ARTICLES

The Role and Competence of the EU in the Area of Supportive Financing Policies for Renewable Energy Projects

Theodoros G. Iliopoulos*

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ABSTRACT: In spite of the increasing interest of the supranational legal order in the field of energy policy, and the insertion of the specific energy legal basis of art. 194 in the Treaty on the Functioning of the European Union, the extent of the Union power to eventually intervene and impact on national renewable energy support policy choices is blurry. Delineating the limits of this competence is very important at a time of unprecedented and increasingly complicated challenges, such as the combination of the aggravation of the climate emergency and the energy security crisis. This situation necessitates the completion of the European integration of energy policies and triggers thorough reforms. Accordingly, this *Article* puts forward the question, does the EU have the competence to elaborate on the field of supportive financing of renewable energy projects? The *Article* shows the persisting need to support renewable energy projects and investigates the expected benefits from an intensification of the EU intervention in national renewable energy support regimes towards more homogeneity. Further, it dissects art. 194 TFEU with the aim to identify the appropriate legal basis for measures of renewable energy support policy, and investigates the scope of the relevant EU competence, as well as the legal and political limits that affect its exercise.

* Visiting professor at Hasselt University and Postdoctoral Fellow (Fundamental Research) of the Research Foundation – Flanders (FWO), theodoros.iliopoulos@uhasselt@be.

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I. INTRODUCTION

The action of the European Union (EU) is strictly governed by the principle of conferral, which means that the EU shall only act within the limits of the competences conferred upon it by the Member States in the Treaties.[1] In 2009 the Treaty on the Functioning of the EU (TFEU) explicitly established energy as an area of shared competence between the EU and the Member States.[2] Its art. 194, which alone stands for the Treaty Title XXI "ENERGY", elaborates on the objectives and terms of the exercise of the relevant competence.

The EU policymaker and the EU legislature have capitalised on this energy competence, as demonstrated by the large number of important policy documents and legal acts that have been enacted in the last years. Characteristic are the Energy Union Strategy[3] and the Energy Union and Climate Action Governance Regulation;[4] the Clean Energy Package and the relevant legislative reform;[5] or the EU Green Deal,[6] the Fit for 55 legislative package,[7] as well as the REPowerEU Plan[8] and the legislative reform linked with it.[9]

[1] Art. 5 TEU.

[2] Art. 4(i) TFEU.

[3] Communication COM(2015) 80 final from the Commission of 25 February 2022 on the Energy Union Package.

[4] 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.

[5] See, for example, *ibid.*; 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. See also A Nouicer, A-M Kehoe, J Nysten, D Fouquet, L Hancher and L Meeus, 'The EU Clean Energy Package' (FSR Technical Report (2020).

[6] Communication COM(2019) 640 final from the Commission of 11 December 2019 on The European Green Deal.

[7] See H Scheuing and J Kamm, "The EU on the road to climate neutrality – is the 'Fit for 55' package fit for purpose?" (2022) Renewable Energy Law and Policy Review 4; B Pérez de las Heras, "The 'Fit for 55' Package: Towards a More Integrated Climate Framework in the EU" (2022) Romanian Journal of European Affairs 63.

[8] Communication COM(2022) 230 final from the Commission of 18 May 2022 on the REPowerEU Plan.

[9] See for example Regulation (EU) 2024/1747 of the European Parliament and of the Council of 13 June 2024 amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design; Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

Such policy documents and legal acts establish an ambitious policy agenda for attaining a clean energy transition and for generally transforming the EU's economy towards a sustainable future.[10] Pursuing these objectives and reaching the relevant targets necessitates innovative action and thorough reforms at the EU level.[11] In its turn, the realisation of such action and reforms affects different levels of governance and makes the discussion about the allocation of competences in the field very actual – again.

From the different aspects of modern energy law and policy, this *Article* focuses on the promotion of renewable energy sources (RES), and more specifically on the field of supportive financing policies for RES.[12] Accordingly, it raises the question, does the EU have the competence to elaborate on the field of supportive financing of renewable energy projects? It should at this point be noted that the *Article* focuses on regulatory instruments that Member States use and to the EU competence to intervene in the terms determining the design, enactment, or implementation of such instruments; its scope does not extend to also investigate Union financing instruments.

The analysis comprises two components. The first component explains the concept of 'support schemes for RES', investigates the persisting need of RES projects to receive financial support, and delves into the purposefulness of an enlarged impact of the EU legal order on Member States' relevant laws and policies. This is an important first step to demonstrate the actual relevance of the *Article*'s research question. And, in fact, the increased market penetration of RES, the technological developments, and the application of carbon taxation systems (that have made the cost of fossil fuels increase) have given rise to arguments about "a declining need for support".[13] This might make one question the persisting relevance of supportive financing policies. In response, this *Article* shows that a) there are older and newer risks that make the granting of financial support

[10] Communication COM(2019) 640 final cit. ch. 2.

[11] See also F Kern and KS Rogge, 'The Pace of Governed Energy Transitions: Agency, International Dynamics and the Global Paris Agreement Accelerating Decarbonisation Processes?' (2016) Energy Research & Social Science 13. Their proposition in p. 16 that "the low carbon energy transition requires an increase in strategic policy intelligence, openness to experimentation and policy learning, new capabilities and novel procedural policy instruments as well as the development of strategies to manage resistance to the decarbonisation of the energy system" has become even more actual after the energy price crisis in the aftermath, first, of the COVID-19 crisis and, then, of the Russian invasion of Ukraine.

[12] Art. 194(1)(c) TFEU.

[13] Council of European Energy Regulators, 'Renewables Work Stream of Electricity Working Group, Status Review of Renewable Support Schemes in Europe for 2020 and 2021' (CEER Report 2023), 41. See also W Hogan, 'Electricity Market Design and Zero-Marginal Cost Generation' (2022) Current Sustainable/Renewable Energy Report 15; T Brown and L Reichenberg, 'Decreasing Market Value of Variable Renewables Can Be Avoided by Policy Action' (2021) Energy Economics 105354. The authors support the use of carbon pricing that will disincentivise the use of fossil fuels instead of the grant of subsidies that directly incentivise production of energy from renewable sources.

to RES necessary for the attainment of decarbonisation targets; and b) EU intervention in the field is capable of bringing more homogeneity between national policies and ensuring certain quality standards of national laws.

Next, the second component investigates the limits of the EU energy competence with regard to national regulatory instruments for the supportive financing of renewable energy projects. This is a specific research line that has not been explored yet. One can of course find a substantial body of literature that has analysed the scope of the EU energy competence under art. 194 TFEU. Such works delve into a broader investigation of the competence and they mostly focus on the limits of a Union intervention in national energy policies in the form of setting RES targets.[14] More recently, legal research on the EU energy competence has also been concerned with other questions, such as links with climate law or investment law.[15]

However, questions about the competence of the EU to impact on national laws for the supportive financing of RES have seemingly flown under the radar. There are certain works that explore the nature, terms, and extent of the Commission's power to exercise State aid control over support schemes for RES.[16] Such analyses, however, do not deal with art. 194 TFEU. In fact, certain works notice that State aid control on the basis of guidelines' conditions can be an alternative for the Commission to circumvent the thorny question of the delineation and exercise of the EU competence in the field of renewable energy support and yet impact on the relevant national policies.[17]

[14] See for example K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) ICLQ 991; K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' (2014) European Energy and Environmental Law Review 208; A Johnston and E Van Der Marel, *'Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' (2013) European Energy and Environmental Law Review 181; L Hancher and F Salerno, 'Energy Policy after Lisbon' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (Oxford University Press 2012) 367.

[15] M Fehling, 'Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement' (2021) Transnational Environmental Law 339; L Reins, 'The European Union's Framework for FDI Screening: Towards an Ever More Growing Competence Over Energy Policy?' (2019) Energy Policy 665.

[16] TG Iliopoulos, *Renewable Energy Support Schemes in the EU: State Aid Law and the Free Movement of Goods* (Routledge, 2025); D Vasbeck, State Aid, the Criterion of State Resources and Renewable Energy Support Mechanisms: Fresh Wind from Luxembourg in EEG 2012' (European Forum Insight of 21 June 2019) European Papers www.europeanpapers.eu 629; AAJ Pliego Selie and OW Brouwer, 'The Commission's State Aid Control over Renewable Energy Stimulation Measures Reinforced' (2016) Maastricht Journal of European and Comparative Law 890; D Pérez Rodríguez, 'Electricity Generation and State Aid: Compatibility Is The Question' (2016) European State Aid Law Quarterly 207; P Nicolaides, 'The Legal Differences and Economic Similarities of the Various Methods of Supporting Green Electricity under State Aid Rules' (2014) European Competition Law Review 227.

[17] TG Iliopoulos, *Law of Finance for Renewable Energy Projects in the EU: Secondary Law and Support Schemes* (Routledge 2025); EL Boasson, 'Constitutionalization and Entrepreneurship: Explaining Increased

The above remarks reveal a research gap that this *Article* aims to address. The more so since the supportive financing of RES is an important aspect of modern energy policy. And one can notice the increasing interest of the supranational level in the field. Indeed, the corpus of EU renewable energy support law has been augmented,[18] while the constant change in the conditions of the market and in technological development requires a rethink of support policies and more initiatives from the EU legislature in the future.

Within this framework, this *Article* aims to expand the state of the art and analyse the EU's competence to impact on the design, enactment, or implementation of national support schemes for RES. Thus, it aspires to contribute to the discussion on European legal integration, with a specific focus on an increasingly important field for the attainment of a European energy transition, that is, renewable energy support. It aims to infer conclusions about the legality of the occurred EU intervention as well as about the prospects of future developments in the field. Besides, the understanding of art. 194 TFEU is not static, but evolves together with legislative and judicial developments. And, indeed, recent judgments and pending cases before the Court of Justice of the EU (CJEU) can amplify the jurists' understanding of the content of art. 194 TFEU.[19] The manifestation of such legal disputes also shows that an analysis and clarification of the EU competences can work towards the increase of legal certainty.

Further, this *Article* aims to enrich the relevant analysis by complementing legal analysis with elements from political sciences. Accordingly, it examines not only the legal limits of the EU competence, but also limitations in the EU action that stem from the political balances between the different actors of the national and supranational levels.

Regarding the structure of the *Article*, this introduction is followed by a section that examines the persisting need to financially support renewable energy projects, and the relevance of an EU intervention in this field. The section relies on a review of policy documents and of existing law and economics literature, mostly regulation and harmonisation theory. Possible benefits that more homogeneity can lead to are investigated. A third section focuses on the EU energy competence and discusses the relationship of art. 194 TFEU with other primary law provisions, with the aim to identify the appropriate legal

EU Steering of Renewables Support Schemes' (2019) Politics and Governance 70; I Solorio and P Bocquillon, 'EU Renewable Energy Policy: A Brief Overview of its History and Evolution' in I Solorio and HF Jörgens (eds), *A Guide to EU Renewable Energy Policy* (Edward Elgar 2017) 23; D Jacobs, 'Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper' in J Tosun, S Biesenbender and K Schulze (eds), *Energy Policy Making in the EU* (Springer 2015) 107.

[18] See for example art. 4 Directive 2018/2001 cit. and Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, art. 19d, which was added to the regulation in 2023.

[19] See case C-451/23 *Poland v Parliament and Council* (case in progress); case C-444/23 *Poland v Parliament and Council* (case in progress); case C-442/23 *Poland v Parliament and Council* (case in progress); case C-59/23 P *Austria v Commission* (pending); case T-101/18 *Austria v Commission*, ECLI:EU:T:2022:728; case C-594/18 P *Austria v Commission* ECLI:EU:C:2020:742; case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2018:483.

basis for measures of renewable energy support policy. Classic legal analysis (EU law interpretation, case law review, scientific literature analysis) is the core methodology of this section. A fourth section investigates the legal and political limitations of the EU competence in renewable energy support law and policy. Classic legal analysis is complemented by political sciences literature review, so that challenges of a political nature that have impeded and might affect future legislative initiatives be revealed and discussed. Last, a fifth section provides the *Article*'s conclusions.

II. Why (still) support renewable energy sources and why the EU should care

II.1. The persisting need for financially supporting RES

Since the 2000s, EU law and State aid soft law have emphasised the need to promote RES.[20] In these earlier years of development of RES, most renewable energy technologies were very expensive and not "mature" enough to be competitive in the market. Such technologies have been more capital-intensive, compared to fossil fuel power plants, and hence the production of energy from renewable sources has been costlier.[21] Besides, fossil fuel and nuclear industries have been operating for a longer time, which has allowed them not only to recover their initial investment costs, but also to establish their position in the market and to take advantage of learning-by-doing gains.[22]

In this regard, EU legislation has recognised the need for regulatory instruments that support the development of RES. In the absence of a full (or medium) harmonisation, the adoption of such support policies occurs at the national level.[23] Accordingly, the EU legislature has

[20] See for example 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; Community guidelines on State aid for environmental protection of 1 April 2008, 48; 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.

[21] See D Jacobs, 'Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper' cit.; TT Onifade, 'Global Clues for Choosing Suitable Support Systems for Renewable Energy in the Power Sector' (2015) Renewable Energy Law and Policy Review 25; C Hart and D Marcellino, 'Subsidies or Free Markets to Promote Renewables?' (2012) Renewable Energy Law and Policy Review 196.

[22] O Woolley, 'Renewable Energy Consumption' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* (Edward Elgar 2021) 118.

[23] TG Iliopoulos, 'Europeanisation of Renewable Energy Support Law: A Suspended Step Towards Harmonisation' in B Vanheusden, T Iliopoulos and A Vanhellemont (eds), *Harmonisation in EU Environmental and Energy Law* (Intersentia 2022) 237; T Iliopoulos, 'Dilemmas on the Way to a New Renewable Energy Directive' (2018) European Energy and Environmental Law Review 210. On the different harmonisation scenarios see G Resch et al., 'Approaches for a Harmonisation of RES(-E) Support in Europe. Design and Impact of a Harmonised Policy for Renewable Electricity in Europe', (Final Report D7.4 of the beyond2020 project, 2014).

acknowledged that Member States may enact "support schemes that will promote the use of energy from RES by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased".[24]

In the recent years the terms for the development and integration of RES in the energy markets have changed. Profitable support schemes have allowed the expansion and development of RES projects, even towards market competitiveness in certain occasions.[25] Today renewable energy technologies are not as costly as they used to be; they are more mature in the market, and there have been cases of permit applications for RES projects that did not ask for any financial support.[26] In addition, in 2021 and 2022 renewable energy projects recorded windfall profits. The reason was the energy inflation and the very high electricity market prices that the so-called "marginal pricing model" has brought. Accordingly, in electricity markets the cheapest source of energy is traded first. If it does not suffice to fully meet demand, the second cheapest available source is also used. If there is still demand for power, the third cheapest source is mobilised, and so on until demand is fully covered. And the price of the most expensive source that is needed to cover demand is a price-setter for all sources and all producers.[27] RES typically have a marginal cost equal or close to zero, and hence they benefit from the prices dictated by the fossil fuels of the energy mix. The prices of fossil fuels radically increased in 2021, because of a mismatch between a quickly risen demand and a gridlocked supply when economies started recovering from the effects of the COVID-19 pandemic. And they skyrocketed in 2022, when an energy supply shock followed the Russian invasion of Ukraine.[28] Thus, in the last few years, RES projects have been able to benefit from the exceptionally high electricity market prices and to have an exceptionally high rate of profitability without needing support.[29]

[24] See arts 2(5) and 4 Directive 2018/2001 cit.; art. 2(k) and 3(3) Directive 2009/28 cit.; art. 4 Directive 2001/77 cit.

[25] See IRENA, 'Renewable Energy Statistics 2022' (Report 2022); TG Iliopoulos, 'Price Support Schemes in the Service of the EU's Low-Carbon Energy Transition' in T Zachariadis, JE Milne, M Skou Andersen and H Ashiabor (eds), *Economic Instruments for a Low-carbon Future* (Edward Elgar 2020) 2.

[26] T Greve and M Rocha, 'Policy and Theoretical Implications of the Zero-Subsidy Bids in the German Offshore Wind Tenders' (2020) The Energy Journal 89; H Martin, S Coronas, À Alonso, J de la Hoz, J Matas, 'Renewable Energy Auction Prices: Near Subsidy-Free?' (2020) Energies 3383.

[27] TG Iliopoulos, *Law of Finance for Renewable Energy Projects in the EU: Secondary Law and Support Schemes* cit. 16 ff; P Mäntysaari, *EU Electricity Trade Law* (Springer 2015) 198 ff.

[28] H Van Doorslaer, 'Why Raising Interest Rates to Fight Off Energy Inflation Is Counterproductive' (GIES Occasional Paper - The Global Energy Crisis, 2023); F Kuik, JF Adolfsen, EM Lis and A Meyler, 'Energy Price Developments in and out of the COVID-19 Pandemic – From commodity Prices to Consumer Prices' (ECB Economic Bulletin, Issue 4/2022).

[29] See Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, recitals 22-24.

The above can make one further doubt the purposefulness of sustaining renewable energy support policies. However, there are still factors that necessitate the granting of support to RES. To begin with, renewable energy projects (and the investments for their connection with the grid) remain capital-intensive. This might prove a serious hurdle for the development of RES, especially in an environment of financial uncertainty and inflation that puts upwards pressure to the cost of capital.[30] The above is particularly true for innovative technologies that have a big potential to significantly contribute to the clean energy transition, but are even costlier and not mature enough to be market-competitive.[31] The uncertainty is further exacerbated by the intermittent nature, and hence unstable and unpredictable productivity that characterises wind and solar power, which are key renewable energy sources.[32] As for the fact that RES currently benefit from extremely high energy prices, it constitutes an anomaly in the market and it is expected to be tackled, also thanks to legislative and regulatory interventions.[33] Further, price volatility and instability of the market is another factor of uncertainty that discourages investors and hardens the bankability of RES projects.[34] In this regard, robust and diligently designed support policies can contribute to the mitigation of price volatility and provide a desirable stability and certainty in the long-term for investors.[35]

[30] See IEA, 'The Cost of Capital in Clean Energy Transitions' (17 December 2021) www.iea.org; N May and K Neuhoff, 'Financing Power: Impacts of Energy Policies in Changing Regulatory Environments' (2021) The Energy Journal 131; S Raikar and S Adamson, *Renewable Energy Finance* (Academic Press, 2020), ch. 1 and 2; F Egli, B Steffen and T Schmidt, 'A Dynamic Analysis of Financing Conditions for Renewable Energy Technologies' (2018) Nature Energy 1084; L Hirth and J C Steckel, 'The Role of Capital Costs in Decarbonizing the Electricity Sector' (2016) Environmental Research Letters 114010.

[31] See K Talus, 'Energy & State Aid: An Overview of EU and National Case Law' (2024) Concurrences Energy & State Aid 119099; A Arabkoohsar, A Behzadi and N Nord, 'A Highly Innovative Yet Cost-Effective Multi-Generation Energy System for Net-Zero Energy Buildings' (2021) Energy Conversion and Management 114120; A Granat and M Kozak, 'The Implementation of the European Green Deal – Tensions Between a Market-based Approach and State Aid for Renewables' (2021) Yearbook of Antitrust and Regulatory Studies 69; P Tillmann, K Jäger and C Becker, 'Minimising the Levelised Cost of Electricity for Bifacial Solar Panel Arrays Using Bayesian Optimisation' (2020) Sustainable Energy & Fuels 254.

[32] See among others N Fabra, 'Reforming European Electricity Markets: Lessons from the Energy Crisis' (2023) Energy Economics 106963; A Held et al., 'Do Almost Mature Renewable Energy Technologies Still Need Dedicated Support Towards 2030?' (2019) Economics of Energy and Environmental Policy 81; N Atmaca and I Lojodice, 'The Impact of Support Schemes on RES Installations and Retail Electricity Prices' (2014) Renewable Energy Law and Policy Review 67.

[33] See for example Regulation 2024/1747 cit.

[34] See among others G Di Foggia and M Beccarello, 'Designing New Energy Markets to Promote Renewables' (2024) Heliyon e31427; N Fabra, 'Reforming European Electricity Markets: Lessons from the Energy Crisis' cit.; L Hirth, 'The Market Value of Variable Renewables: The Effects of Solar Wind Power Variability on their Relative Price' (2013) Energy Economics 218.

[35] See recital 40 Regulation 2024/1747 cit.

At the same time, the EU legislature has revised the EU RES share targets upwards. According to the recently amended art. 3(1) of the Renewable Energy Directive 2018/2001, "Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 42.5 per cent. Member States shall collectively endeavour to increase the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 to 45 per cent".[36] Reaching such ambitious targets requires additional investments of more than 300 billion euros per year.[37]

In this regard, support schemes for RES have not been made redundant. They should, however, evolve to deal with modern needs. Thus, law and regulation governing support schemes is needed to ensure the use of fit-for-purpose instruments. In this regard, the next paras examine the merits of shaping such law and regulation at the EU level.

II.2. The purposiveness of an enlarged impact of the EU legal order on renewable energy support policies

While support schemes are manifestly instruments of the national level, designed, enacted, and implemented by Member States,[38] this sub-section examines the merits of an intervention of the EU legal order that would bring more homogeneity in the field.

Harmonisation theory has studied and highlighted the benefits of a more homogeneous legal landscape. Benefits that are typically associated with increased homogeneity are the reduction of transaction costs, the mitigation of conflicts of laws and of uncertainty, and the alleviation of competition between legal orders with a race-to-the-bottom effect.[39] The field of supportive financing of RES is afflicted by a number of such problems that would justify an intervention at the EU level to promote homogeneity.

To begin with, Member States have traditionally employed different support schemes, from the imposition of renewable energy obligations to the direct granting of support. And even when different Member States resort to the same type of support instruments, the design elements, the prerequisites, and the various terms are very divergent. Worse, support schemes of a different design or of a different type often co-

[36] See art. 1(2)(a) Directive 2023/2413 cit.

[37] Communication COM(2022) 230 final cit.; Communication COM(2020) 21 final from the Commission of 14 January 2020 on the Sustainable Europe Investment Plan - European Green Deal Investment Plan.

[38] Art. 4 Directive 2018/2001 cit.

[39] See among others M Faure, 'To Codify or Not to Codify EU Environmental Law' in B Vanheusden, T Iliopoulos and A Vanhellemont (eds), *Harmonisation in EU Environmental and Energy Law* (Intersentia 2022) 9; H Wagner, 'Is Harmonisation of Legal Rules an Appropriate Target? Lessons from the Global Financial Crisis' (2011) European Journal of Law and Economics 541.

exist, even within the national borders, depending on the technology, the size of the project, the region etc.[40] This hodgepodge of national support regimes entails high transaction costs. These are costs created because of operations that are necessary for the conclusion of a market transaction, such as the collection of information about the counterparties, the drafting of the contract, or the acquisition of knowledge about a foreign and unknown legal system.[41] Transaction costs for cross-border dealings and investments are higher when there is a large diversity between the different legal systems of the counterparties, but they decrease when homogeneity between the legal systems increases.[42] Thus, largely differentiated regulatory frameworks for renewable energy support might deter investors from expanding their portfolios into more jurisdictions. This can militate against the attainment of the clean energy transition, in the sense that it hinders the efficient use of the energy resources and the exploitation of economies of scale and scope at the European level and beyond the limits of the national borders.[43]

Member States, however, seem to prefer to use different support schemes. In this manner, they can attract investors by offering them unique support terms that they could not find in another jurisdiction. This also explains, at least partly, why most national support schemes are "closed": only domestic generation is entitled to benefit from them,

[40] See P del Río and I Boie, 'Action Plan and Policy Recommendations for Collaborative CSP Development in Europe' (Deliverable 10.3, MUSTEC Project, CSIC, 2021), 15; M Banja, M Jégard. F Monforti-Ferrario, J-F Dallemand, N Taylor, V Motola and R Sikkema, 'Renewables in the EU: the Support Framework Towards a Single Energy Market - EU Countries Reporting under Article 22(1) b, e and f of Renewable Energy Directive' (JRC Science for Policy Report, JRC11041, EUR 29100 EN, Publication Office of the European Union, 2017).

[41] According to RH Coase, 'The Problem of Social Cost' (1960) The Journal of Law and Economics 1, p. 15, "[i]In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost". See also H Wagner, 'Is Harmonisation of Legal Rules an Appropriate Target? Lessons from the Global Financial Crisis' cit.; S Porcelli and Y Zhai, 'The Challenge for the Harmonisation of Law' (2010) Transition Studies Review 430.

[42] M Faure, 'To Codify or Not to Codify EU Environmental Law' cit.; A Ofei-Mensah and J Bennett, 'Transaction Costs of Alternative Greenhouse Gas Policies in the Australian Transport Energy Sector' (2013) Ecological Economics 214; E Carbonara and F Parisi, 'The Paradox of Legal Harmonisation' (2007) Public Choice 367.

[43] D Jacobs, 'Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper' cit.; R Hildingsson, J Stripple and A Jordan, 'Governing Renewable Energy in the EU: Confronting a Governance Dilemma' (2012) European Political Science 18. See also Staff Working Document SWD(2013) 439 final of 5 November 2013 from the Commission on Guidance for the design of renewables support schemes.

while renewable energy projects outside national borders are excluded.[44] On the one hand, closed support schemes serve the need of Member States to have control of the costs, coverage, and other effects of their support policies.[45] But, on the other hand, they undermine the completion of the internal energy market and the development of cross-border trade that would yield significant efficiency gains and better energy prices for consumers. As for the development of regulatory competition over renewable energy support regimes, it is often associated with the so-called "race to the bottom" problem: low regulatory standards and charges are appealing to investors, but they may undermine the end policy objective and make states forego revenue that is crucial for the provision of public services.[46] Further, the plethora of national support regimes is also linked with uncertainty about the rules and their application, which often leads to legal disputes. The occurrence of the above brings additional transaction costs, for example because of litigation and dispute settlement costs.[47] A vicious cycle is created, which can be broken with increased homogeneity and the use of harmonisation instruments that will "clarify rules and create a more coherent and solid legal framework".[48]

A higher degree of harmonisation and homogeneity can also ensure a minimum quality of the design of support schemes, reduce the race-to-the-bottom effects of regulatory competition, and lead to more stable support schemes that will not lead to investments under unviable terms. This is important because regulatory competition in the early and mid-2010s resulted in too ambitious support schemes that promised high remuneration to the beneficiaries. The financing of these schemes relied on excessively high extra surcharges passed on to energy consumers and taxpayers, and in the end a regulatory failure could not be avoided. The failure of support schemes, in its turn, led to

[44] N Caldés, P Del Río, Y Lechón and A Gerbeti, 'Renewable Energy Cooperation in Europe: What Next? Drivers and Barriers to the Use of Cooperation Mechanisms' (2019) Energies 70.

[45] And it is on the basis of such arguments that the CJEU tends to justify free movement restrictions that stem from support schemes for RES. See case C-573/12 *Ålands Vindkraft* ECLI:EU:C:2014:2037; case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160.

[46] But there are also voices that see regulatory competition as a "race to the top" process because it spurs authorities to use efficient and effective instruments and allows best practices to disseminate. For a thorough analysis on both viewpoints, see among others J Stark, *Law for Sale: A Philosophical Critique of Regulatory Competition* (Oxford University Press 2019); CM Radaelli, 'The Puzzle of Regulatory Competition' (2004) Journal of Public Policy 1; P Genschel, 'Globalisation, Tax Competition, and the Welfare State' (2002) Politics & Society 245; WE Oates. 'Fiscal and Regulatory Competition: Theory and Evidence' (2002) Perspektiven der Wirtschaftspolitik 377; J Edwards and M Keen, 'Tax Competition and Leviathan' (1996) European Economic Review 113; BS Frey and R Eichenberger, 'To Harmonise or to Compete? That's Not the Question' (1996) Journal of Public Economics 335.

[47] H Wagner, 'Is Harmonisation of Legal Rules an Appropriate Target? Lessons from the Global Financial Crisis' cit.; E Carbonara and F Parisi, 'The Paradox of Legal Harmonisation' cit.

[48] B Vanheusden and A Vanhellemont, 'Harmonisation in Environmental and Energy Law' (2019) Environmental Policy and Law 98, 98.

a series of complex legal disputes between authorities and investors that have sidetracked the efforts for the attainment of the clean energy transition.[49] If there were common rules to ensure the proper and methodical design and the stability of support schemes, such problems would be avoided, at least to a certain extent.

Therefore, it causes no surprise that the EU legislature has been interested in intervening in this field. In 2018 the recast Renewable Energy Directive 2018/2001 introduced common rules about support schemes. Its art. 6 requires the enactment of stable support schemes that may only be revised on the basis of transparent and objective criteria, and in any case without undermining the economic viability of beneficiaries' projects and without negatively affecting rights conferred by the support schemes. Further, the directive requires that support schemes for electricity from renewable sources "provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability".[50] Such support schemes shall be designed so as to "maximise the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximise their market revenues".[51]

When it comes to the granting of direct price support, the law requires the use of sliding or fixed market premiums on top of the market price. In line with the most recent legislative reform of June 2024, from 17 July 2027 on, and for direct price support to investment in new power-generating facilities for the generation of electricity from wind, solar or geothermal energy, and hydropower without reservoir, Member States shall use "two-way contracts for difference or equivalent schemes with the same effects".[52] Two-way contracts for difference (CfDs) are defined in the newly inserted art. 2(76) of the Electricity Market Regulation 2019/943 as contracts between a power-generating facility operator and a counterpart, usually a public entity, that provide both minimum remuneration protection and a limit to excess remuneration. In such support regimes, beneficiaries and public entities

[49] M Aydos, P Toledano, M Dietrich Brauch, L Mehranvar, T Iliopoulos and S Sasmal, 'Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers' (Columbia Center on Sustainable Investment (CCSI) Report, December 2022); TG Iliopoulos, 'Finding the Spearhead of the EU Low-carbon Energy Transition' in M Boeve, A Akerboom, C Backes and M van Rijswick (eds), *Environmental Law for Transitions to Sustainability* (Intersentia 2021) 129.

[50] Art 4(2) Directive 2018/2001, cit.

[51] *Ibid.* art. 4(3).

[52] Art. 2(9)(19d) Regulation 2024/1747 cit.; Directive (EU) 2024/1711 of the European Parliament and of the Council of 13 June 2024 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design, art. 1.

agree on the level of a "strike price". Next, if the market price is lower than the agreed strike price, beneficiaries receive support payments. But they will not benefit from a potentially higher market price. This aims to ensure a fair allocation of risk and benefit between electricity generators and consumers.[53] In any case, support for electricity from renewable sources shall be granted "in an open, transparent, competitive, non-discriminatory and cost-effective manner", which is ensured with the allocation of support after competitive bidding.[54] The above requirements can be also found in soft law.[55]

The EU renewable energy support law that is currently in force is thus largely characterised by abstract legal requirements that are open to interpretation and, in spite of their homogenising potential, they do not lead to a full harmonisation. Member States still have a large discretion with regard to the selection and design of their support schemes. And even more concrete requirements, such as the use of two-way CfDs or equivalent schemes with the same effects or the use of competitive bidding, are softened by exemptions.[56]

Further, the EU legislature has recently enacted rules that aim to facilitate the conclusion of power purchase agreements (PPAs).[57] These are contracts between a generator of energy and a consumer (typically a large consumer, such as corporations and industries, or even utilities), on the basis of which energy will be delivered over a long period and at the agreed price.[58] The expansion of PPAs markets will ensure that private capital complements public funding, which is crucial for the attainment of the clean energy transition.[59]

In view of the above, the next parts of this *Article* examine the competence of the EU in the area of renewable energy support. The analysis will reveal the legality of initiatives like the above, but also the prospects for an intensified action and harmonisation in the area.

[53] See K Neuhoff, N May and JC Richstein, 'Financing Renewables in the Age of Falling Technology Costs' (2022) Resource and Energy Economics 101330; P Wild, 'Determining Commercially Viable Two-Way and One-Way 'Contract-for-Difference' Strike Prices and Revenue Receipts' (2017) Energy Policy 191.

[54] Art. 4(4) Directive 2018/2001 cit.

[55] Guidelines on State aid for climate, environmental protection and energy 2022 of 18 February 2022 from the Commission; Communication of 18 June 2014 from the Commission on Guidelines on State aid for environmental protection and energy 2014-2020.

[56] See art. 19d(6) Regulation 2019/943 cit.; art. 4 Directive 2018/2001 cit.

[57] Art. 19b Regulation 2019/943 cit., as amended by Regulation 2024/1747 cit.

[58] See S Hundt, J Jahnel and A Horsch, 'Power Purchase Agreements and Financing Renewables: An Interdependency' (2020) The Journal of Structured Finance 35.

[59] M Aydos, P Toledano, M Dietrich Brauch, L Mehranvar, T Iliopoulos and S Sasmal, 'Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers' cit.; F Polzin and M Sanders, 'How to Finance the Transition to Low-Carbon Energy in Europe?' (2020) Energy Policy 111863.

III. The EU competence in the area of renewable energy support

The EU competence in the field of energy is determined by art. 194 TFEU, which "constitutes the general reference provision for that policy".[60] Accordingly, art. 194(1) TFEU sets down four specific energy policy objectives, including the development of new and renewable forms of energy, and determines three general principles that shall govern EU energy policy at large: it shall be conducted "in the context of the establishment and functioning of the internal market", "with regard for the need to preserve and improve the environment", and in "a spirit of solidarity between Member States". These principles are linked with policy objectives that also find an expression in other primary law provisions, and are covered by different legal bases. This has given rise to questions about the proper legal basis for energy measures and about the exact scope of art. 194 TFEU. This discussion has been nourished by the opening phrase of art. 194(2) TFEU, which provides the legal basis for EU energy policy and refers to the ordinary legislative procedure, but "[w]ithout prejudice to the application of other provisions of the Treaties". This wording means that the energy legal basis coexists with other primary law provisions and the EU legislature bears the burden to identify and use the appropriate legal basis each time.[61] The following sub-sections examine if it is art. 194(2) TFEU or other articles that should serve as legal basis when it comes to support measures for RES.

III.1. The environmental legal basis of art. 192 TFEU

An obvious "competitor" of art. 194(2) TFEU when it comes to support measures for RES is the legal basis for environmental policy, namely art. 192 TFEU. Indeed, the promotion of RES is linked with environmental protection objectives defined in art. 191 TFEU, such as the prudent and rational utilisation of natural resources or the combat of climate change. However, art. 194 TFEU specifically governs the area of energy and it should be prioritised over other provisions when it comes to energy policy, in accordance with the classical norm *lex specialis derogat legi generali*.[62] The fact that the Renewable Electricity Directive 2001/77/EC, the Renewable Fuels Directive 2003/30/EC, and the Renewable Energy Directive 2009/28/EC had all been adopted under the environmental legal basis of

[60] Case C-490/10 *Parliament v Council*, opinion of AG Mengozzi, ECLI:EU:C:2012:209, para. 23.

[61] See Case C-155/07 *Parliament v Council* ECLI:EU:C:2008:605, para. 34, and the case-law cited.

[62] This is also the dominant position in legal theory. See amongst others D Fouquet, JV Nysten, BB Held and A Johnston, 'Potential areas of conflict of a harmonised RES support scheme with European Union Law' www.res-policy-beyond2020.eu 15. But there are also analyses that reject this posture and conclude that arts 192 and 194 TFEU apply in conjunction, and they can both constitute the appropriate legal basis for renewable energy policy, depending on the primary purpose of a certain measure. See M Peeters, 'Governing Towards Renewable Energy in the EU: Competences, Instruments, and Procedures' (2014) Maastricht Journal of European and Comparative Law 39, 43-46; C Calliess and C Hey, 'Multilevel Energy Policy in the EU: Paving the Way for Renewables' (2013) Journal for European Environmental and Planning Law 87, 95.

what was then art. 175(1) of the Treaty establishing the European Community only emphasises the closeness of renewable energy policy with environmental policy, but does not reverse the above conclusion. Indeed, by the time these directives were adopted there was no energy legal basis to be used. The environmental legal basis was not preferred to the energy legal basis, but it was the only available one.

Things become more complicated because of the second subpara. of art. 194(2) TFEU that restricts the scope of the EU competence in energy and refers back to art. 192 TFEU. This subpara. states that EU measures serving energy policy "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)". This enigmatic clause gives rise to different defensible interpretations, which can be broadly grouped into two major categories. On the one hand, the provision under scrutiny can be seen as introducing a caveat that purely restricts the scope of the EU competence in energy matters. On the other hand, it can be argued that it only has a procedural nature and determines a special legislative procedure for measures having certain effects.[63]

Starting with the latter stance, it relies on a rather teleological interpretive approach. Accordingly, art. 194(2) TFEU establishes the ordinary legislative procedure as the standard procedure for energy policy measures. But, art. 192(2)(c) TFEU requires a unanimous vote for environmental policy measures that significantly affect a Member State's choice between different energy sources and the general structure of its energy supply. Such a coexistence of two different legislative procedures for the same class of measures would be incongruous and would also render the stricter procedure defunct. In this regard, the second subpara. of art. 194(2) TFEU could be read as aiming to align the two procedures. It prevents the use of the ordinary legislative procedure of art. 194(2) TFEU in an abusive manner that would circumvent the use of the special legislative procedure of art. 192(2)(c) TFEU. Thus, it has been argued that "any matter falling within the scope of art. 194(2) TFEU is subject to unanimity".[64] But, if such interpretation is accepted, the second subpara. of art. 194(2) TFEU practically overturns the first subpara. of the article.

Responding to the above criticism, a nuanced interpretive theory has been put forward. It focuses on the letter of the law and notes that the scope of the second subpara.

[63] These two interpretative theories can be seen as the two ends of a spectrum. In between, one can also find nuanced theories that take elements from both ends. In this regard, see A Johnston and E Van Der Marel, '*Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' cit. The authors have brought forward five meticulous hypotheses as regards a possible interpretation of art. 194(2) TFEU.

[64] See L Hancher and FM Salerno, 'Energy Policy after Lisbon' cit. 374; S Andoura, L Hancher and M van der Woude, 'Towards a European Energy Community: A Policy Proposal' (Report, Notre Europe 2010) 12.

of art. 194(2) TFEU is wider than art. 192(2)(c) TFEU. Both legal bases refer to the Member States' choice between different energy sources and the general structure of their energy supply. But art. 194(2) TFEU goes further, by adding a reference to "the Member State's right to determine the conditions for exploiting its energy resources". Consequently, it has been argued that the unanimity requirement covers only energy-related choices between different energy sources and the general structure of Member States' energy supply, while Member States are granted an exclusive competence to determine the conditions for exploiting their energy resources.[65]

But this interpretation cannot address certain counterarguments against procedural theories either. First, such theories are *contra verba legis*. Accordingly, the phrase "without prejudice to Article 192(2)(c) TFEU" of the second subpara. of art. 194(2) TFEU cannot mean a *mutatis mutandis* application of the former.[66] Second, the EU legislature has added a distinct third para. in art. 194 TFEU, which requires unanimous voting for measures of energy policy that are primarily of a fiscal nature. This art. 194(3) TFEU explicitly applies by way of derogation from art. 194(2) TFEU, which means that it introduces something different. Additional arguments rebutting the procedural nature of the provision under scrutiny are derived from a historical interpretation. Accordingly, what is now art. 194(2) TFEU is very close to the proposed art. III-256 of the Treaty establishing a Constitution for Europe (that was in the end rejected). Member States had brought changes to the content of that art. III-256, in their effort to retain competences and ensure a greater area of national sovereignty, and not because of dissent about the procedure.[67]

Opposite to the "procedural theories" is the "caveat" theory, according to which the second subpara. of art. 194(2) TFEU restricts the competence of the EU and preserves national energy sovereignty. This theory is more convincing and this is also what the CJEU seems to endorse. To begin with, in 2011 the CJEU was asked to rule on the legality of the Commission Decision 2011/278/EU that determined transitional Union-wide rules for a harmonised free allocation of emission allowances. In its decision, the CJEU found that art. 194(2) TFEU was not applicable, and consequently not infringed, because the contested decision was founded upon the environmental legal basis. In its judicial reasoning, the CJEU

[65] B Delvaux, *EU Law and the Development of a Sustainable, Competitive and Secure Energy Policy* (Intersentia 2013) 345-347.

[66] K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' cit. 213; A Johnston and E Van Der Marel, '*Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' cit. 195-196.

[67] A Johnston and E Van Der Marel, '*Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' cit. 195-196.

interpreted and compared arts. 192(2)(c) and 194(2) TFEU, and only characterised the former as being "only procedural in nature", which implicitly entails that the latter is not.[68]

More recently, in 2015, Austria requested the annulment of the Commission's approval of the State aid that the United Kingdom had granted to the "Hinkley Point C" nuclear power plant. In dealing with the arguments of Austria regarding the negative effects of such State aid on the decarbonisation process, the General Court and the Court of Justice of the EU clarified that Member States are entitled to choose between different sources of energy and determine their energy mix. In this regard, turning to nuclear energy is a choice that they can make.[69] In the words of Advocate General (AG) Gerard Hogan, "[w]hat emerges from [art. 194(2) TFEU] is that the Member States' room for manoeuvre when it comes to their energy supply must be preserved and acknowledged. To this extent, Article 194(2) TFEU represents an important rebalancing of the role of the individual Member States vis-à-vis the Union in the field of energy policy".[70]

In 2022, in the similar case *Paks II*, the General Court reached the same conclusion. In *Paks II*, Austria requested the annulment of the Commission's approval of the State aid that Hungary had given for the development of two nuclear reactors in the region Paks. The CJEU affirmed that the second subpara. of art. 194(2) TFEU means that Hungary has the right to determine its energy mix, and hence use nuclear energy and devote resources for the construction of nuclear power plants. Despite the EU requirements for decarbonisation, with which Hungary anyhow seemed to conform, the Commission cannot require a Member State to limit financial support to renewable energy sources only or to provide for identical financing or operating conditions for all energy producers.[71] Austria has appealed the judgment and the case before the appellate body is still pending.[72]

Further, particularly interesting is the opinion of AG Eleanor Sharpston in the Opinion procedure 2/15 that related to the EU competence to conclude the Free Trade Agreement between the EU and the Republic of Singapore (EUSFTA). Chapter 7 of EUSFTA concerned the elimination of barriers to trade and investment in RES. Although it was concluded under art. 207(1) TFEU regarding the common commercial policy, it was argued that its conclusion infringed art. 194(2) TFEU. AG Sharpston rejected this argument and concluded that "the sole purpose of Article 194(2) TFEU is to clarify the scope of the European Union's competence to adopt legislative acts for the purposes of implementing an energy

[68] Case T-370/11 *Poland v Commission* ECLI:EU:T:2013:113, para. 17.

[69] Case C-594/18 P *Austria v Commission* cit., para. 79; case T-356/15 *Austria v Commission* ECLI:EU:T:2018:439, paras 507, 526.

[70] Case C-594/18 P *Austria v Commission* ECLI:EU:C:2020:742, opinion of AG Hogan, para. 87.

[71] Case T-101/18 *Austria v Commission* cit., paras 82, 97, 145-146.

[72] Case C-59/23 P *Austria v Commission* cit.

policy. It cannot therefore limit the autonomous scope of the common commercial policy as laid down in Article 207(1) TFEU".[73]

Therefore, art. 194 TFEU is a *lex specialis* for energy matters that takes precedence over art. 192 TFEU in this area. It determines the objectives that shall be pursued and the legislative procedure that shall be followed, while the introduction of a caveat in art. 194(2) TFEU delineates the scope of the relevant competence of the EU. The limits that this caveat entails for a Union intervention in matters of renewable energy support are examined in section IV of this *Article*. But, as the overview of the relevant CJEU case law also demonstrates, the caveat has so far been used only to justify certain choices and initiatives of national policy, and not to block an initiative taken at the EU level.

Focusing on measures of renewable energy support, and in line with the above, Directive 2018/2001, Directive 2024/1711, and Regulation 2024/1747 that include provisions governing national support schemes for RES are all founded upon art. 194(2) TFEU; and correctly so. As for the environmental legal basis, it is still relevant for the enactment of measures that might affect energy policy and be crucial for the energy transition, but they mainly pursue objectives defined in art. 191 TFEU.[74] Characteristic is the case of the European Climate Law, which is manifestly linked with the objective of combating climate change, as per art. 191(1) TFEU.[75] In case a measure has more than one objectives or components, which are contemporaneous and indissolubly linked with each other, without one being secondary and indirect in respect of the others, the legal basis is dual. But for a dual legal basis to apply, the different procedures involved shall not be incompatible.[76] Accordingly, the Regulation on the Governance of the Energy Union and Climate Action is founded on both arts 192(1) and 194(2) TFEU, as its objective is the introduction of governance mechanisms to ensure the attainment of the Union's 2030 targets both

[73] Opinion 2/15 *Free trade agreement with Singapore* ECLI:EU:C:2016:992, opinion of AG Sharpston, para. 488. As for the CJEU analysis vis-à-vis Chapter 7 of EUSFTA, it was rather short and inferred that its conclusion "falls within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU". See Opinion 2/15 *Free trade agreement with Singapore* ECLI:EU:C:2017:376, para. 74.

[74] On the selection criteria for the proper legal basis see the concise analysis of L Reins, 'In Search of the Legal Basis for Environmental and Energy Regulation at the EU Level: The Case of Unconventional Gas Extraction' (2014) Review of European, Comparative & International Environmental Law 125.

[75] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

[76] Case C-178/03 *Commission v. European Parliament and Council* ECLI:EU:C:2006:4, paras 43-56; case C-165/87 *Commission v. Council* ECLI:EU:C:1988:458, para. 11.

for energy and for climate.[77] This regulation is also interesting for renewable energy support law and policy because its art. 33 provides for the establishment of a Union Renewable Energy Financing Mechanism by the Commission.[78]

III.2. The legal basis of art. 114 TFEU regarding the approximation of laws

Another "competitor" of art. 194 TFEU can be art. 114 TFEU. This latter article provides for the ordinary legislative procedure for measures "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". This is a general provision, a residual legal basis that explicitly applies "[s]ave where otherwise provided in the Treaties", as per its para. 1. Thus, it is used for the elimination of appreciable distortions of competition and of obstacles to the exercise of the fundamental freedoms.[79] This is not irrelevant for the clean energy transition. A characteristic example is the EU Taxonomy Regulation 2020/852, which establishes a list of environmentally sustainable economic activities to facilitate a shift towards sustainable investment. The regulation aims to "remove obstacles to the efficient movement of capital into sustainable investments in the internal market and to prevent new obstacles from emerging" and is founded on art. 114 TFEU.[80]

But art. 114 TFEU is a *lex generalis* and interventions relating to matters of energy, including renewable energy support, should be grounded on the *lex specialis* of art. 194 TFEU.[81] However, the use of a dual legal basis consisting of arts 114 and 194(2) TFEU for bringing harmonisation in renewable energy support policies could be justified, provided

[77] Regulation 2018/1999 cit.

[78] See also Commission Implementing Regulation (EU) 2020/1294 of 15 September 2020 on the Union renewable energy financing mechanism.

[79] P Craig and G de Búrca, *EU Law Text, Cases, and Materials* (Oxford University Press 2015) 616; C Barnard, *The Substantive Law of the EU* (Oxford University Press 2007) 568.

[80] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, recital 9.

[81] See K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' cit. 210; A Johnston and E Van Der Marel, *'Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' cit. 185; C Calliess and C Hey, 'Multilevel Energy Policy in the EU: Paving the Way for Renewables' cit. 97-98. But see also M Fehling, 'Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement' cit. 343, where the author argues that "energy competence according to Article 194(2)(1) TFEU explicitly applies only 'without prejudice to the application of other provisions of the Treaties'. This implies that even the general harmonisation clause in the internal market provision (Article 114 TFEU) could be considered as a legal basis in addition to the environmental competence. Ultimately, as is generally the case with overlapping legislative powers, it depends on the main focus of the legal measure".

that the completion and functioning of the internal market is a substantial objective of equal gravity and priority with the promotion of RES. This has not been the case with matters of renewable energy support yet. However, art. 114 TFEU has been used as one of the legal bases for the 2023 amendment of the Renewable Energy Directive 2018/2001 that did not impact on renewable energy support law.[82] Interestingly, the amending Directive 2023/2413 is founded on three legal bases, that is, arts 114, 192(1), and 194(2) TFEU. This is an exceptional case of a triple legal basis, which can be explained by the fact that the amendments did not only involve the Renewable Energy Directive 2018/2001, but also Directive 98/70/EC[83] that is founded upon art. 100a of the Treaty establishing the European Community (which is equivalent to what today is art. 114 TFEU), as well as Regulation 2018/1999[84] that is founded upon both arts 192 and 194 TFEU. Therefore, this choice does not seem sufficient to rejuvenate the discussion about the applicability of art. 114 TFEU in the field of renewable energy policy.

III.3. The solidarity legal basis of art. 122 TFEU

Before concluding this section, it is worth referring to art. 122(1) TFEU, which states that "[w]ithout prejudice to any other procedures provided for in the Treaties, 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". As this wording shows, art. 122 TFEU is a *lex specialis* with regard to art. 194 TFEU. It applies in the exceptional situation when severe difficulties in the supply of energy products need to be tackled.[85] Art. 122 TFEU has been used more frequently after the invasion of Ukraine in 2022 and the outbreak of an energy crisis. It has founded emergency legal acts for containing the excessively high energy prices and for accelerating the realisation of RES projects.[86] This does not change the fact that it is an article of an exceptional nature that should be prudently and warily used, and could not serve as the standard legal basis for renewable energy support policy or other aspects of energy policy.[87]

[82] Directive 2023/2413 cit.

[83] Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC.

[84] Regulation 2018/1999 cit.

[85] See JF Braun, 'EU Energy Policy under the Treaty of Lisbon Rules Between a New Policy and Business as Usual' (European Policy Institute Network, Working Paper No. 31, February 2011), 2.

[86] See for example Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

[87] M Chamon, 'The Rise of Article 122 TFEU: On Crisis Measures and the Paradigm Change' (1 February 2023) Verfassungsblog verfassungsblog.de.

IV. The limits of the EU competence in the area of renewable energy support

The EU competence in matters of energy in general and of renewable energy support in specific is limited by the second subpara. of art. 194(2) TFEU, while the exercise of the competence is subject to the principles of subsidiarity and proportionality and it is *de facto* limited by political parameters.

IV.1. The limited scope of the EU competence

In line with the most convincing theory, and as demonstrated in the previous section of the *Article*, art. 194(2) TFEU, second subpara., introduces a caveat that genuinely restricts the EU competence and reserves certain rights and choices for the national sphere. The extent of this restriction depends on the interpretation of the caveat.

It is noted that the second subpara. of art. 194(2) TFEU is unconditional, and the restriction it introduces is not relativised by any rule of reason or threshold. This is a conscious choice of the EU legislature and it is clearly opposed to the formulation of the similar provision of the environmental legal basis of art. 192(2)(c) TFEU. The wording of this latter article also includes the word "significantly", so that it applies to "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". Accordingly, if one follows a strict grammatical interpretation, the powers bestowed on the EU in the field of energy are considerably limited. Indeed, every measure could somewhat 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. This, however, is not a satisfactory interpretive result. First, it would entail that the energy competence that was deliberately inserted in the TFEU is cramped, if not practically meaningless; second, the EU would be conditionally able to adopt measures significantly affecting national energy policies under the environmental legal basis, but not under the energy legal basis.[88]

On the other hand, a restrictive interpretation of the caveat entails that the EU is not extensively prevented from using the energy legal basis. Such a restrictive interpretation can be grounded upon an analogous application of the significance threshold of art. 192(2)(c) TFEU or upon a reasonable and teleological interpretation that introduces an

[88] K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' cit. 212; A Johnston and E Van Der Marel, '*Ad Lucem?* Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' cit. 183; B Delvaux, *EU Law and the Development of a Sustainable, Competitive and Secure Energy Policy* cit. 346-347.

effects-based threshold.[89] The latter interpretive foundation is more convincing, as it is close to a rule of reason and it is not weakened by the explicit differentiation between art. 192(2)(c) TFEU and art. 194(2) TFEU. A restrictive approach is also supported by the classic interpretive rule that exceptions, such as the one of the second subpara. of art. 194(2) TFEU, are construed narrowly.[90]

As already demonstrated in the previous section, the CJEU has so far only dealt with cases in which Member States have invoked the second subpara. of art. 194(2) TFEU in order to legalise national measures. It has not been asked to determine if a Union initiative of energy policy goes beyond the limits of this provision. However, a restrictive interpretive approach seems to be affirmed by case law focusing on the similar derogation of art. 192(2)(c) TFEU. Accordingly, in Case 5/16 Poland contested the legality of Decision 2015/1814 because *inter alia* it was allegedly erroneously adopted on the basis of the ordinary legislative procedure and not on the basis of the special legislative procedure that art. 192(2)(c) TFEU requires for "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". The contested decision related to the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme. The CJEU acknowledged that the measures therein contained "necessarily affect the energy sector of Member States".[91] However, it rejected a broad interpretation of art. 192(2)(c) TFEU because it "would risk having the effect of making recourse to the special legislative procedure, which the [TFEU] intended as an exception, into the general rule".[92] Such an argumentation can *mutatis mutandis* apply to art. 194(2) TFEU too, which would point towards a restrictive interpretation of the caveat it introduces. In the same case, in para. 38, the CJEU also noted that "the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include, *inter alia*, the aim and content of that measure", and concluded that art. 192(2)(c) TFEU "can form the legal basis of an EU measure only if it follows from the aim and content of that measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State".[93] However, this conclusion refers to the selection of a legal basis. Since art. 194(2)

[89] TG Iliopoulos, *Law of Finance for Renewable Energy Projects in the EU: Secondary Law and Support Schemes* cit. 193; TG Iliopoulos, 'The Zero-Carbon Energy Transition and the Competence of the EU' in G Wood, V Onyango, K Yenneti and MA Liakopoulou (eds), *The Palgrave Handbook of Zero Carbon Energy Systems and Energy Transitions* (Palgrave Macmillan 2022) 1; K Haraldsdóttir, 'The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU' cit. 213.

[90] K Huhta, 'The Scope of State Sovereignty Under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' cit. See also para. 45 C-5/16 *Poland v Parliament and Council* cit.

[91] Case C-5/16 *Poland v Parliament and Council* cit. para. 44.

[92] *Ibid*.

[93] *Ibid*. para. 46.

TFEU does not introduce a special legislative procedure, but a caveat, the *mutatis mutandis* application of this conclusion to it cannot be as easily supported.

Overall, the second subpara. of art. 194(2) TFEU should be construed narrowly to only prevent Union action of an exceptionally and excessively intense impact on certain Member States' energy right and choices. And the rules governing matters of renewable energy support that have been enacted so far do not exceed this threshold. The abstract rules and the more concrete requirements for national support schemes found in Directive 2018/2001 and Regulation 2019/943 might be seen as somewhat affecting the conditions of exploitation of Member States' energy resources. Or, the requirement for the use of competitive bidding can be seen as impacting on the Member States' choice between different energy sources because it means that the most cost-efficient and market-mature technologies have better chances to win an auction and be selected. But it would require a very strict interpretation of the caveat to argue and conclude against the legality of such interventions. And even measures seeking more homogeneity between national RES support regimes or forwarding harmonisation in the field will not easily infringe art. 194(2) TFEU. EU measures that would arguably breach art. 194 TFEU are intensive interventions, such as the prohibition or requirement that Member States allocate support exclusively to a certain source, or the requirement that an identical support treatment is given to all energy sources.[94] Besides, in an *a maiore ad minus* argument, the effects of EU renewable energy support law in the Member States' energy right and choices are much softer compared to the introduction of RES share targets.

IV.2. The limits in the exercise of the EU competence

Energy is an area of shared competence with the Member States, as per art. 4(i) TFEU, and hence its exercise is subject to the principles of subsidiarity and proportionality. The former requires that "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", while the latter entails that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".[95] For matters that do not fall within the Union's exclusive competence, "any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality".[96] This is important because the added value of an EU intervention so that it complies with the above

[94] See T-101/18 *Austria v Commission* cit., para. 97. On the limits of the EU competence under art. 194 TFEU, see also M Fehling, 'Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement' cit.

[95] Art. 5(3) and (4) TEU.

[96] Protocol No 2 on the application of the principles of subsidiarity and proportionality, art. 5.

principles is not self-evident. Accordingly, increasing homogeneity between national support schemes is often associated with beneficial effects, as demonstrated in section II of this *Article*, but it is not a panacea because there are parameters that might undermine the expected beneficial effects. For example, more homogeneity reduces regulatory competition. This is not only associated with transaction costs and to the race-to-the-bottom problem, but it can also be a learning process that allows Member States to infer best practices after having experimented with different regulatory approaches and instruments. Such a constructive process is lost with harmonisation.[97] Besides, limiting regulatory competition has transaction costs too. There are social, political, and administrative costs and difficulties linked with the negotiations about how a more homogeneous regime should be, with the realisation of the necessary reforms and the adaptation of economic actors and national bureaucracies to them, as well as with the enforcement of a new legal regime. And there are economic actors that actually prefer flexibility and a variety of options to choose from.[98]

Such challenges and political contestation have appeared in the area of renewable energy support. Member States have traditionally strongly resisted harmonisation that would divest them of their power to choose their support schemes, especially when the suggested harmonising measures would make them change their own support regimes. The political dissent was demonstrated already in the late 1990s-early 2000s, when the Commission tried to bring harmonisation of national support regimes and promoted a harmonised system of renewable energy quotas and tradeable green certificates. Those Member States that had already applied direct price support schemes, and with Germany in the driver's seat, opposed and eventually blocked the suggested reform.[99] Recital 15

[97] H Wagner, 'Is Harmonisation of Legal Rules an Appropriate Target? Lessons from the Global Financial Crisis' cit.

[98] *Ibid*.; E Carbonara and F Parisi, 'The Paradox of Legal Harmonisation' cit; B Crettez, B Deffains and R Deloche, 'On the Optimal Complexity of Law and Legal Rules Harmonisation' (2009) European Journal of Law and Economics 129.

[99] See A Verbruggen and E Laes, 'Early European Experience with Tradable Green Certificates Neglected by EU ETS Architects' (2021) Environmental Science & Policy 66; EL Boasson, 'Constitutionalisation and Entrepreneurship: Explaining Increased EU Steering of Renewables Support Schemes' (2019) Politics and Governance 70; Solorio and P Bocquillon, 'EU Renewable Energy Policy: A Brief Overview of its History and Evolution' cit.; D Jacobs, 'Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper' cit.; G Resch, M Gephart, S Steinhilber, C Klessmann, P del Rio and M Ragwitz, 'Coordination or Harmonisation? Feasible Pathways for a European RES Strategy Beyond 2020' (2013) Energy & Environment 147; R Hildingsson, J Stripple and A Jordan, 'Governing Renewable Energy in the EU: Confronting a Governance Dilemma' cit.; V Lauber and E Schenner, 'The Struggle over Support Schemes for Renewable Electricity in the European Union: a Discursive-institutionalist Analysis' (2011) Environmental Politics 508; IH Rowlands, 'The European Directive on Renewable Electricity: Conflicts and Compromises' (2005) Energy Policy 965.

of the then newly enacted Renewable Electricity Directive 2001/77 admitted that it was "too early to decide on a Community-wide framework regarding support schemes, in view of the limited experience with national schemes". But a certain homogeneity was achieved because Germany's model of direct price support did serve as an example that other Member States wanted to follow.

Today most Member States have ended up believing in and applying direct price support schemes.[100] The prevalence of direct price support schemes was ultimately also accepted by the Commission, which has abandoned the plan for EU-wide renewable energy quotas. And since the 2010s, plans for increasing homogeneity and forwarding harmonisation in the area of renewable energy support have relied on arguments of economic efficiency of the support schemes of any type that Member States opt to use. And most initiatives that have proven crucial for the development of EU renewable energy support law have been taken by the Commission's stronger Directorate-General for Competition.[101] Accordingly, State aid compatibility soft law covered the area of renewable energy support and included conditions that would make support schemes cost-effective and compatible with the internal market.[102]

Building on this, the minimum harmonisation that was later brought by Directive 2018/2001, Directive 2024/1711, and Regulation 2024/1747 also relies on such economic arguments. The relevant rules apparently prioritise the cost-effectiveness of support schemes and the functioning of energy markets. The Commission's proposals have highlighted that reforms in the area of energy (including renewable energy support) are important for addressing common European problems, such as climate change, security of energy supply, inordinately high energy prices, or economic and social development.[103] They have also stressed the benefits of cross-border trade and investments within a more "integrated and more energy-efficient energy system based on renewable generation".[104]

[100] I Solorio and H Jörgens, 'Contested Energy Transition? Europeanisation and Authority Turns in EU Renewable Energy Policy' (2020) Journal of European Integration 77.

[101] *Ibid.*; EL Boasson, 'Constitutionalisation and Entrepreneurship: Explaining Increased EU Steering of Renewables Support Schemes' cit.

[102] See Community guidelines on State aid for environmental protection cit.; Guidelines on State aid for environmental protection and energy 2014-2020 cit.

[103] Explanatory Memorandum COM(2023) 148 final from the Commission of 14 March 2023 on the Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design, 8; Proposal for a Directive of the European Parliament and of the Council COM(2016) 767 final from the Commission of 30 November 2016 on the promotion of the use of energy from renewable sources (recast), 6.

[104] Explanatory Memorandum COM(2023) 148 final, cit. 9. See also Proposal for a Regulation of the European Parliament and of the Council COM(2016) 861 from the Commission of 30 November 2016 on the on the internal market for electricity, 9.

Besides, the design and implementation of support schemes directly affects the functioning of the electricity markets.[105]

Thus, a large degree of heterogeneity in national RES support policies might militate against the vision and objective of a well-functioning internal energy market that will facilitate cross-border exchanges and will strengthen competition. In this regard, a fragmented approach on the basis of divergent national rules is found to risk higher costs for consumers and an overall lower deployment of renewable energy across the Union.[106] Further, it is found to undermine investment certainty,[107] unlike an EU intervention that would ensure a minimum degree of homogeneity and of design quality of supportive financing policies, and would require a certain regulatory stability. It is thus a common approach that is needed to ensure the competitive and sustainable functioning of an internal energy market that serves the decarbonisation objective.[108]

The above demonstrates the need and added value of EU action in the area of renewable energy support, in line with the requirements of the principles of subsidiarity and proportionality. Especially with regard to the latter, the EU intervention has not gone beyond what is necessary to serve the sought objectives. Member States have flexibility as to the how they will contribute to the common EU-wide energy objectives. They also retain discretion in designing their national support schemes. In a very characteristic example, the subsidiarity assessment of the proposal for what now is the Renewable Energy Directive 2018/2001 emphasised that the cross-border participation in support schemes is needed to address fragmentation of the internal market.[109] However, art. 6 of the directive only softly invited Member States to provide for such cross-border participation and introduced no legal obligation. A legislative intervention at the EU level will of course have certain negative effects too. The Commission has acknowledged that it might have "increased administrative costs and burden for undertakings and national administrations" or "short-term impact on businesses, as these would have to be adapted for new

[105] For an analysis on how renewable energy support choices of one Member State impact the electricity markets of another, see for example I Mas Urquijoa and F Paraschiv, 'Cross-border Effects between the Spanish and French Electricity Markets: Asymmetric Dynamics and Benefits in the Light of European Market Integration' (2023) The Energy Journal 241; M Bartek-Lesi et al., 'Measuring the Benefits of Cross-border Renewable Auctions in Central and Eastern Europe – The Theoretical Case of Hungary' (2023) Energy Reports 5004.

[106] Proposal for a Directive of the European Parliament and of the Council COM(2016) 767 final cit. 6.

[107] *Ibid.*

[108] For recent analyses arguing for the need of homogeneity in energy policy, see for example V Venizelou and A Poullikkas, 'Trend Analysis of Cross-Border Electricity Trading in Pan-European Network' (2024) Energies 5318; M Melliger and E Chappin, 'Phasing out Support Schemes for Renewables in Neighbouring Countries: An Agent-based Model with Investment Preferences' (2022) Applied Energy 117959.

[109] Proposal for a Directive of the European Parliament and of the Council COM(2016) 767 final cit. 6.

trading arrangements".[110] But such drawbacks are outweighed by the attainment of key policy objectives and by expected economic gains that a more homogeneous system will deliver.[111]

On the basis of the above, the EU legislature has affirmed that Directive 2018/2001, Directive 2024/1711, and Regulation 2024/1747 all comply with the principles of subsidiarity and proportionality.[112] The introduction of more rules or the intensification of harmonisation in this area in the future is possible, provided that political consensus is attained. Further, it is required that the added value of another Union intervention is shown, and that any further intervention is appropriate, necessary and *stricto sensu* proportionate with regard to the objective sought.

V. Conclusion

The field of energy policy is growing more complicated, with different challenges arising and calling for effective and immediate answers. The disruption of the energy markets, the energy inflation crisis, and the energy price crisis in the early 2020s have been added to the ongoing climate change emergency and have necessitated a major rethink of energy law and policy, as well as an extensive revision of the relevant legislation. The European integration of energy systems is, thus, increasingly important and challenging, and the acceleration of the clean energy transition with market stability is becoming an urgent priority.[113]

A significant aspect of energy policy is the field of renewable energy support. The development of RES is manifestly and inextricably linked with the attainment of the clean energy transition, but also with energy security and growth. But while financially supporting renewable energy projects has been a standard practice in all Member States, the energy inflation crisis and the energy price crisis have blurred the need for granting such support to RES. This *Article*'s section II has demonstrated that, in spite of technological developments and in spite of the unprecedentedly high prices that renewable energy projects can now benefit from, the need for a solid framework governing the enactment of support schemes for RES persists. In other words, the current situation does not call for an overall suspension, but rather for a rethink of support policies to steadily accelerate the clean energy transition without (further) distorting energy markets and without

[110] Proposal for a Regulation of the European Parliament and of the Council COM(2023) 148 from the Commission of 14 March 2023 on amending Regulations (EU) 2019/943 and (EU) 2019/942 as well as Directives (EU) 2018/2001 and (EU) 2019/944 to improve the Union's electricity market design, 14, 15.

[111] *Ibid.*

[112] See recital 128 Directive 2018/2001 cit.; recital 35 Regulation 2024/1747 cit.; recital 61 Directive 2024/1711 cit.

[113] Communication COM(2022) 230 cit.

passing an excessive financial burden on to consumers. The EU has a role to play here. This *Article*'s section II has shown that an EU intervention towards more homogeneity for national support regimes could ensure a better design and implementation quality of national support schemes, bring more certainty, and relieve investors who wish to expand their portfolios in more Member States from transaction costs.

In view of the above, this *Article* investigated the EU competence in the field of renewable energy support. The "general reference provision" for energy policy is art. 194 TFEU.[114] It establishes the objectives of the EU energy policy and provides a specific legal basis for energy policy measures. But its wording also shows that it is the legislative fruit of a political compromise between the EU and the Member States that have been reluctant to cede sovereignty in the field of energy and to accept the establishment of a strong Union competence. This *Article*'s section III has deconstructed art. 194 TFEU and has showed that in spite of the doubts about its scope and true meaning, it is a *lex specialis* on which renewable energy support policy should be founded (possibly, if needed, in conjunction with arts 114 or 192 TFEU). This section also analysed the obfuscated derogation of the second subpara. of art. 194(2) TFEU and it showed that it does not introduce a special legislative procedure, but a genuine, albeit not as extensive, restriction of the EU competence.

Next, section IV of the *Article* examined the limits of the EU competence. It argued that the caveat of the second subpara. of art. 194(2) TFEU does not neutralise or significantly delimit the EU competence in matters of renewable energy support. The same section also examined legal and political limitations with regard to the exercise of this competence. While the EU legal order has the competence to intervene, adopt legislative measures, and even harmonise in the area of renewable energy support, the exercise of this competence is subject to the principles of subsidiarity and proportionality. The worthiness of a reform towards more homogeneity cannot be *in abstracto* taken for granted, but should be concluded *ad hoc*, when the expected benefits are properly weighed against the problems that might arise. Further, political dissent and contestation have made it even more difficult for the Commission to successfully pursue its harmonisation agenda. Today a certain homogeneity of national support schemes has been achieved, thanks to a *de facto* convergence on the basis of successful direct price support policies, to soft law conditions, and to a minimum harmonisation brought by recent legislative initiatives that have capitalised on cost-efficiency arguments. One cannot exclude further convergence on the basis of best practices or an expansion of the relevant corpus of EU law rules, on the basis of and in line with the terms of art. 194 TFEU.

[114] *Parliament v Council*, opinion of AG Mengozzi, cit., para. 23.