between the EU and its Member States' in Arnull A and Wincott D (eds), *Accountability and legitimacy in the European Union* (Oxford University Press 2002)

Derdevet M, 'L'énergie dans le Traité de Lisbonne: un premier pas vers une communauté européenne de l'énergie?' in Raccah A (ed) *Le Traité de Lisbonne: de nouvelles compétences pour l'Union européenne?* (L'Harmattan 2012)

Hancher L and Salerno FM, 'State aid in the energy sector' in Szyszczak E (ed) *Research handbook on European State Aid Law* (2011)

Hancher L and Salerno FM, 'Energy Policy after Lisbon' in Biondi A and others (eds), *EU law after Lisbon* (Oxford Scholarship 2012)

Howes T, 'The EU's new Renewable Energy Directive (2009/28/EC)' in Oberthür S and Pallemaerts M (eds), *The new Climate Policies of the European Union Internal legislation and Climate diplomacy* (VUBPress 2010)

Lang A, 'Le competenze dell'Unione europea' in Adinolfi G and Lang A (eds), *Il trattato che adotta una costituzione per l'Europa: quali limitazioni all'esercizio dei poteri sovrani degli stati?* (Giuffrè Editore 2006)

Marletta M, 'Il Trattato di Lisbona e l'energia' in Parisi N and others (eds), *Scritti in onore di Ugo Draetta* (Editoriale Scientifica 2011)

Marletta M, 'Articolo 194' in Tizzano A (ed) *Trattati dell'Unione europea* (Giuffrè Editore 2014)

Matláry JH, 'The Development of Energy Policy in the European Union' in Matláry JH (ed) *Energy Policy in the European Union* (Macmillan Education UK 1997)

Mazak J and Moser M, 'Adjudication by reference to general principles of EU law: a second look at the Mangold case law' in Adams M and others (eds), *Judging Europe's judges The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2013)

Michel V, 'Les objectifs à caractère transversal' in Neframi E (ed) *Objectifs et compétences dans l'Union européenne* (Bruylant 2013)

Neergaard UB, 'In search of the role of "solidarity" in primary law and the case law of the European Court of Justice' in Neergaard UB and others (eds), *The role of Courts in developing a European social model – Theoretical and methodological perspectives* (DJØF Publishing 2010)

Neframi E, 'Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'Unione européenne' in Neframi E (ed) *Objectifs et compétences dans l'Union européenne* (Bruylant 2013)

Pace L, 'I principi generali del diritto dell'Unione europea e il "viaggio attraverso i paesi della Comunità"' in Pace L (ed) *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona* (2012)

Peeters M, 'Instrument mix or instrument mess? The administrative complexity of the EU legislative package for climate change' in Peeters M and Uylenburg R (eds), *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar 2014)

Pielow J-C and Lendewel BJ, 'The EU energy policy after the Lisbon Treaty' in Dorsman A and others (eds), *Financial Aspects in Energy: a European Perspective* (Springer 2011)

Pizzetti F, 'Le competenze dell'Unione' in Bassanini F and Tiberi G (eds), *Una costituzione per l'Europa Dalla Convenzione europea alla Conferenza intergovernativa* (Il Mulino 2003)

Potvin Solis L, 'Compétences partagées et objectifs matériels' in Neframi E (ed) *Objectifs et compétences de l'Union Européenne* (Bruylant 2013)

Pozzo B, 'Le politiche ambientali dell'Unione europea' in Bronzini G and others (eds), *Le scommesse dell'Europa Diritti, istituzioni, politiche* (Ediesse 2009)

Preschal S and De Leeuw ME, 'Transparency: A General Principle of EU Law?' in Bernitz U and others (eds), *General principles of EC law in a process of development* (Kluwer Law International 2008)

Ross M, 'Solidarity - a new constitutional paradigm for the EU?' in Ross M and Borgmann-Prebil Y (eds), *Promoting solidarity in the European Union* (Oxford University Press 2010)

Rossi LS, 'Does the Lisbon Treaty provide a clearer separation of competences between EU and Member States?' in Biondi A and others (eds), *EU After Lisbon* (Oxford University Press 2012)

Sandholtz W and Stone Sweet A, 'Neo-functionalism and Supranational Governance' in Jones E and others (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012)

Sandoval I and Morata F, 'Introduction: the re-evolution of energy policy in Europe' in Sandoval I and Morata F (eds), *European Energy Policy An Environmental Approach* (Edward Elgar Publishing 2012)

Solorio I and Bocquillon P, 'EU renewable energy policy: a brief overview of its history and evolution' in Solorio I and Jörgens H (eds), *A guide to EU renewable energy policy - comparing europeanization and domestic policy change in EU Member States* (2017)

Sommermann K-P, 'Article 3 [The Objectives of the European Union]' in Blanke H-J and Mangiameli S (eds), *The Treaty on European Union (TEU)* (Springer-Verlag Berlin Heidelberg 2013)

Timmermans C, 'ECJ Doctrines on Competences' in Azoulai L (ed) *The Question of Competence in the European Union* (Oxford University Press 2014)

Tosato GL, 'La delimitazione delle competenze dell'Unione europea tra istanze europee e nazionali' in Pace L (ed) *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona* (Giuffrè Editore 2012)

Tridimas T, 'Proportionality in Community law: searching for the appropriate standard of scrutiny' in Ellis E (ed) *The principle of proportionality in the laws of Europe* (Hart Publishing 1999)

Tridimas T, 'Competence after Lisbon. The elusive search for bright lines.' in Ashiagbor D and others (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012)

Usher J, 'The development of Community powers after the Single European Act' in White R and Smythe B (eds), *Current Issues in European and International Law* (Sweet & Maxwell 1990)

Vedder H, 'The formalities and substance of EU external environmental competence: stuck between climate change and competitiveness' in Morgera E (ed) *The external environmental policy in the EU: EU and international law* (Cambridge University Press 2012)

Virally M, 'La notion de fonction dans la théorie de l'organization internationale' in Rousseau CE (ed) *Mélanges offerts à Charles Rousseau* (Editions A. Pedone 1974)

Von Bogdandy A, 'Founding principles' in Bast J and Von Bogdandy A (eds), *Principles of European Constitutional law* (Hart Publishing 2010)

Weatherhill S, 'Beyond Preemption? Shared competence and constitutional change in the European Community.' in O'Keefe D and Twomey P (eds), *Legal issues of the Maastricht Treaty* (Chancery Law 1994)

Weatherhill S, 'Competence' in De Witte B (ed) *Ten reflections on the Constitutional Treaty for Europe* (European University Institute 2003)

White ND, 'The World Court, the WHO, and the UN System' in Blokker NM and Schermers HG (eds), *Proliferation of International Organizations - Legal Issues* (2001)

Wiklund O and Bengoetxea J, 'General Constitutional Principles of Community Law' in Bernitz U and Nergelius J (eds), *General Principles of European Community Law* (Kluwer 2000)

Wouters J et al, 'The European Union's External Relations after the Lisbon Treaty' in Griller S and Ziller J (eds), *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* (2008, European Community Studies Association of Austria Publication Series) Vol 11, 173

Journal Articles

Akande D, 'The competence of international organizations and the advisory jurisdiction of the International Court of Justice' (1998) 9 European Journal of International Law 437-467

Alberton M and Montini M, 'Le novità introdotte dal Trattato di Lisbona per la tutela dell'ambiente' (2008) 2 Rivista giuridica dell'ambiente 505-515

Andresen S and others, 'The Paris Agreement: Consequences for the EU and Carbon Markets?' (2016) 4 Politics and Governance 188-196

Baratta R, 'Le competenze dell'Unione tra evoluzione e principio di reversibilità' (2010) 3 Il Diritto dell'Unione Europea 517-554

Barents R, 'The internal market unlimited: some observations on the legal basis of Community legislation' (1993) 30 Common Market Law Review 85-109

Beck G, 'The problem of Kompetenz-Kompetenz: a conflict between right and right in which there is no praetor' (2005) 30 European Law Review 42-67

Bell M, 'The new Article 13 EC Treaty: a sound basis for European anti-discrimination law' (1999) 6 Maastricht Journal of European and Comparative Law 5

Bengoetxea J, 'Review Essay on Xavier Groussot, General Principles of EC Law: The Wider European Law and Jurisprudence Debate' (2006) 45 Common Market Law Review 1279-1303

Boom SJ, 'The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?"' (1995) 43 The American Journal of Comparative Law 177-226

Boysen S and Unger Mv, 'Regulating eu Climate and Energy Matters through Conclusions: The Limits of Consensus' (2015) 12 Journal for European Environmental and Planning Law 128-155

Bradley K, 'The European Court and the legal basis of Community legislation' (1988) 13 European Law Review 379-402

Buchan D, 'Why Europe's energy and climate policies are coming apart?' (July 2013) The Oxford Institute for Energy Studies

Buchan D and Keay M, 'The EU's new energy and climate goals for 2030: under-ambitious and over-bearing?' (2014) The Oxford Institute for Energy Studies

Buchan D, Keay M and Robinson D, 'Energy and climate targets for 2030: Europe takes its foot off the pedal' (October 2014) The Oxford Institute for Energy Studies

Bürgin A, 'National binsing renewable energy targets for 2020, but not for 2030 anymore: why the European Commission developed from a supporter to a brakeman' (2015) 22 Journal of European Public Policy 690-707

Campbell AIL, 'The limits of the powers of international organisations' (1983) 32 International and Comparative Law Quarterly 523-533

Cannizzaro E, 'Gerarchia e competenza nel sistema delle fonti dell'Unione europea' (2005) Il diritto dell'Unione europea 651

Carta M, 'La liberalizzazione dei servizi di interesse economico generale nell'Unione: il mercato interno dell'energia elettrica' (2003) 4 Il Diritto dell'Unione Europea 784

Cavallaro MC, 'Il principio di integrazione come strumento di tutela dell'ambiente' (2007) 2 Rivista italiana di diritto pubblico comunitario 467-483

Cisotta R, 'Disciplina fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi' (2015) 1 Il Diritto dell'Unione Europea 57-90

Cordero Martinez F, 'The EU Energy Market Regulation Puzzle: Is There Still a Way Out? - The Case for a Fourth Energy Package Along Completely Different Lines' (2014) Renewable Energy Law and Policy Review 121-129

Corthaut T, 'Institutional pragmatism or constitutional mayhem? Note to Case C-166/07, *European Parliament v. Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 3 September 2009, [2009] ECR I-7135' (2011) 48 Common Market Law Review 1271-1296

Craig P, 'Competence: clarity, conferral, containment and consideration' (2004) 29 European Law Review 323-344

Craig P, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) 10 European Public Law 653-676

Craig P, 'Case C-133/06, European Parliament v. Council (Delegation of legislative power), judgment of the Grand Chamber of 6 May 2008, [2008] ECR I-3189.' (2009) 46 Common Market Law Review 1265-1275

Cremona M, 'Balancing Union and Member State interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon' (2010) 35 European Law Review 678-694

Crosby S, 'The single market and the rule of law' (1991) 16 European Law Review 451-465

Cross ED, 'Preemption of Member States law in the European Economic Community: a framework for analysis' (1992) 29 Common Market Law Review 447-472

Cullen H and Charlesworth A, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (1999) 36 Common Market Law Review 1243-1270

Dainith T and Hancher L, 'The management of diversity: Community Law as an instrument of energy and other sectorial policies' (1984) 4 Yearbook of European Law 123-167

Dashwood A, 'The relationship between the Member States and the European Union/European Community' (2004) 41 Common Market Law Review 355-381

Davies G, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 Common Market Law Review 63-84

de Sadeleer N, 'Environmental governance and the legal bases conundrum' (2012) 31 Yearbook of European Law 373-401

Dhondt N, 'Integration of environmental protection into the EC energy policy' (2004) 4 The yearbook of European environmental law 247-302

Di Fabio U, 'Some remarks on the allocation of competences between the European Union and its Member States' (2002) 39 Common Market Law Review 1289-1301

Ehricke U and Hackländer D, 'Europäische Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrages von Lissabon' (2008) 4 Zeitschrift für Europarechtliche Studien 579

Emiliou N, 'Opening Pandora's Box: the legal basis of Community measures before the Court of Justice' (1994) 19 European Law Review 488-507

Favilli C, 'L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'"emergenza" immigrazione' (2015) 3 Quaderni costituzionali 785-788

Garben S, 'Confronting the competence conundrum: democratising the European Union through an expansion of its legislative powers' (2015) 35 Oxford Journal of Legal Studies 55-89

Gendarme R, 'Reflexions sur la politique énergetique européenne' (1962) 13 Revue Économique 505-520

Geraci A, '"There is not enough union in this Union". Principio di solidarietà e Sistema di Dublino alla prova del più imponente esodo di profughi dal secondo dopoguerra' (2016) 9 Federalismiit 29

Gerbeti A, 'L'attuazione a livello europeo delle disposizioni sui meccanismi di cooperazione previsti dalla Direttiva 2009/28/CE sulla promozione delle energie rinnovabili' (2013) 1 Rivista giuridica dell'ambiente 125-134

Gill TD, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter' (1995) 26 Netherlands Yearbook of International Law 33-138

Hancher L, 'Energy and the environment: striking a balance?' (1989) 26 Common Market Law Review 475-512

Hancher L, 'A single European Energy Market - Rhetoric or Reality' (1990) 11 Energy Law Journal 217-242

Haraldsdóttir K, 'The limits of EU competence to regulate conditions for exploitation of energy resources: analysis of Article 194(2) TFEU' (2014) 23 European Energy and Environmental Law Review 208

Harbo TI, 'The function of the proportionality principle in EU law' (2010) 16 European Law Journal 158-185

Hartwig I and Nicolaides P, 'Elusive Solidarity in an Enlarged European Union' (2003) 3 Eipascope 19

Hilpold P, 'Understanding solidarity within EU law: an analysis of the "Islands of Solidarity" with particular regard the Monetary Union' (2015) 34 Yearbook of European Law 257-285

Hoffmann L and Shaw J, 'Constitutionalism and federalism in the future of Europe debate: the German dimension' (2004) 03/04 Federal Trust Paper

Jans JH, 'Stop the integration principle?' (2010) 33 Fordham International Law Journal 1533-1547

Johnston A and Van der Marel E, 'Ad lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU' (2013) 5 European Energy and Environmental Law Review 181

Kingston S, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 European Law Journal 780-805

Klamert M, 'Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?' (2010) 35 European Law Review 497-515

Koutrakos P, 'Case C-94/03, Commission v. Council, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-1; Case C-178/03, Commission v. Parliament and Council, judgment of the Second Chamber of 10 January 2006, [2006] ECR I-107.' (2007) 44 Common Market Law Review 171-194

Küçük E, 'Solidarity in EU law' (2016) 23 Maastricht Journal of European and Comparative Law 965-983

Kulovesi K, Morgera E and Muñoz M, 'Environmental integration and multi-faceted international dimensions of EU law: unpacking the EU's 2009 climate and energy package' (2011) 48 Common Market Law Review 829-891

Lauber V, 'The European Experience with Renewable Energy Support Schemes and Their Adoption: Potential Lessons for Other Countries' (2011) 2 Renewable Energy Law and Policy Review 120

Leal-Arcas R and Filis A, 'Conceptualizing EU Energy Security through an EU Constitutional Law Perspective' (2013) 36 Fordham International Law Journal 1225-1301

Leal-Arcas R and Minas S, 'Mapping the International and European Governance of Renewable Energy' (2016) 35 Yearbook of European Law 621–666

Lee M, 'The environmental implications of the Lisbon Treaty' (2008) 10 Environmental Law Review 131-138

Lenaerts K, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) University Of Chicago Legal Forum 93-133

Lenaerts K, 'The principle of subsidiarity and the environment in the European Union: Keeping the balance of federalism' (1993) 17 Fordham International Law Journal 846

Manzella A, 'La ripartizione di competenze tra Unione Europea e Stati Membri.' (2000) XX Quaderni costituzionali 531-543

Marenco G, 'Les conditions d'application de l'article 235 du Traité CEE' (1970) 13 Revue du Marché Commun 147-157

Massera A, 'I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario' (2005) 4 Diritto amministrativo 707

Mayer FC, 'Competences-reloaded? The vertical division of powers in the EU and the new European constitution' (2005) 3 International Journal of Constitutional Law 493-515

Mengozzi P, 'L'immigrazione e la giurisprudenza della Corte di giustizia dell'Unione europea' (2016) 3 Il Diritto dell'Unione Europea 587-602

Michel V, '2004: Le défi de la répartition des compétences' (2003) 1-2 Cahiers de Droit Européen 17-86

Monti G, 'Article 81 EC and public policy' (2002) 39 Common Market Law Review 1057

Montini M, 'L'accordo di Parigi sui cambiamenti climatici' (2015) 4 Rivista giuridica dell'ambiente 517-528

Munari F, 'Il nuovo diritto dell'energia: il contesto comunitario e il ruolo degli organi europei' (2006) 4 Il Diritto dell'Unione Europea 881-900

Nespor S, 'La lunga marcia per un accordo globale sul clima: dal protocollo di Kyoto all'accordo di Parigi' (2016) 1 Rivista trimestrale di diritto pubblico 81-121

Nicolaides P, 'The legal differences and economic similarities of various methods of supporting green electricity under state aid rules' (2014) 35 European Competition Law Review 227

Olmi G, 'La place de l'article 235 CEE dans le système des attributions de compétence à la Communauté' (1979) 2 Mélanges Dehousse 273-294

Papa MI, 'Crisi dei rifugiati, principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'Unione europea' (2016) 3 Costituzionalismoit 41

Peeters M, 'Governing towards renewable energy in the EU: competences, instruments, and procedures' (2014) 21 Maastricht Journal of European and Comparative Law 39

Peeters M, 'An EU law perspective on the Paris Agreement: will the EU consider strengthening its mitigation effort?' (2016) 6 Climate law 182-195

Poiares Maduro M and Grosso G, 'Quale Europa dopo la sentenza della Corte costituzionale tedesca sul Trattato di Lisbona?' (2009) 3 Il Diritto dell'Unione Europea 503-527

Politi M, 'Energia nel diritto comunitario' (1991) IV Digesto delle discipline pubblicistiche 1-11

Pozzo B, 'Le politiche comunitarie in campo energetico' (2009) 6 Rivista giuridica dell'ambiente 841-876

Radicati Di Brozolo LG, 'Profili di diritto comunitario del mercato dell'energia elettrica' (1995) Rivista italiana di diritto pubblico comunitario 431

Randazzo V, 'Case C-155/07, Parliament v. Council, judgment of the Court (Third Chamber) of 6 November 2008, not yet reported' (2009) 46 Common Market Law Review 1277-1291

Rashbrooke G, 'Clarification or Complication? The new energy title in the Draft Constitution for Europe' (2004) 22 Journal of Energy & Natural Resources Law 373-387

Razzitti L, 'Principi ed evoluzione della normativa e della politica comunitaria in tema di energia elettrica' (1996) Rassegna giuridica dell'energia elettrica 597

Reins L, 'In search of the legal basis for environmental and energy regulation at the EU level: the case of unconventional gas extraction' (2014) 23 Review of European Community and International Eunvironmental Law 125-133

Rinella A, 'Osservazioni in ordine alla ripartizione delle competenze tra Comunità europea e Stati membri alla luce del principio di sussidiarietà' (1994) XIV Quaderni costituzionali 431-450

Rizzo A, 'Ricollocazione infracomunitaria e principio di solidarietà: un nuovo paradigma per le politiche d' asilo dell' Unione' (2017) 3 La comunità internazionale 397-419

Roberti GM, 'La giurisprudenza della Corte di giustizia sulla base giuridica degli atti comunitari' (1991) IV Foro it 99-119

Rossi LS, 'I principi enunciati dalla sentenza della corte costituzionale tedesca sul Trattato di Lisbona: un'ipoteca sul futuro dell'integrazione europea?' (2009) 4 Rivista di diritto internazionale 993-1015

Sánchez Galera MD, 'The Integration of Energy and Environment under the Paradigm of Sustainability threatened by the Hurdles of the Internal Energy Market' (2017) 26 European Energy and Environmental Law Review 13-25

Sangiovanni A, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213

Schaffrin D, 'Dual legal bases in EC environmental law revisited: note on the judgments of the European Court of Justice in the cases C-94/03 (Commission of the European Communities v. Council of the European Union) and C-178/03 (Commission of the European Communities v. European Parliament and Council of the European Union)' (2006) 15 Review of European, Comparative and International Environmental Law 339-343

Schmitt von Sydow H, 'The Dancing Procession of Lisbon: Legal Bases for European Energy Policy' (2011) 1 European Energy Journal 33-46

Schumacher T, 'The environmental integration clause in Article 6 of the EU Treaty: prioritising environmental protection' (2001) 3 Environmental Law Review 29-43

Schutze R, 'Organized change towards an “Ever Closer Union”: Article 308 EC and the limits to the Community’s legislative competence' (2003) 22 Yearbook of European Law 79-115

Schutze R, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order' (2006) 31 European Law Review 167-184

Schutze R, 'Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption.' (2006) 43 Common Market Law Review 1023-1048

Schutze R, 'Lisbon and the federal order of competences: a prospective analysis' (2008) 33 European Law Review 709-722

Schwarze J, 'Constitutional perspectives of the European Union with regard to the next Intergovernmental Conference in 2004' (2002) 8 European Public Law 241-254

Siddi M, 'The EU’s Energy Union: A Sustainable Path to Energy Security?' (2016) 51 The international spectator - Italian Journal of International Affairs 131-144

Skjærseth JB, 'The Climate Policy of the EC: too Hot to Handle?' (1994) 32 Journal of Common Market Studies 25-45

Sokoøowski MM, 'European Law on the Energy Communities: a Long Way to a Direct Legal Framework' (2018) April European Energy and Environmental Law Review 60-70

Somsen H, 'Case C-300/69, Commission v. Council (Titanium dioxide), Judgment of 1 1 June 199 1, not yet reported' (1992) 29 Common Market Law Review 140-151

Stoczkiewicz M, 'The Climate Policy of the European Union from the Framework Convention to the Paris Agreement' (2018) 15 Journal for European Environmental and Planning Law 42-68

Stokes E, 'New EU policy on shale gas' (2014) 16 Environmental Law Review 42-49

Strazzari D, 'Le competenze complementari e il metodo aperto di coordinamento: suggerimenti per un ruolo più attivo delle Regioni in ambito comunitario' (2003) 1 Diritto pubblico comparato ed europeo 221-251

Strozzi G, 'Alcuni interrogativi a proposito della delimitazione delle competenze nell’Unione Europea' (1994) Rivista di diritto internazionale 136-141

Swenden W, 'Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism' (2004) 42 Journal of Common Market Studies 371-392

Toniatti R, 'Conflitti di competenza e forma di governo comunitaria: un contributo della Corte europea di giustizia. Nota a C-42/97. Parlamento c. Consiglio' (1999) 3 Diritto pubblico comparato ed europeo 1149-1157

Tridimas T, 'The European Court of Justice and judicial activism' (1996) 21 European Law Review 199

Tyagi Y, 'Permanent sovereignty over natural resources' (2015) 4 Cambridge Journal of International and Competition Law 588

Van Nuffel P, 'Working Time Directive (UK v. Council)' (1997) 3 Columbia Journal of European Law 298-309

Vedder H, 'Analysis: The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental LAw 285

Von Bogdandy A, 'The European Union's vertical order of competences: the current law and proposals for its reforms' (2002) 39 Common Market Law Review 227-268

Von Bogdandy A, 'I principi costituzionali dell'Unione europea' (2005) 6 Federalismi.it

Von Bogdandy A, 'Founding principles of EU law: a theoretical and doctrinal sketch' (2010) 16 European Law Journal 95-111

Wagenbaur R and Wainwright R, 'European Community Energy and Environment Policy' (1996) 16 Yearbook of European Law 59-86

Wasmeier M, 'The integration of environmental protection as a general rule for interpreting Community law' (2001) 38 Common Market Law Review 159-177

Weatherill S, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1-55

Weiler JHH, 'The transformation of Europe' (1991) 100 Yale Law Journal 2403-2483

Wenneras P, 'Towards an ever greener Union? Competence in the field of the environment and beyond' (2008) 45 Common Market Law Review 1645-1685

Conference proceedings

Clement W, *Europa gestalten – nicht verwalten. Die Kompetenzordnung der Europaïschen Union nach Nizza* (FCE 2001)

Reports

Fouquet D, Nysten JV and Johnston A, *Potential areas of conflict of a harmonised RES support scheme with European Union Law* (European IEE-project beyond 2020, 2012)

Fouquet D, Nysten JV and Johnston A, *Potential areas of conflict of a harmonised RES support scheme with European Union Law*, 2012)

EU legislation

Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ L 31, 5.2.1976

Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20–29

Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas OJ L 204, 21.7.1998, p. 1–12

Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, p. 33–40

Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings OJ L 1, 4.1.2003, p. 65–71

Council Resolution of 3 March 1975 on energy and the environment [1975] OJ C 168, 25.7.1975, p. 2–3

Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users [1990] OJ L 185, 17.7.1990

Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids [1990] OJ L 313, 13.11.1990, p. 30–33

Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids [1990] OJ L 147, 12.6.1991, p. 37–40

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, 22.7.1992, p. 7–50

Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons [1994] OJ L 164, 30.6.1994, p. 3–8

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity OJ L 283, 31.10.2003, p. 51–70

Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37–56

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1–98

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 Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62

Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 5.6.2009, p. 63–87

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20, 26.1.2010, p. 7–25

Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13–35

Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, p. 1–56

Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78

Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, OJ L 198, 28.7.2017, p. 1–23

Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, p. 26–42

Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, PE/4/2018/REV/1, OJ L 156, 19.6.2018, p. 75–91

Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the

European Parliament and of the Council, PE/55/2018/REV/1, OJ L 328, 21.12.2018, p. 1–77

Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, PE/48/2018/REV/1, OJ L 328, 21.12.2018, p. 82–209

Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency, PE/54/2018/REV/1, OJ L 328, 21.12.2018, p. 210–230

Documents of the European Commission

Communication from the Commission - An overall view of energy policy and actions COM(1997)167 final

Green paper - For a European Energy policy COM(1994)659 final

Green Paper: Towards a European strategy for the security of energy supply, COM (2000)769 final

Preliminary report on the problems of pollution and nuisances originating from energy production (with a special emphasis on SO2, particulate matter, NOx and thermal discharges). SEC (74) 1150 final. 3 April 1974

The Development of an Energy Strategy for the Community. Communication from the Commission to the Council. Mandate of 30 May 1980. COM (81) 540 final, 2 October 1981. Bulletin of the European Communities, Supplement 4/81, pp. 7-20

Completing the Internal Market. White paper from the Commission to the European Council COM(1985)310 final

The Internal Energy Market (Commission working document), COM(1988)238 final

Intergovernmental Conferences: Contributions by the Commission. Bulletin of the European Communities, Supplement 2/91

European social policy - a way forward to the Union – A white paper, COM(1994) 333 final

An Energy Policy for the European Union – A white paper, COM(1995) 682 final

Communication from the Commission - Eenergy for the Future: Renewable Sources of Energy - Green paper for a Community Strategy, COM(1996) 0576 final

Report from the Commission to the Council on civil protection, tourism and energy SEC(1996) 496 final

Communication from the Commission “Energy for the future: renewable sources of energy. White paper for a Community Strategy and Action Plan”, COM(1997)599 final

Energy for the Future: Renewable Sources of Energy 80 Council Resolution nº 8522/97 of 10 June 1997 81 PE 221/398

Communication from the Commission to the Council, the European Parliament, the Economic and Socila Committee and the Committee of the Regions on the implementation of the Community Strategy and Action Plan on Renewable Energy Sources, COM (2001) 69 final

Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2001) 581 final

Proposal for a Regulation of the European Parliament and of the Council on Shipments of Waste, COM(2003) 379 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - White Paper on services of general interest, COM(2004)0374 final

Commission Green Paper of 8 March 2006: "A European strategy for sustainable, competitive and secure energy”, COM (2006) 105 final

Communication from the Commission to the Council and the European Parliament “Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future”, COM (2006) 848 final

Communication from the Commission to the European Council and the European Parliament “An Energy Policy for Europe”, COM (2007) 12 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 20 20 by 2020 Europe's climate change opportunity, COM (2008) 30 final

Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM (2008) 19 final

Communication from the Commission to the European Parliament and the Council “Renewable Energy: Progressing towards the 2020 target”, SEC (2011) 129 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Energy Roadmap 2050, COM(2011) 885 final

Communication from the Commission Delivering the internal electricity market and making the most of public intervention, COM(2013) 7243 final

Green Paper - A 2030 framework for climate and energy policies, COM(2013) 169 final

Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewable energy progress report, SWD(2013)102 final

2014/70/EU: Commission Recommendation of 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, OJ L 39, 8.2.2014, p. 72–78

Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final

Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, COM(2015) 337 final

Communication from the Commission to the European Parliament and the Council - The Road from Paris: assessing the implications of the Paris Agreement and accompanying the proposal for a Council decision on the signing, on behalf of the European Union, of the Paris agreement adopted under the United Nations Framework Convention on Climate Change, COM(2016) 110 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank "Clean Energy For All Europeans", COM(2016) 860 final

Proposal for a Directive of the European Parliament amd of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final

Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final

Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewable Energy Progress Report, COM(2017) 57 final

European Commission, *2030 climate and energy goals for a competitive, secure and low-carbon EU economy* (IP/14/54 22 January 2014)

Documents of other EU bodies and institutions

Draft Treaty establishing a Constitution for Europe of 18 July 2003, CONV 850/03

European Convention Secretariat, Final Report of Working Group V of 4 November 2002, CONV/375/1/02

European Convention Secretariat, Note from the Praesidium to the Convention on Draft sections of Part Three with comments of 27 May 2003, CONV 727/03

European Convention Secretariat, Note from the Presidium to the Convention on the Draft of Articles 1 to 16 of the Constitutional Treaty of 6 February 2003, CONV 528/03.

European Convention Secretariat, Note of the Praesidium to the Convention on Draft Constitution, Volume I - Revised text of Part One of 26 May 2003, CONV 724/03

European Convention Secretariat, Note on the Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored of 15 May 2002, CONV 47/02

European Convention Secretariat, Note on the plenary meeting - Brussels, 15 and 16 April 2002 of 25 April 2002, CONV 40/02

European Convention Secretariat, Reactions to draft text CONV 802/03 - Analysis of 27 June 2003, CONV 821/03

European Convention Secretariat, Reactions to the draft protocol on the role of National Parliaments in the European Union - Analysis of 12 March 2003, CONV 611/03

European Convention Secretariat, Summary of the meeting on 17 July 2002, CONV 209/02

European Council, Laeken Declaration on the future of Europe, 14-15 December 2001

IGC, CONFER 4711/00 of 22 February 2000

Council of the European Communities. Press Releases. Presidency: Portugal January-June 1992. Meetings and press releases May 1992

Council Resolution of 8 July 1996 on the White Paper 'An energy policy for the European Union' [1996] OJ C 224, 1.8.1996, p. 1–2

2002/358/EC: Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder [2002] OJ L 130, 15.5.2002, p. 1–3

Conference of the Representatives of the Governments of the Member States, IGC 2003 - Meeting of Focal Points (Dublin, 4 May 2004) working document, CIG 73/04, Brussels, 29 April 2004

Conference of the Representatives of the Governments of the Member States, IGC 2003 - Presidency proposal following the Ministerial meeting on 24 May 2004, CIG 79/04, Brussels, 10 June 2004

Conference of the Representatives of the Governments of the Member States, IGC 2003 - Presidency proposals following the meeting of "focal points" on 4 May 2004, CIG 76/04, Brussels, 13 May 2004

Council of the European Union, Brussels European Council 8/9 March 2007 - Presidency Conclusions, 7224/1/07 REV 1

European Council, Conclusions of 23-24 October 2014, EUCO 169/14

Environmental Council, Outcome of the 3452nd Council meeting, 4 March 2016, 6792/16

General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), ST 8697 2017 REV 3 - 2016/0382 (COD)

Committee on Legal Affairs of the European Parliament, 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))

International Agreements

Procedures and mechanisms relating to compliance under the Kyoto Protocol, Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3

Paris Agreement (Dec. 13, 2015), in UNFCCC, COP Report No. 21, Addenum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1

Decisions of the European Court of Justice

Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66

Joined cases 6/69 and 11/69 *Commission v France* [1969] ECR 00523

Case 74/69 *Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co.* [1970] ECR 00451

Case 40/69 *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann* [1970] ECR 00069

Case 22/70 *Commission v Council (ERTA)* [1971] ECR 264

Case 10/71 *Ministère public luxembourgeois v Madeleine Muller* [1971] ECR 723

Case 39/72 *Commission v Italy* [1973] EU:C:1973:13

Case 155/73 *Giuseppe Sacchi* [1974] ECR 409

Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvent Corporation v Commission* [1974] ECR 224

Case 31/74 *Filippo Galli* [1975] ECR 47

Joined Cases 3,4,6/76 *Kramer* [1976] ECR 1279

Case 128/78 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Tachographs)* [1979] ECR 00419

Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629

Case 804/79 *Commission v United Kingdom* [1981] ECR 1045

Case 15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijzen* [1982] ECR 1409

Case 53/81 *Levin* [1982] ECR 1035

Case 28/84 *Commission v Germany* [1985] ECR 3097

Case 195/84 *Denkavit Futtermittel GmbH v Minister fur Ernährung des Landes Nordrhein Westfalen* [1985] ECR 3369

Case 294/83 *Parti Ecologiste Les Verts v Parliament (Les Verts)* [1986] ECR 1339

Case 45/86 *Commission v Council* [1987] ECR 1493

Case 45/86 *Commission v Council* [1987] ECR-01493

Case 45/86 *Commission v. Council* [1987] ECR 1493

Case C-242/87 *Commission v Council* [1989] ECR I-1425

Case C-62/88 *Greece v Council* [1990] ECR I-1527

Case C-62/88 *Hellenic Republic v Council of the European Communities* [1990] ECR 1527

Case C-70/88 *Parliament v Council (Chernobyl)* [1990] ECR I-2041

Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] ECR I-2867

Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889

Joined cases C-63/90 and C-67/90 *Portugal and Spain v Council* [1992] ECR I-5073

Case C-155/91 *Commission v Council* [1993] ECR-I-939

Case C-155/91 *Commission v. European Parliament and Council ("Waste Directive")* [1993] ECR I-939

Case C-405/92 *Mondiet* [1993] ECR I-6133

Case C-320/91P *Procureur du Roi v Paul Corbeau* [1993] ECR I-2533

Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029

Opinion 2/94 [1996] ECR I-1759

Case C-268/94 *Portugal v Council* [1996] ECR I-6177

Case C-84/94 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [1996] ECR I-05755

Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755

Case C-159/94 *Commission v French Republic* [1997] ECR I-5815

Case C-158/94 *Commission v Italy* [1997] ECR I-5789

Case C-160/94 *Commission v Kingdom of Spain* [1997] ECR I-5851

Case C-157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I-5699

Case C-233/94 *Federal Republic of Germany v European Parliament and Council of the European Union* [1997] ECR I-02405

Case C-85/96 *Martinez Sala* [1998] ECR I-2691

Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265

Case C-392/96 *Commission v Ireland* [1999] ECR I-05901

Case C-42/97 *European Parliament v Council of the European Union* [1999] ECR I-00869

Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419

Case C-475/99 *Ambulanz Glockner v Landkreis Südwestplatz* [2001] ECR I-8089

Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-07079

Opinion 2/00 *Opinion of the Court of 6 December 2001* [2001] ECR 9713

Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-02099

Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193

Case C-36/98 *Spain v Council* [2001] ECR I-779

Case C-122/00 *Omega Air and Others* [2002] ECR I-2569

Case C-211/01 *Commission v Council* [2003] ECR I-8913

Case C-138/02 *Collins* [2004] ECR I-2703

Case C-210/03 *Swedish Match* [2004] ECR I-11893

Case C-127/02 *Waddenvereniging and Vogelsbeschermingvereniging* [2004] ECR I-07405

Case C-176/03 *Commission v. Council* [2005] ECR I-7879

Joined Cases C-154 and C-155/04 *The Queen ex parte of Alliance for Natural Health v. Secretary of State for Health* [2005] ECR I-06451

Case C-94/03 *Commission v. Council* [2006] ECR I-1

Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107

Case C-451/03 *Servizi ausiliari dottori commercialisti Srl vs Calafiori* [2006] ECR I-2941

Case C-91/05 *Commission v. Council* [2007] ECR I-03651

Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV (Essent)* [2008] ECR I-05497

Case C-155/07 *Parliament v. Council* [2008] ECR I-8103

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

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

Case C-166/07 *Commission v. Council* [2009] ECR I-7135

Case C-411/06 *Commission v. European Parliament and Council* [2009] ECR I-9713

Opinion 1/2008 *General Agreement on Trade in Services (GATS)* [2009] ECR I-11129

Joined cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585

Case C-13/07 *Commission v. Council* EU:C:2009:190

Case C-2/10 *Azienda Agro-Zootecnica Franchini Sari, Eolica di Altamura Srl v. Regione Puglia* [2011] ECR I-06561

Case C-271/09 *European Commission v Republic of Poland* EU:C:2011:855

Joined cases C-411/10 and C-493/10 *N.S.* [2011] ECR I-865

Case C-490/10 *European Parliament vs Council* EU:C:2012:525

Case C-130/10 *Parliament v Council* [2012] OJ C295/2

Case C-130/10 *Parliament v. Council* EU:C:2012:472

C-336/09P *Poland v. Commission* ECLI:EU:C:2012:386

Case C-370/12 *Thomas Pringle v Government of Ireland and Others* EU:C:2012:756

Case C-137/12 *Commission v Council* EU:C:2013:675

Case T-370/11 *Republic of Poland v European Commission* EU:T:2013:113

Case C-105/12 *Staat der Nederlanden v Essent NV* EU:C:2013:677

Case C-573/12 *Ålands vindkraft AB v. Energimyndigheten* EU:C:2014:2037

Opinion 2/13 *Opinion of the Court (Full Court) of 18 December 2014* EU:C:2014:2454

Case C-5/16 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2018:483

Opinions of the Adovate General

AG Opinon Case C-161/04 *Republic of Aurstria v. European Parliament and Council of the European Union* [2006] ECR I-07183

AG Opinion Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-01107

AG Opinion Case C-370/12 *Thomas Pringle v Government of Ireland and Others* EU:C:2012:675

AG Opinion Case C-5/16 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2017:925

Decisions of other Courts

BVerfG Urteil vom 12.10.1993 2 BvR 2134/92, 2159/92

Advisory Opinion of 11 April 1949 *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports

Advisory Opinion of 13 July 1954 *Effect of Award of Compensation Made by the United Administrative Tribunal Opinion* [1954] ICJ Reports

Advisory Opinion of 20 July 1962 *Certain Expenses of the United Nations* [1962] ICJ Reports

Advisory Opinion of 21 June 1970 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970] ICJ Reports

Advisory Opinion of 8 July 1996 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* [1996] ICJ Reports 66

Joined Cases BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 *Lissabon-Urteil* [2009]

Online resources

Eurostat, 'Where does our energy come from?' (2016) <http://ec.europa.eu/eurostat/cache/infographs/energy/bloc-2a.html> accessed 09 July 2018

Fernandes S and Rubio E, 'Solidarity within the Eurozone: how much, what for, for how long?' Notre Europe Policy Paper <http://www.notre-europe.eu/media/solidarityemu_s.fernandes-e.rubio_ne_feb2012.pdf?pdf=ok>

Keating D and Simon F, 'EU strikes deal on 32% renewable energy target and palm oil ban after all-night session' *Euractivecom* (14 June 2018)

<https://www.euractiv.com/section/energy/news/eu-strikes-deal-on-32-renewable-energy-target-and-palm-oil-ban-after-all-night-session/>

Nations U, 'United Nations Conference on Environment & Development - AGENDA 21' (Rio de Janerio, Brazil, 3 to 14 June 1992) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 15 July 2017

Neslen A, 'EU sets out 'walk now, sprint later' 2030 clean energy vision' (*Euractiv.com,* 23 January 2014) <https://www.euractiv.com/section/science-policymaking/news/eu-sets-out-walk-now-sprint-later-2030-clean-energy-vision/> accessed 29 Agoust 2018

UN, 'Rio Declaration on Environment and Development' (Rio de Janeiro, 3-14 June 1992) <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> accessed 15 July 2017

Van Calster G, 'Mengozzi AG saves ETS in energy policy legal basis opinion.' (*GAVC Law - Geert Van Calster,* 05 December 2017) <https://gavclaw.com/tag/c-5-16/> accessed 03 June 2018

Vincenti D, 'EU looks beyond 'weak' Copenhagen climate deal' (2009) <https://www.euractiv.com/section/development-policy/news/eu-looks-beyond-weak-copenhagen-climate-deal/> accessed 26 July 2018