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The interaction between Article 192 and 194 TFEU

Examining the scope of a predominant environmental purpose



Key questions

- Are Member States *de facto* sovereign with regards to their choice of energy mix?
- Does the predominant environmental purpose trigger an increased leverage of the EU in this matter?
- How is this approach interpreted and justified by the European Court of Justice?

Article 194 (2) TFEU

- 194 (1) (c) TFEU grants the EU competence in the area of the development of new and renewable forms of energy
- Article 194 (2) TFEU recalls that the measure «shall not affect a Member State's right to determine the conditions for exploiting its energy resources and the general structure of its energy supply, without prejudice to Article 192 (2) TFEU»

Article 192 TFEU

- The absence of a specific energy provision triggered environmental legal basis? (De Sadeleer, 2014)
- Choice underlining the main predominant purpose?

Energy and environment as shared competences

- Automatic pre-emption of Member State action?
- Judicial interpretation thereof as well as the choice of legislation will determine the practical divide between Member State and EU competence (Craig, 2010)

Common interest, common means

- Exhaustive harmonisation or the lack thereof follows a different interpretation but nevertheless emphasises the predominant environmental purpose
- Case T-370/11 *Republic of Poland v Commission*
- Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten*

Case T 370/11 Republic of Poland v Commission

- Alleged failure to take into consideration the specificity of each Member State
- Would disrupt energy balance and redefine overall energy policy
- The right referred to in the second subparagraph of Article 194 (2) TFEU is not applicable
- General prohibition established?
- Did not combined constitute the legal basis of the directive

Relates solely to the energy sector

The Court upheld that “it is true that under the second subparagraph of Article 194 (2) TFEU, measures [...] cannot affect the right of a Member State to determine the conditions for exploring its energy resources, its choice between different energy sources and the general structure of its energy supply [...]

Case T-370/11 Republic of Poland v Commission [2013], not yet published para 17, emphasis added

Not a general prohibition

- **However, 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 [...].** On the one hand, Article 194 TFEU is a general provision **which relates solely to the energy sector** and, consequently, delineates a sectoral competence [...]. On the other hand, it should be noted that the second subparagraph of Article 194(2) TFEU expressly refers to point (c) of the first subparagraph of Article 192(2) TFEU. Indeed, the second subparagraph Article 194(2) TFEU provides that the prohibition on affecting the right of a Member State to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply applies without prejudice to point (c) of the first subparagraph of Article 192 (2) TFEU. While it is true that that latter provision is only procedural in nature, it none the less provides specific rules relating to the environment policy of the European Union. It follows that the right referred to in the second subparagraph of **Article 194(2) TFEU is not applicable in the present case, *since the contested decision constitutes an action taken by the European Union within the framework of its environment policy.***

Case C-573/12 Ålands Vindkraft AB v Energimyndigheten

- Mandatory targets necessarily exerts an influence
- Territorial restrictions as a benchmark for Article 194 (2) TFEU?

Mandatory targets necessarily exerts an influence

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 the 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

Territorial restrictions as a benchmark

- Any prohibition on territorial restrictions would cause the Member States to lose control over their energy mix (Opinion AG Yves Bot para. 110)
- A Member State does not exceed the bonds of the discretion to which it remains entitled in the pursuit of the legitimate objective of increasing production of green electricity (C-573/12 para. 103)

Interpreting as EU law currently stands

- De facto EU competence regarding the conditions for exploiting energy sources
- Territorial restrictions as an indirect benchmark for 194 (2) TFEU

Conclusion

- Balance of the various objectives within different cases
- Leverage of the EU within a predominant environmental purpose
- European Union – further legal development when energy and environment are combined



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