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European Energy and Environmental Law Review

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Aims and Scope

European Energy and Environmental Law Review is a bimonthly journal which presents comprehensive coverage of the latest developments in energy and environmental law throughout Europe. In addition to this, European Energy and Environmental Law Review contains concise, accessible articles which explore and analyse significant issues and developments in energy and environmental law and practice throughout Europe.

European Energy and Environmental Law Review enables the reader to keep abreast of significant and topical aspects of energy and environmental law, including the legal issues relating to renewables, energy security, energy efficiency, energy competition law, energy liberalisation process, electricity and gas markets, climate change; sustainable energy, land, air, fresh water, oceans, noise, waste management, dangerous substances, and nature conservation. Its succinct, practical style makes it ideal for the busy professional, while the authority, scope,and topicality of its coverage make it an invaluable research tool.

Interpreting the New EU Energy Provision

Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU†

Angus Johnston and Eva van der Marel***

I. Introduction

This analysis will examine Article 194 of the Treaty on the Functioning of the European Union (''TFEU'', or ''Treaty''), which was added to the TFEU as a result of the Lisbon Treaty amendments. Article 194 TFEU allows the European Union (''EU'') to adopt secondary legislation in order to achieve certain objectives related to the functioning of the energy market (as listed in Article 194(1) TFEU), given that the area of ''energy'' is now a shared competence between the Member States and the EU. However, the usefulness of this provision as a basis for secondary legislation is curtailed by the second sentence of Article 194(2) TFEU (''the caveat''), which states that such EU measures ''shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply''. For the sake of simplification, these will be referred to as ''Member States' energy rights''. In order to establish the extent to which Article 194 TFEU can serve as a basis for approximating Member States' national laws and regulations in the field of energy, it is important first to interpret the meaning of the caveat in Article 194(2) TFEU. Since the Court of Justice of the European Union (''CJEU'') has not yet ruled on this aspect of the new energy provision, this commentary will consider five hypothetical interpretations. In brief, these hypotheses are as follows:

(i) **Hypothesis 1**: the derogation options resulting from Article 114(4) and (5) TFEU would remain applicable even in the context of a harmonising measure based on a more specific Treaty provision (here, Article 194(2) TFEU), where the latter included less specific information on such options;

(ii) **Hypothesis 2**: the substantive and procedural requirements of the derogation provisions in Article 114(4) and (5) may still serve as a role model and be used to put at least some flesh on the very bare bones of Article 194(2) TFEU;

(iii) **Hypothesis 3**: the caveat in Article 194(2) TFEU *either* (A) implies that an EU measure based on Article 194 TFEU should include an ''opt-out'' clause, so that Member States' ''energy rights'' remain unaffected; *or* (B) amounts to a free-standing derogation provided expressly by the TFEU, which would allow Member States to derogate from the requirements of legislation adopted under the first paragraph of Article 194(2) where its ''energy rights'' were (significantly) affected;

(iv) **Hypothesis 4**: EU harmonisation measures in the energy field will require unanimity voting in Council when the measure risks affecting Member States' energy rights; and

(v) **Hypothesis 5**: a measure based on Article 194 TFEU may not (whatsoever) affect Member States' ''energy rights''.

The level of harmonisation of the energy market which can be achieved under the TFEU[1] will ultimately depend upon which hypothesis is upheld. Even at this preliminary stage, the very fact that so many possible approaches have been developed to the interpretation of Article 194(2) suggests that the introduction of the new Energy Chapter into the TFEU has generated significant uncertainty as to the scope of this new EU legislative competence. We will return to this point in our conclusions.

II. Article 194 TFEU

2.1 The text of Article 194 TFEU

After the tumultuous rise and fall of the EU's Constitutional Treaty, Article 194 TFEU was eventually introduced into EU law for the first time as a result of the Treaty of Lisbon, and reads as follows:

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
   (a) ensure the functioning of the energy market;
   (b) ensure security of energy supply in the Union; and
   (c) promote energy efficiency and energy saving

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[1] Considering that, in light of the completion of the internal energy market, some level of harmonisation of the energy market will (continue to) be pursued.

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and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

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

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

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

The advent of a specific energy provision in the EU's Treaties seemed to be an important step in the maturation of EU law and policy in the energy field. And the wide range of goals which that policy was to pursue, allied with the use of the ordinary legislative procedure for passing such measures, seemed to confirm this impression.[3] But the precise implications of the caveat inserted as the second paragraph of Article 194(2) (italicised in the text above) may yet cast doubt[4] upon such optimistic assessments: it is the meaning and scope of the caveat with which we are concerned here.

2.2 Similar provisions elsewhere in the TFEU?

At first sight, when examining the wording and possible implications of Article 194 TFEU, there would appear to be parallels between the Article 194(2) caveat and the relatively vague formulations of the limitations included in other TFEU provisions. Such provisions include Articles: 165(1)[5] on sport; 166(1)[6] on vocational training; 167(1)[7] on culture; 168(7)[8] on public health; or, indeed, 345[9] on national systems of property ownership and 346[10] on national security issues. All of these provisions, in their different ways, address the issue of the limits of the EU's competence to legislate, whether providing a general exception applying across the board (like Articles 345 and 346) or operating only within the specific competence area in question (as in Articles 165 to 168). At the same time, this comparison also shows that the wording used in Article 194(2)'s caveat differs from that employed under these other provisions: care should thus be taken when seeking to borrow from these other provisions when developing our understanding of Article 194.

With these preliminary considerations in mind, we can now turn to introducing the range of possible ways in which the caveat to Article 194(2) might be understood, before providing detailed analysis of each hypothesis in the subsequent sections of this paper.

2.3 Background to the possible interpretations of the caveat

2.3.1 A general "significant effect" threshold?

From the outset, it can be observed that Member

[2] Emphasis added.

[3] See also the only CJEU judgment on Article 194 TFEU to date: Case C-490/10 *European Parliament* v. *Council*, nyr, judgment of 6 September 2012, supporting the Parliament's contention that Article 194 was now clearly the proper legal basis for measures pursuing EU energy policy goals.

[4] See, e.g., the more balanced assessment provided throughout L. Hancher & F. Salerno, "Energy Policy After Lisbon" in A. Biondi *et al* (eds.), *EU Law After Lisbon* (Oxford: OUP, 2012), Ch. 18, esp. section V.

[5] *Viz.*: "[t]he Union shall contribute to the promotion of European sporting issues, *while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*" (emphasis added).

[6] *Viz.*: "The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, *while fully respecting the responsibility of the Member States for the content and organisation of vocational training*" (emphasis added).

[7] *Viz.*: "The Union shall contribute to the flowering of the cultures of the Member States, *while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore*" (emphasis added).

[8] *Viz.*: "Union action shall *respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care*. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The [EU] measures . . . *shall not affect national provisions on the donation or medical use of organs and blood*" (emphasis added).

[9] *Viz.*: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". For discussion of this provision, see: B. Akkermans & E. Ramaekers, "Article 345 TFEU (ex Article 295 EC). Its meaning and interpretations" (2010) 16(3) *ELJ* 292 and B. Akkermans, "Property Law and the Internal Market", in J.H.M. van Erp *et al* (eds.), *The Future of Property Law* (Munich: Sellier European Law Publishers, 2012), 201ff.

[10] *Viz.*: "1. The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes."

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States' "energy rights", as listed in the caveat, can either be relative or absolute. Both possibilities will be considered. In the light of a consistent interpretation of EU law,[11] it can be suggested that the meaning of the caveat bears some similarity to Article 192(2)(c) TFEU. Article 192 TFEU is the appropriate legal basis for EU measures aimed at environmental protection, and Article 192(2)(c) TFEU states that, by way of derogation, "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply" should be adopted using a different legislative procedure[12] from other EU measures based on that provision. It has therefore been suggested that Article 194 TFEU, similarly to Article 192 TFEU, includes a threshold of "significant effect". In other words, an EU measure based on Article 194 TFEU shall not "significantly" affect Member States' "energy rights",[13] but any effect on Member States' "energy rights" below this threshold does not infringe upon the Treaties. This theory will be referred to as the "significance-threshold" and is the premise for several of the hypotheses suggested below.

However, it should be remembered that there is no explicit mention in Article 194(2) TFEU of a threshold of any kind. A level of uncertainty therefore remains as to the validity of an interpretation which considers a threshold to be implicit in the article's wording. However, there are various reasons to believe that the CJEU could, and possibly would, interpret Article 194(2) TFEU in this way.[14]

Taking a step back, we can observe that the CJEU has at times adopted some form of appreciability test without there being an explicit basis in the Treaty. It is well known that for an agreement to fall within the scope of Article 101(1) TFEU – which prohibits particular agreements or concerted practices which "may affect trade between Member States" and have as their object or effect the "prevention, restriction or distortion" of competition – the CJEU has held that an agreement must affect competition and inter-Member State trade to an "appreciable extent".[15] Equally relevant are the CJEU's more recent interpretations of Article 34 TFEU (free movement of goods), a provision which can be seen as "a crucial element in determining the constitutional relationship between the Union and its Member States".[16] In its judgments in *Commission* v. *Italy* ("*Trailers*")[17] and *Mickelsson and Roos* ("*Jetskis*"),[18] the CJEU seems to have adopted an effects-based approach including a *de minimis* threshold to find a national measure in breach of Article 34 TFEU,[19] by specifically examining the measure's hindrance of market access.[20] The *weight* given to the magnitude of a measure's impact on

[11] Case C-225/91 *Matra SA* v. *Commission* [1993] ECR I-3203, para. 42.

[12] *Viz.*: requiring unanimous voting in the Council, rather than qualified majority voting (as under the EU's "ordinary legislative procedure", for which see Article 289 TFEU).

[13] E.g. C. Callies & M. Ruffert, *EUV/EGV: das Verfassungsrecht der EU mit Europaischer Grundrechtecharta: Kommentar* (München: C.H. Beck, 4th edn., 2011); M. Ludwigs, "Band 5: Energierecht", in M. Ruffert (ed.), *Europäisches sektorales Wirtschaftsrecht* (Hatje/Muller-Graf, 2012).

[14] Beyond the obvious similarities of Article 194(2) TFEU with Article 192(2)(c) TFEU, pointed out earlier in this section.

[15] Case 22/71 *Béguelin Import Co* v. *GL Import-Export S.A.* [1971] ECR 949, para. 16. The Commission has set out guidelines as to when it deems an agreement to be of minor importance, using market share thresholds to quantify whether or not there is an appreciable restriction of competition (Commission Notice on Agreements of Minor Importance which do not appreciably restrict Competition under Article 81(1), [2001] OJ C 368/13), but it should be noted that such Commission documents create legitimate expectations which bind the Commission in its decisional practice, but do not bind the Court: see Joined Cases T-374, 375, 384 and 388 *European Night Services* v. *Commission* [1998] ECR II-3141. For general discussion of appreciability in this area, see J. Alison, "Journey Toward an Effects-Based Approach under Article 101 TFEU – the Case of Hardcore Restraints" (2010) 55 *Antitrust Bulletin* 783.

[16] M. Dougan, "Legal Developments" (2010) 48 *JCMS* 163, at 165.

[17] Case C-110/05 *Commission* v. *Italian Republic* ("*Trailers*") [2009] ECR I-519.

[18] Case C-142/05 *Åklagaren* v. *Percy Mickelsson and Joakim Roos* ("*Jetskis*") [2009] ECR I-4273.

[19] The CJEU has examined a national measure's effect on market access since its *Keck* judgment (Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097), but until recently did so by laying the emphasis on the discriminatory nature of the measure and without applying a *de minimis* test (although such a test was suggested by AG Jacobs in his Opinion of 24 November 1994 on Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* v. *TF1 Publicité SA and M6 Publicité SA*, at para. 42). With regard to freedom of movement of services and workers, ensuring market access is equally an important consideration in examining compliance with the free movement provisions, but the CJEU's focus remains on the "directness" of the hindrance to market access (Case C-384/93 *Alpine Investments BV* v. *Ministerie van Financien* [1995] ECR I-1141; Case C-415/93 *Union royale belge des sociétés de football association ASBL* v. *Jean-Marc Bosman* [1995] ECR I-4921). For general discussion, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: OUP, 3rd edn., 2010), esp. Chs. 5 (goods) and 9–11 (workers, establishment and services, respectively).

[20] Considering that the national measures in question laid down restrictions on use, the CJEU would normally have considered them using its *Dassonville* formula to see whether the measures were "capable of hindering, directly or indirectly, actually or potentially, intra-community trade" (Case 8/74 *Procureur du Roi* v. *Benoit and Gustave Dassonville* [1974] ECR 837, para. 5) or, if the measures constituted selling arrangements, whether or not they affected in the same manner, in law and in fact, marketing of domestic products and of those from other Member

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market access is especially evident from the ruling in *Jetskis*, where the CJEU observed that "where the national regulations ... have the effect of *preventing* users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of *greatly restricting* their use, ... such regulations have the effect of hindering the access to the domestic market".[21] As Dougan has observed, this "suggests the need to demonstrate a considerable impact on consumer demand for the relevant goods, perhaps even of practical equivalence",[22] and thus implies a considerable threshold beyond which access to the market is deemed to be hindered and, unless justified, there is a breach of Article 34 TFEU. Whilst the "market access test" has not necessarily superseded the CJEU's traditional approach to examining the scope of Article 34 TFEU,[23] the use of a *de minimis* threshold in establishing a hindrance to market access might be thought to reflect a move towards a more practical take on the interpretation of Article 34 TFEU,[24] and there is a possibility that the CJEU might take a similar approach to interpreting Article 194(2) TFEU.[25]

At any rate, as will be discussed below (Section 9), if no threshold of any kind were applied to Article 194(2) TFEU, then the introduction of a new, explicit energy competence to the Treaties would in fact result in significantly restricting the EU's competence in the field of energy. It would be surprising if the CJEU were to adopt such a narrow reading of Article 194 TFEU. Therefore, whilst acknowledging the objections to imposing a "significance-threshold" on Article 194(2) TFEU, we consider it likely that the CJEU would adopt an appreciability test of some kind in determining the extent to which an EU measure may affect a Member State's "energy rights". As can be observed from the hypotheses set out below, in the absence of any threshold, it seems that Article 194 TFEU would leave little scope for EU regulation in the field of energy.

2.3.2 Background to the hypotheses

Before going into more detail, it is important to set the context for using Article 194 TFEU as a legal basis for secondary legislation (an "EU measure") in the first place. Before the Lisbon Treaty amendments came into force on 1 December 2009, the most appropriate Treaty provision for the harmonisation of Member States' national laws for the purpose of the internal market (thus including the energy market) was Article 95 EC which is now (after the Lisbon renumbering) Article 114 TFEU. Article 114 TFEU empowers the EU to adopt measures to approximate the provisions resulting from Member States' national laws, regulations or administrative actions with the aim of establishing or ensuring the functioning of the internal market. The approximation of national laws can be done to various degrees. At one end of the spectrum, an EU measure can aim at what we will call "exhaustive harmonisation", which does not allow for contradicting national provisions beyond the limits of certain Treaty-specific safeguard and derogation options.[26] At the other end of the spectrum, an EU

cont.

States (*Keck and Mithouard*, n. 30, above, at para. 12). This emphasis on hindering market access can also be found in Case C-265/06 *Commission* v. *Portugal* [2008] ECR I-2245, paras. 33-35.

[21] *Jetskis*, n. 18, above, para. 28 (emphasis added).

[22] Dougan, n. 16, above, at 170.

[23] The CJEU in *Trailers* (n. 17, above, para. 37) observes that Article 34 TFEU captures three categories of measures: discriminatory measures, product requirements and "any other measure which hinders products originating in other Member States to the market of a Member State". The latter category presumably includes selling arrangements. Therefore, non-discriminatory selling arrangements which "hinder" market access now appear to fall within the scope of Article 34 TFEU (subject to the *de minimis* threshold), where previously only those non-discriminatory selling arrangements which "prevented" market access did. As Dougan has observed (n. 27, above, at 169) this may also indicate that the product requirements/ selling arrangement distinction has become redundant, since discriminatory selling arrangements are necessarily caught by the first category, as are those which hinder market access.

[24] For an analysis of the inconsistencies in the CJEU's use of the "market access" test more generally, across the free movement provisions, see J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 *CMLRev* 437.

[25] Note that this is not necessarily so. AG Jacobs, in his Opinion on *Leclerc-Siplec* (n. 30, above), warned that while a *de minimis* test could be used with regard to what is now Article 34 TFEU, such a test would be out of place with regard to charges having equivalent effect to customs duties, given that: the prohibition of such charges is more specific than the prohibition of measures having equivalent effect to a quantitative restriction, and the Treaty has as its objective to eliminate all customs barriers (para. 47). Arguably, this objection to a *de minimis* threshold does not apply with the same force to Article 194 TFEU because of the lack of specificity surrounding the prohibitions laid down in Article 194(2) TFEU and in light of the objectives listed in Article 194(1) TFEU.

[26] And, indeed, such exhaustive harmonisation measures may themselves specify in detail the application of such exemptions/derogations (or, alternatively, separate legislative measures may be adopted which achieve such harmonisation). This will often lead to future reliance directly upon such legislation, rather than what one might term the "underlying" Treaty provision: see, e.g., Directive 64/221/EEC [1964] OJ 850 (English Special edition, Series I, Chapter 1963-4, 117) with regard to Treaty derogations (on grounds of public policy, public security and public health) from the provisions on freedom of movement of workers, freedom of establishment and the freedom to provide and receive services. (This function is now performed in that field by the provisions of Chapter VI (Articles 27 to 33) of Directive 2004/38/EC [2004] OJ L158/77.)

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measure may only aim at "minimum harmonisation" by establishing minimum standards but allowing for more stringent national measures and differing rules at Member State level (within the limits of the Treaties).

Since the introduction of Article 194 TFEU, Article 114 TFEU is no longer the appropriate legal basis for an EU measure aimed at establishing or ensuring the functioning of the *energy* market. Article 114(1) TFEU applies "[s]ave where otherwise provided in the Treaties", which expresses its subsidiary nature with regard to more specific provisions. In the context of the functioning of the energy market, which is listed as an explicit objective in Article 194(1)(a) TFEU, Article 194 TFEU thus applies as a more specific provision (*lex specialis*). This has been confirmed by the CJEU in *European Parliament* v. *Council*,[27] where it stated that Article 194 TFEU "constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives". Article 114 TFEU can thus no longer be used as a general legal basis for harmonisation measures with a view to establishing or ensuring the functioning of the internal energy market.[28]

We will first briefly introduce the different methods of Treaty interpretation used by the CJEU, before considering the various possible interpretations of Article 194 TFEU in turn.

III. Interpreting the Treaties

EU law can be interpreted in various ways using various methods.[29] The various hypotheses listed below are the result of using these different methods when interpreting Article 194 TFEU. For example, a literal interpretation stays as close to the text as possible, presuming that the meaning of a provision lies in its explicit wording. This method of interpretation is rigid, and not exemplary of the method most commonly used by the CJEU. Following a teleological interpretation, on the other hand, the "spirit, the general scheme and the wording" of a provision has to be considered,[30] as well as the "system and objectives of the Treaty".[31] The CJEU has also adopted a contextual approach, stating that "in interpreting a provision of [EU] law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part".[32] Both a teleological and a contextual interpretation require reliance upon a variety of source material, such as Member States' declarations and the legislative history of a Treaty provision. However, the variety of case law proves there is no single correct approach. Bearing this in mind, the following hypotheses make use of each of these interpretative tools in the way which seems most appropriate.

IV. Hypothesis 1 – Article 114 TFEU Derogation Options

Hypothesis 1 presumes that Member States' "energy rights", as referred to in Article 194(2) TFEU, are not absolute but subject to a significance-based threshold.[33] Furthermore, Hypothesis 1 imposes the structure of Article 114 TFEU on to Article 194 TFEU in order to explain the meaning of the caveat in Article 194(2) TFEU. Article 114 TFEU provides for the possibility of exhaustive harmonisation[34] of areas necessary for the functioning of the internal market, whilst at the same time allowing Member States to derogate from such a harmonisation on the basis of Article 114(4) and (5) TFEU (the "derogation options"). Arguably, Article 114 TFEU's deference to more specific Treaty provisions where these exist applies not to the article as a whole, but only to the

[27] Case C-490/10, n.y.r., judgment of 6 September 2012, para. 67.

[28] E.g., the Commission has acknowledged that, had it been adopted after the entry into force of the Treaty of Lisbon, the likely legal basis of Regulation 713/2009/EC (establishing an Agency for the Cooperation of Energy Regulators) would have been Article 194 TFEU rather than what is now Article 114 TFEU: see Commission, "Proposal for a regulation of the European Parliament and of the Council on energy market integrity and transparency", COM (2010) 726 (8 December 2010). See further, I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (Cheltenham: Edward Elgar, 2013), 31, n.14.

[29] Of course, the literature on this question is extensive and wide-ranging, and it is not our intention to delve into its depths here. See, further (e.g.): J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: OUP, 1993) and B. de Witte *et al* (eds.), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Cheltenham: Edward Elgar, 2013).

[30] Case 26/62 *Van Gend en Loos* [1963] ECR I-1.

[31] Case 6/72 *Europemballage and Continental Can* v. *Commission* [1972] ECR 215.

[32] Case 292/82 *Merck* v. *Hauptzollamt* [1983] ECR 3781, para. 12.

[33] Of course, one could still pursue a similar argument even in the absence of the "significant effect" threshold; the difficulty would be that – due to the relatively strict conditions usually attached to the exercise of such derogations – EU legislation adopted under Article 194 would be almost bound to have *some* effect upon Member States' energy rights, even accounting for the successful exercise by a Member State of such a derogation.

[34] As one author has recently noted, while Article 114 TFEU itself does not expressly mandate exhaustive harmonisation (instead of, say, minimum or partial harmonisation), legislative trends may well suggest that the EU is moving towards (more) exhaustive harmonisation on the basis of Article 114: this, in turn, may have implications in terms of both the availability and importance of the derogation clauses under that provision (Maletic, n. 28, above, 63–67 and 175–176).

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extent that the other Treaty provision is indeed more "specific" (see section 4.2). This would mean that the derogation options resulting from Article 114(4) and (5) TFEU would remain applicable even in the context of a harmonising measure based on a more specific Treaty provision, where the latter included less specific information on such options. Specificity will be discussed in more detail below. As explained below in further detail, it can be argued that Member States retain significant rights through these derogation options. If the same derogation options applied in the context of Article 194 TFEU, then Member States' "energy rights" would be sufficiently protected, since the EU measure would have no *significant* effect upon them. Exhaustive harmonisation on the basis of Article 194 TFEU would then be possible to the same extent as any other internal market measure based on Article 114 TFEU.

4.1 CJEU case law

At first sight, there is no explicit reference in Article 194 TFEU to Article 114(4) and (5) TFEU. In addition, the CJEU's case-law suggests that derogation options are not necessarily implicitly available when they are not referred to explicitly. In *González Sánchez*,[35] the CJEU held that since the former Article 94 of the Treaty establishing the European Community (the EC Treaty) (see now Article 115 TFEU) did not explicitly allow Member States to maintain or establish measures departing from EU harmonising measures, as was the case for Article 95 EC (Article 114 TFEU), Member States could not derogate from a harmonising measure based on Article 94 EC unless that measure contained an explicit clause to that effect. This reading implies that the derogation possibilities of Article 114 TFEU only exist with regard to harmonising measures based on Article 114, and that provision alone. However, there are several objections against this interpretation of *González Sánchez*.

First, when what was then Article 95 EC was initially introduced by the Single European Act, in 1987, the introduction of derogation options in its paragraphs 4 and 5 was intended to protect Member States who voted against the measure but were overruled by a qualified majority vote.[36] Article 94 EC, on the other hand, required unanimity voting in order to pass a harmonising measure (and this is still the case under Article 115 TFEU). Considering the function of derogation provisions as a safeguard against majority voting, drawing a parallel with Article 94 EC would not have made sense. Second, Articles 94 and 95 EC pursued slightly different objectives in terms of contribution to the internal market (and so do Articles 114 and 115 TFEU). Third, drawing a parallel between the two provisions would have been inconsistent with the fact that the former Article 95 EC explicitly derogated from Article 94 EC.

All or a combination of these reasons may have contributed to the CJEU's reluctance to allow the derogation provisions of the former Article 95 EC to apply with regard to an EU measure based on Article 94 EC. However, these objections cannot be upheld with regard to the relationship between Article 194 TFEU and Article 114 TFEU. The newly-introduced Article 194 TFEU builds upon Article 114 TFEU, both in its aim (the establishment and functioning of the internal market) and procedure (ordinary legislative procedure, except for Council unanimity for fiscal measures)[37] and does not contain a clear and explicit derogation.[38] Moreover, paragraphs 4 and 5 of Article 114 TFEU allow a Member State to maintain and establish national measures "after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission". The derogation provisions therefore neither refer to paragraph 1 of Article 114 TFEU (the legal basis for a harmonisation measure pursuing a general internal market objective) nor do they in any way indicate whether their application is limited to EU measures based on Article 114(1) TFEU. Adopting a literal approach, the only condition for a Member State to rely upon the Article 114 TFEU derogation provisions seems to be that *some kind* of EU harmonisation measure must have been adopted, regardless of the Treaty provision upon which this measure is based.

4.2 Specificity

Article 194(2) TFEU applies "without prejudice to the application of other provisions of the Treaty". This phrase appears in many other Treaty articles, such as Article 19 TFEU on discrimination. Regarding this provision and building on the CJEU's ruling in *Cowan*[39] in respect of the similarly worded Article 12 EC (now Article 18 TFEU), Bell has explained that "(t)o the extent that there is an overlapping legal base between (two provisions), the reference in Article 13 EC [now Article 19 TFEU] to "without prejudice to the other provisions" tends to support the view that, where a more specific legal base exists [as] an alternative to the general powers provided under

[35] Case C-183/00, [2002] ECR I-3901.

[36] C.D. Ehlermann, "The internal market following the Single European Act" (1987) 24 *CMLRev* 361. See, further, J.H.H. Weiler, "The Transformation of Europe" (1991) 100 *Yale LJ* 2403, esp. at 2471 with regard to giving enhanced "voice" to Member States as a transitional measure.

[37] See Article 113 TFEU which retains unanimity in Council for legislation concerning "turnover taxes, excise duties and other forms of indirect taxation", and Article 194(3) TFEU (reproduced in section 2, above).

[38] Subject, of course, to arguments about the proper interpretation of the second paragraph of Article 194(2) TFEU: see, further, the discussion of Hypotheses 3A and 3B, below (section 6).

[39] Case 186/87 *Cowan* v. *Trésor public* [1989] ECR 195.

Article 13 TEC, then this should be used".[40] As mentioned above (in section 2.2), Article 194(2) TFEU, by comparison with Article 114 TFEU, is clearly the most specific provision when it comes to choosing a legal basis for an EU measure regulating the internal energy market. At the same time, it is also *less specific* in terms of framing the extent to which Member States' rights remain protected from harmonisation measures. Whilst the caveat of Article 194(2) TFEU states that "such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply", this does not indicate the extent of Member States' "energy rights", or how they should be safeguarded. As discussed above (in section 4.1), the introduction of derogation options in Article 114(4) and (5) was intended to protect Member States who voted against the measure but were overruled by a qualified majority vote. Whilst the question remains as to the level of protection at which the caveat aims, there is therefore a clear overlap with the aim of the derogation provisions of Article 114 TFEU: namely, the relative protection of Member States' rights. What is more, the derogation options in Article 114 TFEU are described in specific procedural detail, whereas Article 194(2) TFEU only states that a measure based on Article 194 TFEU may not affect Member States' "energy rights". Considering that Article 194 TFEU only applies "without prejudice" to more specific Treaty provisions to the extent that there is an overlapping legal basis, it is arguable that the specific derogation provisions of Article 114 TFEU are more specific than the caveat of Article 194(2) TFEU. It could thus be argued that, in the event of a harmonising measure based on Article 194 TFEU, Member States should be able to continue to rely upon the derogation options resulting from Article 114(4) and (5) TFEU.

At the same time, it should be acknowledged that this argument is somewhat speculative, since it depends upon the possibility of relying upon only a partial exclusion of Article 114 TFEU by the *lex specialis* provision of Article 194 TFEU. Whilst in theory it seems that Article 194 TFEU could be interpreted following Hypothesis 1, we conclude that this is highly unlikely to happen in practice because of the rather convoluted reasoning involved. Much more straightforwardly, Member States will still be able to rely upon Article 347 TFEU (concerning Member State action in the event of "serious internal disturbances", and co-ordination to prevent such action from affecting the functioning of the internal market) in the energy context.[41] While obviously a provision of very limited scope, Article 347 clearly applies across the board, regardless of the interpretation of Article 194(2) which is adopted. It is highlighted here because it offers a further Treaty provision which could be used by Member States for the purpose of protecting their "energy rights", although its narrow scope means that it will do little of the work in protecting such rights.

V. Hypothesis 2 – "Guiding Principles" drawn from Article 114 TFEU

Considering the aforementioned objections, it is far from certain that the provisions of Article 114 TFEU can continue to apply *as they are* in the context of a harmonisation measure based on Article 194 TFEU, and Hypothesis 1 seems unlikely to be upheld. Hypothesis 2 therefore takes a slightly different approach. Similarly to Hypothesis 1, Hypothesis 2 presumes that Member States' "energy rights", as referred to in Article 194(2) TFEU, are not absolute but subject to a significance threshold. Hypothesis 2 also transposes the structure of Article 114 TFEU into Article 194 TFEU in order to explain the meaning of the caveat in Article 194(2) TFEU. Article 114 TFEU provides for the possibility of exhaustive harmonisation of areas necessary for the functioning of the internal market, whilst at the same time allowing Member States to derogate from such a harmonisation on the basis of Article 114(4) and (5) TFEU. As explained in the context of Hypothesis 1, Member States retain significant rights through these derogation options. If derogation options similar to those under Article 114 TFEU were to apply in the context of Article 194 TFEU, because both provisions were underpinned by the same federalism concerns, then Member States' "energy rights" would be sufficiently protected since the EU measure would have no "significant" effect upon them. This would, however, depend upon the exact scope of the derogation options. If the derogation options were shaped similarly to those under Article 114 TFEU, then exhaustive harmonisation upon the basis of Article 194 TFEU would be possible to a similar extent as under any other internal market measure based on Article 114 TFEU. We will therefore consider the substantive criteria of the derogation provisions of

[40] M. Bell, "The New Article 13 EC Treaty: A Sound basis for European Anti-Discrimination Law" (1999) 6 *Maastricht J. Eur. & Comp. L.* 5, at 9.

[41] See Declaration No. 35, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, on Article 194 of the Treaty on the Functioning of the European Union [2010] O.J. C83/1, at C83/349, which states: "[t]he Conference believes that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347." For discussion of the scope of Article 347 TFEU in the context of free movement of goods, see P. Oliver (gen. ed.), *Oliver on Free Movement of Goods in the European Union* (Oxford: Hart Publishing, 5th edn., 2010), paras. 10.43 to 10.49 (A. Johnston).

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Article 114 TFEU in more detail. This will help us to understand which of their elements might be transposed to Article 194 TFEU to put at least some flesh on the very bare bones of Article 194(2) TFEU, and where this would cause problems. Since the conditions for *maintaining* a national provision are different from adopting *new* provisions, these will be considered in turn. Note that the analysis of the substantive criteria of the Article 114 TFEU derogation provisions is *a fortiori* equally relevant to Hypothesis 1.

5.1 Conditions for relying upon the derogation

Article 114(4) TFEU allows Member States to *maintain*, where they deem this necessary, national provisions on grounds of the major needs referred to in Article 36 TFEU, or relating to the protection of the environment or the working environment. Derogations must be approved by the Commission. The purpose of this approval procedure is "to assess the specific needs of a Member State",[42] and the Commission is required to examine whether the harmonisation measure should be adapted if it approves a Member State's derogation (Article 114(7) TFEU).

Unlike Article 114(5) TFEU (discussed below), there need not be a problem specific to the Member State when it wishes to maintain a national provision. This was confirmed in *Denmark* v. *Commission*, yet the CJEU also maintained that the specificity of a problem may be "highly relevant in guiding the Commission".[43] Nor is it necessary, unlike Article 114(5) TFEU, to base a national measure on "new scientific evidence". What is less clear, however, is on what kind of evidence a Member State *could* base its national measure, or to what extent this allows for policy choices to come into play.

Article 114(5) TFEU allows Member States to adopt *new* national measures based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure. These conditions are stricter than those under Article 114(4) TFEU. First of all, the grounds on which a measure may be adopted do not include the interests listed in Article 36 TFEU but are limited to the protection of the environment and the working environment. The CJEU has taken a strict approach to this condition.[44] More importantly, the measure must be based on new scientific evidence. Whilst the CJEU generally has a broad understanding of what could be included as "scientific evidence", it did not respond to Advocate General Sharpston's suggestion that new conclusions based on old scientific evidence may be considered as "new scientific evidence".[45] Furthermore, the above-mentioned specificity test is, in the context of Article 114(5), an explicit substantive requirement. This means that, while the problem need not be unique to a Member State, it has been held that the problem in question must significantly distinguish it from other regions in the EU and as such be particular to its territory.[46]

5.2 The control procedure

The procedure for derogations following Article 114(4) and (5) TFEU is laid down in the subsequent paragraphs of Article 114 TFEU. The derogating measure must be notified as soon as possible to the Commission in order to be rejected or approved, and the Commission has a period of 6 months within which to reach a decision. Exceptionally, and in the absence of a danger to human health, this may be extended for a further period of up to 6 months. If the Commission fails to arrive at a decision within the designated time limit, the measure is deemed to be approved. Following the approval of a national derogation, the Commission must consider whether the EU harmonisation measure should be adapted in the light of the evidence raised.

It is a substantive requirement that the derogation is not a means of arbitrary discrimination, a disguised restriction on trade between Member States or that it constitutes an obstacle to the functioning of the internal market (Article 114(6) TFEU). The first two requirements also appear in Article 36 TFEU, and are familiar to the free market provisions. The latter requirement has been said to constitute just one element to be considered by the Commission when reviewing the derogation,[47] considering that its meaning is rather ambiguous. In practice, this means that the Commission can only reject those measures which constitute a clear obstacle to the functioning of the internal market.[48]

A final important feature of the procedure for a derogation based on Article 114(4) and (5), beyond the requirements listed in the provision itself, is the absence of a right to be heard. This was emphasised by the CJEU in both *Denmark* v. *Commission* and *Land Oberösterreich*, and implies that the Commission does not need to hear a Member State's view on the expert evidence gathered during the 6-month review period. Whilst the concept of a fair hearing is a fundamental principle of EU law, the CJEU considered that the objective of a swift conclusion of the

[42] Case C-3/00 *Denmark* v. *Commission* [2003] ECR I-2643, para. 40.
[43] *Ibid*., para. 60.
[44] Joined Cases C-439/05 P and 454/05 P *Land Oberösterreich and Austria* v. *Commission* [2007] ECR I-7141.
[45] *Ibid.*
[46] Case T-182/06 *Netherlands* v. *Commission* [2007] ECR II-1983, paras. 115 and 117.
[47] N de Sadeleer, "Procedures for Derogation from the principle of approximation of laws under Article 95 EC" (2003) 40 *CMLRev* 889.
[48] P. Léger, *Commentaire article par article des Traites UE et CE* (Brussels: Hebing & Lichtenhahn etc., 2000).

derogation procedure "would be difficult to reconcile with a requirement for prolonged exchanges of information and observations".[49] It is therefore important, from the Member State's perspective, to anticipate opposing expert evidence and to prepare a complete and well-argued derogation dossier if it wants to avoid the rejection of its derogating measures by the Commission.

5.3 Analysis in light of Article 194 TFEU

The emphasis upon specificity is highly relevant. To take a hypothetical example: an EU measure based on Article 194 TFEU which sought to harmonise the rules on renewable energy sources across Europe may cause specific hardship for certain Member States because of their geographical differences and subsequent difficulty in accessing particular renewable energy sources. A Member State whose "energy rights" are significantly affected due to its specific situation could therefore potentially rely upon the specificity argument to adopt new measures to give effect to its own choices of energy sources, the conditions for exploiting them and/or the general structure of its energy supply, subject to the measures being based on "new scientific evidence" relating to the protection of the environment and the working environment. Moreover, as mentioned above, specificity also appears to be a relevant factor where a Member State wishes to maintain *pre-existing* national measures. If a Member State's situation is not specific, then it appears from the CJEU's reasoning in *Denmark* v. *Commission* that a proportionate derogating measure achieving a higher level of protection (for example of human health or the environment) could still justify maintaining stricter national provisions. In *Denmark* v. *Commission*, which concerned health concerns related to food additives, it was held that:

> "a Member State may base an application to maintain its already existing national provisions on an assessment of the risk to public health different from that accepted by the Community legislature when it adopted the harmonisation measure from which the national provisions derogate. To that end, it falls to the applicant Member State to prove that those national provisions ensure a level of health protection which is higher than the (EU) harmonisation measure and that they do not go beyond what is necessary to attain that objective".[50]

The protection of health is one of the grounds of Article 36 TFEU to which Article 114(4) TFEU refers; other such grounds referred to include the protection of industrial and commercial property, public security and the health and life of humans, animals and plants (which, on one possible interpretation of *Preussen-Elektra*,[51] could now be said to encompass environmental protection more broadly).[52] Imposing the reasoning of *Denmark* v. *Commission* upon a hypothetical derogation option under Article 194 TFEU, a Member State could justify maintaining national legislation where it assesses the environmental risks (e.g. related to using certain energy sources) differently from the Commission, as long as it can prove that its provisions ensure a level of environmental protection higher than that of the EU harmonisation measure and do not go beyond what is necessary to obtain that objective (i.e. the measure is proportionate). However, the proportionality test remains an obstacle, especially if a derogating measure is based one of the other grounds of Article 36 TFEU (e.g. protection of industrial property) and achieves a lower level of environmental protection. The preservation and improvement of the environment is, together with the functioning of the internal market, one of the two aims of Article 194 TFEU. This means that a derogating measure which does not achieve a higher level of environmental protection is contrary to both of the objectives of Article 194 TFEU, since by definition a derogating measure will also be an obstacle to the functioning of the internal energy market.[53] It will therefore be difficult to argue that a national measure does not go beyond what is necessary if it achieves a lower level of environmental protection than the EU measure, even where the measure pursues one of the "major needs" of Article 36 TFEU.

To sum up, following the guiding principles of Article 114(4) and (5) TFEU, it will be easier for a Member State to derogate from a harmonising measure where it feels the effect of such a measure more than other Member States due to its specific (e.g. geographical) situation.[54] If the conditions for specificity are not fulfilled, then a Member State can maintain pre-existing derogating national measures based on a different risk assessment (e.g. related to the environmental risks of using particular energy sources). In order to adopt *new* derogating measures,

[49] *Land Oberösterreich*, n. 44, above, para. 41.
[50] Case C-3/00, n. 42, above, para. 63.
[51] Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099.
[52] Although this is controversial: for discussion, see A. Johnston *et al*, "The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects" (2008) 17(3) *EEELRev* 126, esp. 131-137.
[53] Indeed, the Court has been demanding in what it requires of Member States to discharge the onus of showing that national rules achieve a higher level of protection: see Maletic, n. 28, above, at 83 (esp. n. 68).
[54] One might also argue that Member States whose situation is not specific would not be significantly affected anyway, so that the EU measure would fulfil the conditions of the caveat in Article 194(2) TFEU. However, it should be acknowledged that even if all Member States were affected equally, provided that all were *also* "significantly" affected then the suggested threshold for triggering the caveat for Member States would be met.

however, the guiding principles of Article 114(5) TFEU are strict. The "new scientific evidence" requirement and the emphasis upon the aim for protecting the environment or the working environment limit the possibilities for Member States to exercise their rights. On the one hand, it is therefore difficult to argue that Member States' "energy rights" are not significantly affected if Member States may only introduce national provisions derogating from the harmonisation where this relates to the protection of the environment or the working environment. On the other hand, both the preservation and improvement of the environment and the functioning of the internal market are the main aims of Article 194 TFEU. It would be in accordance with the spirit of the EU's overall energy policy[55] to accept that an EU measure does *not* significantly affect Member States' "energy rights" as long as Member States may subsequently adopt derogating national measures aimed at the protection of the environment and the working environment, where their specific situation required this. Of course, this conclusion depends upon the scope for such a derogation: the strict criteria applicable to new national measures under Article 114(5) might leave some significant impacts upon Member States' "energy rights" without coverage.

This leads us to the next possible interpretative approach to Article 194(2)'s caveat: its use as a Treaty-level derogation which empowers Member States to depart from legislation adopted under the first paragraph of Article 194(2) or a mechanism which generates the inclusion of an "opt-out" clause in any legislation adopted thereunder.

VI. Hypothesis 3 – The "Opt-Out" Clause or a Treaty-Level Derogation

6.1 Hypothesis 3A – the "opt-out" clause

Hypothesis 3A considers that Member States' "energy rights" may be sufficiently preserved by introducing an "opt-out" clause in the EU measure taken on the basis of Article 194 TFEU. Depending on the extent to which Member States can "opt out", which will in turn depend upon how the clause is drafted, this hypothesis can be based either on the presumption that Member States' "energy rights" are absolute, or that they are relative and subject to a significance-threshold. If it is presumed that an EU measure may not affect Member States' "energy rights" whatsoever, then the possibilities to "opt out" must be extensive. If on the contrary we accept the significance-threshold-theory, then Member States' "opt-out" possibilities may be subject to certain conditions. Under this approach, the caveat of Article 194(2) TFEU would thus function as what Pielow and Lewendel have called a "relative escape clause", as opposed to an "absolute blockade of EU energy policy".[56] An "opt-out" clause can be construed along similar lines to the amendments to the Deliberate Release of Genetically Modified Organisms (GMOs) Directive[57] recently proposed by the Commission.[58]

6.1.1 Conditions for opting-out

In June 2009, the idea was introduced for an "opt-out" clause to be integrated into the Deliberate Release of GMOs Directive (Directive 2001/18). This point was taken up, among other GMO-specific concerns, by the Commission in its 2010 Coexistence Recommendation[59] and Proposal for a Regulation amending the Deliberate Release Directive.[60] Considering that harmonised GMO regulation contains limited safeguard possibilities for Member States to deviate from the regime, this move was seen as "intriguing and innovative within the EU, as it attempts to encourage harmonisation of the overall EU GM cultivation regime via post-authorisation de-harmonisation".[61] While some Member States have expressed strong opposition and the Commission's proposal is still under negotiation,[62] this may be due more to the sensitive nature of GMOs than apprehension about "opt-out" clauses in general. We will use the proposed "opt-out" clause for the Deliberate Release Directive (Article 26b) as a point of reference in our examination of the possibility for an "opt-out" clause in a measure based on Article 194 TFEU.

The proposed Article 26b would allow Member States to take national measures to prohibit GMOs

[55] Into which, after all, environmental protection principles must be integrated: Article 11 TFEU.

[56] J.-C. Pielow & B. Lewendel, "The EU Energy Policy After the Lisbon Treaty" in A. B. Dorsman *et al* (eds.), *Financial Aspects in Energy, a European Perspective* (Heidelberg: Springer, 2011) Ch 9, at 154. This description would also aptly describe Hypothesis 3B, developed below (section 6.2). On the "absolute blockade" point see in particular our discussion of Hypothesis 5 (section 9, below).

[57] Directive 2001/18/EC [2001] O.J. L106/1.

[58] "Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory", COM (2010) 375 final (13 July 2010).

[59] Recommendation of 13 July 2010 on guidelines for the development of national co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops [2010] O.J. C200/1.

[60] COM (2010) 375 final, n. 58, above.

[61] M. Dobbs, "Legalising General Prohibitions on Cultivation of Genetically Modified Organisms" (2011) 11(12) *German Law Journal* 1347, at 1370.

[62] As recently confirmed in AG Bot's Opinion in Case C-36/11 *Pioneer Hi Bred Italia* (26 April 2012): the most recent Council discussion of the dossier took place in early 2012, at which agreement could not be reached (Council Press Release 7448/12, 3152nd Council meeting, "Environment" (Brussels, 9 March 2012; available at: http://europa.eu/rapid/press-release_PRES-12-99_en.htm?locale=en).

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which have been authorised at EU level (thereby deviating from the harmonised regime established by the Directive), provided that: (a) the measures are based on grounds other than those related to the assessment of health and environmental risks; and (b) they are in conformity with the Treaties.

Using Article 26b as a model, it could be argued that an EU measure based upon Article 194 TFEU should, when aiming for harmonisation, include a provision enabling Member States to "opt out" of (aspects of) the harmonisation measure. The extent to which Member States could "opt out" would logically be defined by what is deemed necessary to ensure that the harmonisation does not (significantly) affect their "energy rights". This, in turn, would require an examination of the instrument used and the goal(s) pursued by the EU measure. For example, if the Commission were to propose a directive which sought to achieve exhaustive harmonisation of renewable energy support measures across the EU, such a measure could well involve: setting EU-wide targets (and removing national targets); creating an EU-wide support scheme; and harmonising the framework conditions of the design elements of the support scheme which was selected.[63] Thus, this would involve harmonisation of: levels of support; support schemes themselves; and the legal framework as a whole, including regulatory issues. The result would be to achieve an EU-wide equalisation of the costs of supporting renewables. For such an ambitious scheme to succeed, the EU harmonisation measure would need to be designed so as to prevent any subsequent Member State "opt-outs" from destabilising the operation of such a scheme, thus jeopardising the achievement of the EU targets. It quickly becomes apparent that it would be very difficult to design such a measure and be certain that it would not subsequently be undermined by Member State opt-outs or derogations (whether under Hypothesis 3A or 3B: see further below).

Member States' "opt-outs" would still have to conform to EU law in general, something of which Member States are explicitly reminded in the proposed Article 26b. This includes the internal market rules. A *prima facie* breach of the free movement provisions in the Treaty must therefore be justified on the usual grounds – i.e. Article 36 or, if the measure is indistinctly applicable, the mandatory requirements developed by the CJEU in *Cassis de Dijon*[64] and subsequent cases – and must fulfil the proportionality requirement. As Lee has highlighted with regard to GMOs, the obligation to conform to internal market law poses a serious hurdle for national "opt-out" measures, thereby significantly limiting Member State autonomy.[65] Where a Member State seeks to deviate from a support mechanism for renewable energy set at EU level, for example, it must overcome obstacles such as the prohibition on granting unjustified State aid and the prohibition on obstructing the free movement of goods and services, as well as compatibility with the pre-existing EU legislation on the internal energy market.[66] Important questions which will have to be asked are: (a) whether an "opt-out" clause would also include a limitation, e.g. that measures may only pursue non-environmental and non-health objectives; and (b) if such measures amount to a *prima facie* breach of the internal market provisions, on which grounds they can be justified. Lee has examined the latter problem in detail, reminding us that "economic considerations" cannot justify an interference with the free movement of goods[67] and highlighting that, whilst the CJEU has potentially opened the door for religious and ethical concerns to come into play when considering grounds of "public morality",[68] Member States face practical difficulties in proving that a measure is indeed based on such grounds.[69]

Following the model of the proposed Article 26b, an "opt-out" measure would only have to be notified to the Commission; unlike a derogation measure pursuant to Article 114(4) and (5) TFEU, it would not require the Commission's approval under some separate authorisation or clearance procedure, but might only be subjected to *ex post facto* challenge by the Commission before the CJEU under Article 258 TFEU (or, possibly,[70] by private individuals in a national court).

Finally, it should be noted that the inclusion of an

[63] For one attempt to explain what such a proposal might involve, see: .P. del Rio *et al*, "Key policy approaches for a harmonisation of RES(-E) support in Europe: Main options and design elements" (beyond2020 project, D2.1 Report, March 2012; available at http://www.res-policy-beyond2020.eu/pdf/Policy%20pathways%20for%20RES%20harmonisation%20(beyond2020%20-%20D2-1).pdf), section 6, esp. at 35–39.

[64] Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*") [1979] ECR 649.

[65] M. Lee, "The Ambiguity of Multi-Level Governance and (De-) harmonisation in EU Environmental Law" (2012-13) 15 *Cambridge Yearbook of European Legal Studies*, forthcoming.; and see, further, M. Lee, *EU Environmental Law, Governance and Decision Making* (forthcoming, Hart Publishing, 2014).

[66] On which see generally, e.g., A. Johnston & G. Block, *EU Energy Law* (Oxford: OUP, 2012), esp. Chs. 3 to 8.

[67] Case C-120/95 *Decker* [1998] ECR I-1831, [39]; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV* v. *Minister van Volksverhuizing, Ruimtelijke Orderning en Miliebeheer* [1998] ECR I-4075, [44].

[68] Case C-165/08 *Commission* v. *Poland* [2009] ECR I-6843. See Section 7, below.

[69] M. Lee, n. 65 above.

[70] E.g. where such a derogation affects a private party's EU law rights (such as under free movement law) or where that party has sufficient interest to bring an application for judicial review of such a national measure under national law.

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"opt-out" clause would not prevent a Member State from relying upon any other available derogation options: e.g. under Article 347 TFEU, or Article 114(4) and (5) TFEU,[71] in the event that Hypothesis 1 were (also) upheld.[72]

6.1.2 Effects of opting out

It is evident that the type of harmonisation achieved by a measure containing an "opt-out" clause will depend upon the extent to which Member States can indeed "opt out", and whether they decide to do so. If no Member State were to opt out, exhaustive harmonisation would effectively be achieved. In other words, exhaustive harmonisation can constitute the ultimate aim of the EU measure but remains contingent upon Member States exercising their "opt-out" rights. If the "opt-out" clause is developed along the lines of the proposed Article 26b, then this is likely to result in a more or less extensive form of minimum harmonisation. Member States may "opt out", provided that they do so on particular grounds (e.g. environmental protection), and provided this does not amount to a breach of the Treaties or other applicable provisions of EU law. Effectively, this would create an effect similar to Article 193 TFEU which, in the event of a measure based upon Article 192 TFEU, allows Member States to adopt more stringent measures. Along similar lines to the "opt-out" clause idea, more stringent national measures pursuant to Article 193 TFEU need to conform to the Treaties and only require notification to the Commission. The difference between harmonisation based upon Article 192 TFEU (which allows for more stringent national measures) and a harmonisation measure based on Article 194 TFEU with an "opt-out" clause would lie in the scope and conditions of the "opt-out" clause. While Member States may only go *beyond* a harmonisation measure based on Article 192 TFEU, an "opt out" clause inserted on the basis of Article 194(2) would not necessarily contain this limitation. On the other hand, the proposed Article 26b restricts national "opt-outs" to measures based on certain socio-economic grounds (namely those grounds "not related to the assessment of health and environmental risks"). Logically, an "opt-out" clause in a measure based on Article 194 TFEU would not limit national measures to those based on socio-economic reasons but rather to those necessary for the protection of Member States' "energy rights" (precisely what these rights are will require further definition).

Once these variables have been decided, it will become clear to what extent a harmonisation measure with an "opt-out" clause, based on Article 194(2) TFEU, would resemble or go beyond a minimum harmonisation measure based upon Article 192 TFEU. Assessing which of the two legal bases allows for the greatest scope of harmonisation may prove useful in the event that the EU considers adopting a measure which pursues both the environmental objectives of Article 191 TFEU and the objectives of Article 194 TFEU, so that a choice of legal basis must be made (assuming that different decision-making procedures would apply:[73] otherwise, a measure could be based jointly on both provisions). On the face of it, in many cases it will be possible to use Articles 192 and 194 TFEU as a joint legal basis, since both rely upon the ordinary legislative procedure. Meanwhile, Article 194(2)'s caveat expressly applies "without prejudice to Article 192(2)(c)", which employs a special legislative procedure with unanimity in Council to "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". Thus, where an environmental measure also only incidentally[74] concerns energy goals and has such effects upon these Member State interests, then the default legal basis will be Article 192. In such circumstances, the Article 194(2) caveat will not come into play: instead, the position of Member States will be protected by the unanimity voting rule in Council. In that situation, therefore, the degree of harmonisation achieved will be the result of the political bargaining process within the Council.

6.2 Hypothesis 3B – a Treaty-level derogation

A similar, but subtly different, approach to the Article 194(2) TFEU caveat would be to conceptualise its effect as creating a Treaty-based, express derogation option for Member States. A Member State could rely upon this to derogate from those aspects of a measure adopted under the first paragraph of Article 194(2), provided that its "energy rights" were (significantly) affected thereby.

Relying upon such a derogation would, as with the "opt-out" clause approach, seem still to require Member States to respect the other provisions of the TFEU on free movement, competition and State aid. However, it would also function somewhat differently

[71] M. Weimer, "What Price Flexibility? The Recent Commission Proposal to Allow for National 'opt-outs' on GMO Cultivation under the Deliberate Release Directive and the Comitology Reform Post-Lisbon" [2010] *Eur J for Risk Reg* 345.

[72] With regard to Hypothesis 2, meanwhile, the inclusion of an opt-out clause in legislation might be said to cover the field within which an Article 114-inspired interpretation of Article 194(2) might otherwise have operated, suggesting that the two could not be relied upon sequentially (although, again, this suggestion is at best tentative).

[73] See, e.g., Joined Cases C-164/97 and C-165/97 *European Parliament* v. *Council* [1999] ECR I-1139, para. 14; where key elements from both legal bases are involved, then the measure should be based jointly upon the two provisions, unless procedural incompatibility requires that a choice of a sole legal basis must be made.

[74] *Ibid.*

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from the traditional Treaty-based derogations, such as Article 36 TFEU: ordinarily, unless the relevant EU legislation *itself* is found to have breached (e.g.) the Treaty free movement provisions,[75] then the legislation will cover the field and reliance upon such a derogation will not be possible.[76] But the operation of the Article 194(2) caveat would be different, because it would empower a Member State to derogate from such EU legislation adopted under the first paragraph of Article 194(2).[77]

If adopted, this approach would raise other questions of no little difficulty. Unlike Article 114(4) and (5), Article 194(2) offers no assistance as to the procedure which Member States might follow to exercise such a derogation. For example, would prior notification to the Commission of intended derogating national measures be required, even extending to Commission approval thereof? It could be objected that such requirements would themselves affect Member State's "energy rights". However, Member States might struggle to object to the Commission wanting to ensure that the other Treaty provisions and extant EU legislation were respected. Any attempt at EU level to develop legislation to establish such a procedure might itself be open to the objection that it affected Member States' "energy rights". A possible alternative would be to adopt some elements of Hypothesis 2 (discussed in section 5, above), drawing upon the procedural approach used under Article 114(4) and (5) to provide some more detailed guidance on the operation of Article 194(2)'s caveat.

As with Hypothesis 3A on the "opt-out" clause, under Hypothesis 3B the nature and extent of harmonisation which could be achieved by an EU measure adopted under Article 194(2) would depend greatly upon how easily a Member State could rely upon the caveat as a Treaty basis for derogation from such a measure, whether by retaining pre-existing national rules or introducing new domestic measures in response to the EU measure. Satisfying the proportionality requirements attached to any such derogation may prove the key issue here: how strictly might the CJEU scrutinise the Member State's reasons for seeking to derogate from an EU measure in this context? On the one hand, the Court has typically taken a narrow approach to the scope of Treaty derogations from fundamental freedoms and a similar approach might be applied here;[78] on the other hand, areas of sensitivity and controversy have often attracted a more lenient and permissive response from the Court when scrutinising a Member State's domestic regulatory choices.[79] To state the point briefly: it is difficult to predict exactly how the CJEU would react if it were faced with this question.

VII. The Additional Possibility of "Residual" Member State Autonomy

Having discussed the possibility of derogation options, an "opt-out" clause and some form of Treaty-level derogation, a final remark should be made with regard to the effect of this on what we will call "residual" Member State autonomy. Like Article 347 TFEU (above, section 4.2), "residual" autonomy provides an additional option for Member States to deviate from a potential harmonisation measure. However, unlike Article 347 TFEU, "residual" autonomy remains contingent upon the breadth of the harmonisation and, therefore, dependent upon the interpretation given to the caveat.

'Residual" Member State autonomy can be described as follows. Where an EU measure harmonises a clearly defined area – e.g. the notification, classification, packaging and labelling of (dangerous) substances (as was the case in *Toolex*)[80] – then it remains possible for Member States to adopt national measure in the areas that the measure does not harmonise: e.g. the conditions under which such substances may be marketed or used. Scott, in her analysis of Regulation No. 1829/2003 on GM Food and Feed (at the time still in the proposal stage), has built upon *Toolex* and *Compassion in World Farming*[81] to suggest that, therefore, Member States retain the

[75] For a recent unsuccessful attempt to argue just that, see Case C-58/08 *R (on the application of Vodafone)* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

[76] Unless it is minimum harmonisation, in which case the Treaty provisions and their possible derogations will remain relevant if a Member State seeks to go *beyond* that minimum level. See, generally, Case 120/78 *Cassis de Dijon* [1979] ECR 649.

[77] One might also wonder whether, in the context of the new provisions introduced by the Treaty of Lisbon – including Article 194 TFEU, but also Article 4(2) TEU concerning the EU's respect for national identities (on which see Case C-208/09 *Sayn-Wittgenstein* v. *Landeshauptmann von Wien* [2010] ECR I-13693 and Case C-391/09 *Runevič-Vardyn* (judgment of 12 May 2011)) –, the Court's approach to the traditional derogations might become more relaxed, at least in areas of controversy. For earlier possible examples of such leniency in the energy field, see: Case 72/83 *Campus Oil* v. *Ministry for Industry and Energy* [1984] ECR 2727 and Case C-379/98 *PreussenElektra* v. *Schleswag* [2001] ECR I-2099.

[78] See, e.g., Case 46/76 *Bauhuis* v. *Netherlands* [1977] ECR 5, para. 12.

[79] See n. 77, above.

[80] Case C-473/98 *Kemikalieinspektionen* v. *Toolex Alpha AB* [2000] ECR I-5681.

[81] Case C-1/96 *The Queen* v. *Minister of Agriculture, Fisheries and Food,* ex parte *Compassion in World Farming Limited* [1998] ECR 1-1251.

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power to regulate in a harmonised area where this aims to ensure a different value from the value (or objective) aimed at by the harmonisation measure: thus *de facto* regulating outside the scope of the harmonisation.[82] Member States' regulation would remain possible as long as it pursued one of the "other" values recognised by EU law (e.g. in Article 36 TFEU or the mandatory requirements). Naturally, the usual limits of the Treaty, including proportionality, would continue to apply to such national regulation.

Poland recently seemed to follow this line of reasoning in *Commission* v. *Poland*,[83] where it argued that the "case-law confirms that an action under Article [36 TFEU] ceases to be possible only where [EU] harmonisation has introduced the measures necessary for achieving the specific objective which Article [36 TFEU] seeks to foster", and that because the EU harmonisation measure (in that case, the Deliberate Release Directive) only aimed to protect the environment and human health, Poland could therefore restrict GMOs on ethical grounds since this would fall outside the scope of the harmonisation.[84] The Commission did not dispute whether, in principle, this reasoning was correct, but argued that the EU measure amounted to exhaustive harmonisation of GMOs, including with regard to ethical issues. The CJEU chose not to rule explicitly on the issue, considering that the Commission was correct in its argument that Poland had, in any event, failed to show that the true purposes of its national provisions were the religious and ethical objectives relied upon. It stated the following:

> "... for the purposes of deciding the present case, it is not necessary to rule on the question whether – and, if so, to what extent and under which possible circumstances – the Member States retain an option to rely on ethical or religious arguments in order to justify the adoption of internal measures which, like the contested national provisions, derogate from the provisions of Directives 2001/18 or 2002/53."[85]

The CJEU then continued to explain that the evidence upon which Poland relied was insufficient to establish that its national measures were really taken on the basis of "public morality" (the Article 36 TFEU-justification which Poland invoked to defend its national measures). Arguably, if sufficient evidence *had* been presented to discharge the burden of proof, Poland could have relied upon this (or any other) Article 36 TFEU justification to deviate from the harmonised regime on the release of GMOs. Even if the CJEU had ruled, or will rule in the future, that the Deliberate Release Directive pre-empts ethical considerations and that therefore a Member State is prevented from relying upon the Article 36 TFEU-justification of protecting "public morality", this does not in and of itself amount to a flat out rejection of the principle that Member States retain the autonomy to regulate in a harmonised area where the national regulation aims to ensure a different EU value from the value aimed at by the harmonisation.

Considering the above discussion, Member States arguably retain the autonomy to regulate in a field which has been harmonised as long as they pursue a recognised EU value which is not pursued by the EU harmonisation measure. Using the same example as above (section 6.1.1), if the Commission were to propose a Directive which sought to achieve exhaustive harmonisation of renewable energy support measures across the EU, such a measure would involve: setting EU-wide targets (and removing national targets); creating an EU-wide support scheme; harmonising the framework conditions of the design elements of the support scheme which was selected. It would do this with the objectives of Article 194(1) TFEU in mind and both "in the context of" the internal market as well as "with regard to" environmental protection. The measure would involve harmonisation of: levels of support; support schemes themselves; and the legal framework as a whole, including regulatory issues. The result (or at least the aim) would be to achieve an EU-wide equalisation of the costs of supporting renewables. Arguably, then, Member States would retain the ability, e.g., to set a different level of support or design a different support scheme as long was this aimed at ensuring a recognised EU value not pursued by the EU harmonisation measure: such as the protection of "public morality", on the basis of Article 36 TFEU. Especially if the EU measure were to harmonise energy sources – e.g. biofuels – it is not impossible that a Member State might wish to derogate from the harmonised scheme where they held a different ethical opinion on the acceptability of such sources.

Given that the greater the breadth of the harmonisation, the lesser the extent of "residual" autonomy, it is clear that "residual" Member State autonomy is not likely to prove sufficient in and of itself to secure Member States' "energy rights". Not unlike Article 347 TFEU, "residual" autonomy (possibly) constitutes an additional option for Member States in trying to bypass EU harmonisation. Arguably, where an "opt-out" clause is inserted into an EU measure, which clause allows for national regulation to deviate from that EU measure on specific grounds – e.g. any of the interests listed in Article 36 TFEU – then these objectives again fall *outside* of the scope of the harmonisation, which increases the possibility for "residual" Member State autonomy. On the other hand, the more extensively that the EU measure addresses derogations or "opt-outs", the more exhaustive the nature of the harmonisation

[82] J. Scott, "European Regulation of GMOs under the WTO" [2002-2003] *Colum. J. Eur. L.* 213, at 227.
[83] Case C-165/08 *Commission v Poland* [2009] ECR I-6843.
[84] *Ibid.*, at para. 29.
[85] *Ibid.*, at para. 51.

becomes, and the fewer possibilities remain (outside the scope of any derogation or "opt-out" options) for Member States to legislate in the harmonised area in order to pursue different objectives. In other words, whilst an "opt-out" clause may be considered as carving out space for national regulation within an otherwise harmonised area, it may also constitute a means for the EU legislator to constrain Member States' "residual" autonomy. As always, the precise implications for the scope of such national autonomy will depend upon the wording and interpretation of the EU legislative measure in question.

VIII. Hypothesis 4 – Unanimous Voting Required in the Council

Various authors have assumed that an EU measure adopted pursuant to Article 194 TFEU which aims to affect Member States' "energy rights" should be subject to a unanimous Council Decision.[86] Several reasons exist for such an interpretation.

First, it follows from a strict reading of Article 194(2) TFEU that an EU measure based on that provision may not, without exception, affect Member States' "energy rights". Therefore, only when all Member States agree that a particular measure should be adopted (by a unanimous vote in the Council) will no Member State feel "overruled" and initiate a complaint before the CJEU. This logic is tempting, but may not hold in practice. Even if initially all Member States were to agree on an EU measure which would affect their "energy rights", changing circumstances (e.g. political developments at national level) could subsequently prompt a Member State to backtrack. The Member State could then argue that, regardless of its initial vote in favour of the measure, it feels that its "energy rights" are affected. This situation is not unlikely. With regard to the old Article 95 EC (now Article 114 TFEU), it has long been a matter of debate whether the derogation options under its paragraphs 4 and 5 were open to Member States who had, initially, voted in favour of the measure.[87] This led to Member States systematically voting against an EU measure, simply to retain the possibility to derogate. The Treaty of Amsterdam finally resolved this issue by amending the wording of Article 95 EC, scrapping the reference to a "qualified majority", and it is now generally accepted[88] that any Member State can use the Article 114 TFEU derogation options regardless of its initial vote in the Council. Even if the requirement for unanimity voting were upheld, we would therefore still have to assess the possibility for a Member State to derogate from or "opt out" of the measure. It is clear that a unanimity condition does not sufficiently explain what is meant by the caveat that Member States' "energy rights" should not be affected.

Second, the caveat of Article 194 TFEU is "without prejudice to" Article 192(2)(c) TFEU which, in the context of an EU measure based on Article 192 TFEU, states that unanimity voting is required for EU measures "significantly affecting a Member State's choice between different energy sources and the general structure of their energy supply". The wording "without prejudice to" mainly indicates that the possibility to adopt environmental measures based on Article 192(2)(c) TFEU is not affected by Article 194(2) TFEU. Nevertheless, it could also be seen as an indication that an EU measure based upon Article 194 TFEU which affects Member States' "energy rights" requires a unanimous vote in the Council, for similar reasons to Article 192(2)(c) TFEU. Whilst this is not an incredible interpretation, it requires a stretch of the imagination. It is not to be taken for granted that Article 192(2)(c) TFEU and Article 194(2) TFEU both aim to protect the same "energy rights", since there is a difference in wording. Whilst Article 194(2) TFEU states that a measure shall not affect Member States' "right to determine the conditions for exploiting its energy resources", this particular prohibition does not appear in Article 192(2)(c) TFEU. Considering that Article 194 TFEU was added at a later date than Article 192 TFEU, it is interesting that the Member States chose not to copy the wording of Article 192(2)(c) TFEU but to introduce an additional right. The significance of this is debatable, but it is a reason to hesitate before simply transferring the procedural requirements of Article 192(2)(c) TFEU to measures taken on the basis of Article 194 TFEU.

The point made in the preceding paragraph is bolstered by the genesis of Article 194 TFEU. In the revised version of the draft Constitutional Treaty (12 June 2003),[89] Article III-152 (as it was then numbered) on energy did include a caveat:

> The law or framework law shall not affect a Member State's choice between different energy sources and the general structure of its energy supply. *Such measures shall be adopted in accordance with Article III-125(2)(c) (ex 175)(2)(c))*.

In other words, it seems that the intention was that – while measures would take the form of directives or regulations (as we still call them)[90] – the decision-

[86] Hancher & Salerno, n. 4, above, section III; H. Vedder, "The formalities and substance of EU external environmental competence: stuck between climate change and competitiveness" in E. Morgera (ed.), *The External Environmental Policy of the EU: EU and International Law Perspectives* (Cambridge: CUP, 2012), Ch. 1.

[87] N de Sadeleer, "Procedures for Derogation from the principle of approximation of laws under Article 95 EC" (2003) 40 *CMLRev* 889.

[88] See, further, Maletic, n. 28, above, at 69 (incl. n. 3).

[89] Available at: http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00802.en03.pdf, emphasis added.

[90] But which were, under the Constitutional Treaty, to be re-styled as "European laws and framework laws", respectively: see Article I-32(1) of the draft (at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf).

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making process would involve a requirement of unanimous approval in Council: this is the result of the italicised text of the draft Article III-152(2) and its cross reference to the provision on the environment (now to be found in Article 192(2)(c) TFEU). This also explained the absence of the further paragraph (now to be found as Article 194(3) TFEU) concerning such unanimity on fiscal measures. Further, this wording directly mirrored the text of the environmental provision with regard to "energy sources" and "supply structure".

In the various "Reactions to the draft text" of 27 June 2003,[91] numerous suggestions were made to amend the draft text. Some[92] suggested the deletion of the energy article altogether; others[93] suggested it should be replaced with a text referring to the requirement to ensure sustainable development, while retaining the caveat and decision-making procedure in the extract quoted above; and yet another proposal[94] was to add a third paragraph relating to cooperation by the Union and the Member States with third countries and competent international organisations, and (importantly for our purposes) a fourth paragraph specifying that this new EU competence was to be without prejudice to national sovereignty over natural resources.

After this, the Draft Constitutional Treaty of July 2003,[95] the relevant part of Article III-152 was slightly rephrased to read:

> The law or framework law shall not affect a Member State's choice between different energy sources and the general structure of its energy supply, *without prejudice to Article [III-125(2)(c) (ex 175(2)(c))]*.

Finally, the actual Constitutional Treaty was amended to include the familiar caveat (also present in the current Article 194(2) TFEU) that:

> Such European laws or framework laws 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 III-234(2)(c).

There is, however, surprisingly little discussion in official submissions to the Convention on the new energy provision, whether in general or with particular reference to the caveat with which the analysis here is concerned. It thus seems that relatively little interpretive guidance is to be gained from examining the Convention documentation, beyond the obvious point that some members of the Convention and, ultimately, a number of Member States were simultaneously: (a) willing to allow the inclusion of a provision in the EU Treaties granting the EU competence in the energy field; and (b) concerned that an (over-?) expansive interpretation of such a provision could have far-reaching consequences for domestic legislative and policy autonomy in that field. Thus, including such a provision required a concomitant effort to restrict its possible practical implications: and so the caveat in Article 194(2) TFEU was developed.

The changes made to the wording of what is now Article 194(2), both during the Convention on the Future of Europe and the final agreement by the Member States of the Constitutional Treaty, make it strange simply to assume that the new wording intended to retain the original approach.[96]

As mentioned above, it is also important to consider that Article 194 TFEU only makes explicit reference to unanimity voting in respect of measures primarily of a fiscal nature (Article 194(3) TFEU). Paragraph 3 explicitly states that "by way of derogation from paragraph 2" measures of a fiscal nature will be taken by a unanimous vote in the Council, in accordance with the special legislative procedure. It would seem very odd indeed if unanimity voting were also required for measures affecting Member States' "energy rights" (i.e. certain measures based on Article 194(2) TFEU), considering that the Article 194(3) procedure explicitly derogates from Article 194(2).

[91] See: http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00821.en03.pdf

[92] P. Hain, member of the Convention (and then the UK's Europe Minister), http://european-convention.eu.int/docs/Treaty/pdf/845/Art%20III%20152%20Hain%20EN.pdf; E. Teufel (member of the Convention) *et al*, http://european-convention.eu.int/docs/Treaty/pdf/845/Art%20III%20152%20Teufel%20DE.pdf; and the Irish government (during its Council Presidency) in May 2004 (see L. Hancher, "The New EC Constitution and the EU Energy Market", in M.M. Roggenkamp and U. Hammer (eds.), *European Energy Law Report II* (Antwerp: Intersentia, 2005), ch. 1, at 6).

[93] D. de Villepin, member of the Convention, http://european-convention.eu.int/docs/Treaty/pdf/845/Art%20III%20152%20de%20Villepin%20FR.pdf.

[94] G.M. de Vries (member) and T.J.A.M. de Bruijn (alternate), http://european-convention.eu.int/docs/Treaty/pdf/845/Art%20III%20152%20Vries%20EN.pdf.

[95] See: http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00848.en03.pdf.

[96] An early reaction to the final text of the Constitutional Treaty (Hancher, n. 92, above, at 7) seemed to suggest that the Article 194(2) caveat should be taken to import a unanimity requirement for the two areas which are identically worded in Article 194(2) and Article 192(2)(c). One could agree with this insofar as the EU measure might be said to involve environmental and energy policy goals (when the procedure under Article 192(2)(c) would prevail if a joint legal basis were pursued): indeed, the General Court appears to have reasoned in a manner which would confirm this point in Case T-370/11 *Commission* v. *Poland*, n.y.r., judgment of 7 March 2013), at para. 17. *But* – as explained in the text – this argument is less convincing where no environmental goal is involved, and does not apply at all to the other term in Article 194(2) (a Member State's "right to determine the conditions for exploiting its energy resources"), which is not present in Article 192(2)(c) at all.

IX. Hypothesis 5 – Absolute Competence Limit

The final and most strictly literal interpretation of the wording of Article 194(2) TFEU arrives at the conclusion that no EU measure based on that article may affect Member Sates' "energy rights" at all.

9.1 Restricting the use of Article 194 TFEU

An absolute competence limit would greatly restrict the usefulness of Article 194 TFEU as a legal basis for approximating, to almost any extent, Member States' energy laws. If this interpretation were to be accepted, then the key stumbling block for adopting a measure based upon Article 194 TFEU would be the exact definition of the extent of Member States' "energy rights". In other words, the debate would focus on (*inter alia*) the following questions:

- which aspects of the energy market can be seen as the "conditions" for exploiting energy resources;
- what is included in the "general structure" of energy supply; and
- when is a Member State's choice "affected"?

Whilst these questions have to be answered for any of the abovementioned Hypotheses (e.g. to define the scope of an "opt-out" clause, or to set and assess the conditions for derogating), this exercise would be even more crucial if the "absolute competence limit" hypothesis were to be followed. In the event of a broad interpretation of Member States' rights, Article 194 TFEU as a legal basis for EU measures would be rendered all but redundant. This would be a particularly unfortunate and implausible outcome, given the explicit inclusion in Article 4(2)(i) TFEU of energy as an area of shared competence between the EU and its Member States.

9.2 Falling back on Article 114 TFEU?

Finally, it might be argued that, since a measure affecting Member States' "energy rights" cannot be based upon Article 194 TFEU, recourse to other legal bases is possible, given that the proposed measure falls within the ambit of those legal bases. The only other Treaty provision which aims at establishing and ensuring the functioning of the internal market is the abovementioned Article 114 TFEU. This would mean that an EU measure aimed at harmonising the internal energy market (where this has an effect on Member States' "energy rights" and cannot be taken upon the basis of Article 194 TFEU) would have to be based upon Article 114 TFEU, despite Article 194 TFEU being *lex specialis* in the field of energy. It would have to be argued that, in respect of measures which have an effect on Member States' "energy rights", Article 114 TFEU is again the more specific Treaty base: this would seem an implausible argument. We have discussed this specificity requirement as part of Hypothesis 1. If the measure were based upon Article 114 TFEU itself, this would equally mean that the derogation options of Article 114(4) and (5) TFEU would be available to Member States. However, this would merely circumvent the caveat and the final outcome would still be that the EU measure affects Member States' "energy rights". Whether or not we accept that the derogation options sufficiently protect Member States' rights so as not to amount to the significance-threshold is irrelevant, since the premise of Hypothesis 5 is that Member States' "energy rights" are absolute, and may not be affected whatsoever.

Relying upon other legal bases where Member States' "energy rights" are affected seems contradictory to the main reason why the caveat was initially introduced into Article 194(2) TFEU: namely, to protect, to some extent, Member States' sovereignty over their "energy rights". Furthermore, an attempt to use Article 114 as a fall-back option would also be contrary to the reasoning of the CJEU in its only judgment to date on the interpretation of Article 194 TFEU as a legal basis for EU legislation.[97] Thus, it is submitted that this possible fall-back option, relying upon Article 114 TFEU, will simply not be available as the basis for adopting EU legislation (and circumventing the Article 194(2) caveat).

X. Conclusion

Having examined five hypothetical interpretations of Article 194 TFEU, based on a more or less flexible understanding of the caveat in Article 194(2) TFEU, we have shown the difficulties inherent in the interpretation and possible application of the new energy provision which was introduced by the Lisbon Treaty. Whilst the area of "energy" is now a shared competence between the EU and the Member States, it is far from clear whether Article 194 TFEU tilts the balance in favour of the EU or rather of the Member States. From our discussion in this article, it would seem that unless some sort of *de minimis* threshold is introduced, only the most superficial secondary legislation could be adopted on the basis of Article 194 TFEU for fear of affecting a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply. In order to avoid this pitfall, we have suggested a *de minimis* test along the lines of a "significance threshold" which is explicitly included in the very similarly worded Article 192(2)(c) TFEU.

We have considered the merits and obstacles of each Hypothesis throughout this article. Whilst Hypothesis 1 appears at least theoretically possible, the difficulty of separating Article 114 TFEU so that its derogation provisions continue to apply in the context of Article

[97] Case C-490/10, *European Parliament* v. *Council*, n. 3, above.

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194 TFEU make this probably the least likely interpretation to be followed by the CJEU. Using the derogation provisions of Article 114(4) and (5) TFEU to inform Article 194 TFEU, as suggested in Hypothesis 2, seems more plausible, but constitutes no easy task for lack of information on when, and in which circumstances, a Member State could rely upon a derogation. The inclusion of an "opt-out" clause in an EU measure taken on the basis of Article 194 TFEU, as suggested in Hypothesis 3A, seems a somewhat more convincing possibility to avoid such legislation affecting (to whichever *de minimis* threshold is upheld) Member States' "energy rights". In that case, the EU measure could aim at a more or less exhaustive harmonisation of the EU energy market, subject to Member States using the "opt-out" options available to them. The inclusion of such an "opt-out" clause would naturally bring its own problems, in terms of drawing up a legal framework resistant to individual Member States subsequently "opting out", without this unacceptably undermining that overall EU framework. On the other hand, the opt-out device within a legislative measure could clearly serve to defuse political tensions in Council, in order to secure agreement on an EU-level legislative measure. Indeed, it is clear that such compromises are commonplace in the ordinary course of negotiations in Council, and between Council and the European Parliament, when reaching agreement: witness, for example, the complicated outcome of negotiations (under what is now Article 114 TFEU) concerning (ownership) unbundling of transmission networks in the EU's Third Internal Energy Market Package of legislation from 2009.[98] Similarly, we discussed a Treaty-level derogation based on Article 194(2) TFEU itself (Hypothesis 3B). A Treaty-level derogation would also raise other difficult questions. Unlike Article 114(4) and (5), Article 194(2) offers no detailed information on the procedures to be followed, and would therefore face similar obstacles to Hypothesis 2.

Furthermore, there remains the possibility that any secondary legislation adopted on the basis of Article 194 TFEU which threatens to affect Member States' "energy rights" simply requires a unanimous vote in the Council: this was Hypothesis 4. While this seems an implausible analysis in light of the wording and context of Article 194, it would solve many problems in interpreting the actual meaning of Article 194(2) TFEU. But that would be a disappointing outcome considering the difficulty of achieving unanimity among 27 Member States without diluting at least some of the measure's substantive content. Finally, we have considered the possibility that no *de minimis* threshold would apply at all, which would leave little scope indeed for EU secondary legislation in the field of energy.

If the aim of the introduction of Article 194 TFEU was to pull together the strands of the EU's competence to legislate in the field of energy, then it seems to have been only a partial success. The desire at the same time to protect a group of national interests which we have described as a "Member State's energy rights" has, through its unclear wording in Article 194(2)'s second paragraph, introduced uncertainty into the likely impact and functioning of Article 194 as a whole, as well as its interaction with other provisions of the TFEU. It is apparent from our analysis that none of the proposed hypotheses is both deeply convincing and obviously easy to implement in practice, yet situations could well arise where the meaning and impact of Article 194 will prove crucial.[99] If nothing else, this uncertainty and its potential implications are likely to feed back into the process of proposal, discussion and negotiation of EU legislative measures in the field of energy: it is entirely possible that this may result in a narrower and shallower sphere of action for the EU in the energy field than existed under the Treaty arrangements in force prior to the Treaty of Lisbon, which would be a somewhat paradoxical outcome.

So, one might ask whether in the energy field this was, as Garcia and Weatherill[100] have noted in the context of the inclusion of sport in the competences of the EU, "a strategy of empowering the EU in order to restrain it"? The evidence is by no means clear on this point, especially given that the EU had already used (*inter alia*) Article 95 EC (now Article 114 TFEU) to adopt far-reaching EU legislation in the energy field. On some of the hypotheses discussed above, the result might be seen as "appearing *further* to empower the EU, while in fact inserting potentially far-reaching constraints upon EU activity, so as in practice to restrain the EU in future": this is a less catchy and more cynical, but probably in the EU energy field more accurate, reading of the arrival of Article 194 TFEU. Naturally, the vagueness of the Article 194(2) caveat also has the consequence of delegating responsibility

[98] See Article 9ff. in Directives 2009/72/EC [2009] O.J. L211/55 (electricity) and 2009/73/EC [2009] O.J. L211/94 (gas). For discussion, see Johnston & Block, n. 66, above, ch. 3.

[99] For example, in Case T-370/11 (n. 96, above), Poland relied strongly upon the implications for what we have termed Member States' "energy rights" in its challenge to the Commission's Decision 2011/728/EU [2011] O.J. L130/1, adopted under Article 10a of the EU's Emissions Trading System Directive 2003/87/EC (as amended). While the General Court held (at para. 17) that the legal basis of that Directive (under the old Article 175 EC) rendered the energy-specific caveat of Article 194 TFEU inapplicable, the facts of the case show the range of situations where Member States may find cause to complain about the scope and application of measures to which they have previously acceded.

[100] B. Garcia and S.R. Weatherill, "Engaging with the EU in order to minimise its impact: Sport and the negotiation of the Treaty of Lisbon" (2012) 19 *JEPP* 238.

for shaping EU legislation under Article 194 to the EU's complex political process, with the ultimate fall-back of a challenge of such measures before the Court of Justice, in an attempt to provide some clarity as to the boundaries set by the caveat. It is, in the final analysis, perhaps a shame that so much about the possible implications of Article 194(2) in the energy field seems likely to remain *so* uncertain unless and until the Court is called upon to rule in what is likely to be a controversial set of circumstances.[101]

[101] Although perhaps – given the diplomatically sensitive context of the Convention and Lisbon IGC, allied with the Member States' experience of such political sensitivities in the process of Council legislative deliberations – reaching agreement on the wording of Article 194 was inevitably going to produce, at best, a fudge.