



Plenary sitting

21.3.2019

A8-0039/2018/err01

ADDENDUM

to the report

on the proposal for a regulation of the European Parliament and of the Council on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC (COM(2016)0862 – C8-0493/2016 – 2016/0377(COD))

Committee on Industry, Research and Energy

Rapporteur: Flavio Zanonato
A8-0039/2018

Insert the following opinion after the explanatory statement:

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

21.2.2019

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

Subject: Opinion on the legal basis of the proposal for a Regulation the European Parliament and of the Council on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC (COM(2016)0862 – C8-0493/2016 – 2016/0377(COD))

Dear Mr Chair,

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By letter of 29 January 2019 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was valid.

The committee considered the above question at its meeting of 18 February 2019.

I - Background

The proposal for the Regulation in question is aimed at ensuring that all Member States put in place appropriate tools to prevent, prepare for and manage electricity crisis situations which often have a cross-border effect, given that electricity systems are integrated as well as at improving the functioning of the internal electricity market.

To meet this objective, the approach proposed is that Member States should cooperate with each other to prevent and manage crisis situations, especially by providing common methods for assessing risks, by bringing more comparability and transparency to the preparation phase and during an electricity crisis, and by ensuring that even in the crisis electricity is delivered where it is needed most.

The legal basis proposed by the Commission is Article 194 TFEU, which sets out the legal base for energy policy; however, during the inter-institutional negotiations, it was considered necessary to add a reference to paragraph 2 of the above-mentioned Article, which stipulates that the measures shall be established in accordance with the ordinary legislative procedure.

The Chair of the Committee on Industry, Research and Energy, responsible for the proposal for a Regulation of the European Parliament and of the Council on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC (2016/0377(COD)), therefore asked that the Committee on Legal Affairs, pursuant to Rule 39(2) of the Rules of Procedure, verifies the legal bases of the proposal and more specifically the appropriateness of the suggested addition.

II - Relevant Treaty Articles

The following Article of the Treaty on the Functioning of the European Union, under Title XXI on 'Energy', is presented as the legal basis in the Commission proposal (emphasis added):

Article 194 TFEU

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;*
- (b) ensure security of energy supply in the Union;*
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
- (d) promote the interconnection of energy networks.*

2. Without prejudice to the application of other provisions of the Treaties, the European

Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

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

III – CJEU case law on the choice of legal basis

It is settled case-law of the Court of Justice that "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure*"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act in question. Accuracy in the indication of the legal basis is particularly important in the present case, since paragraphs 2 and 3 of Article 194 make reference to the ordinary legislative procedure and to a special legislative procedure with unanimous vote in Council, respectively.

IV - Analysis and determination of the appropriate legal basis in consideration of the aim and content of the proposal, the Parliament's mandate and the Council's mandate

This proposal for the Regulation aims at establishing common rules on crisis prevention to safeguard the security of supply by providing tools to ensure cross-border cooperation, by requiring Member States to cooperate at regional level, in a spirit of solidarity. The proposal also provides for measures to prevent, prepare for and handle electricity crises, with a view to ensuring that electricity is delivered where it is most needed. It also sets out a framework for an effective monitoring of security of supply in Europe via the Electricity Coordination Group. This should result in better risk preparedness at a lower cost. It should also strengthen the internal energy market by enhancing trust and confidence across Member States and ruling out inappropriate state interventions in crisis situations, in particular avoiding undue curtailment of cross-border flows.

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

The main purpose of the proposal seems to fall entirely into the objectives of the Union policy on energy laid down in Article 194(1) TFEU.

The agreed amendment to the legal basis does not substantively change the basis selected by

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 014393, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-07585.

the Commission for its proposal, but it renders the choice of legal basis more precise by specifying the relevant paragraph of Article 194 TFEU on which the co-legislators seek to rely.

Article 194 TFEU contains in fact, in paragraphs 2 and 3, two different legal bases for measures of different nature. While paragraph 3 refers to measures that are mainly of a fiscal nature, paragraph 2 refers to the adoption of measures necessary to achieve the objectives in paragraph 1, which include, inter alia, security of supply. Furthermore, it is important to notice that Article 194 TFEU provides for different legislative procedures depending on the nature of a measure.

V - Conclusion and recommendation

In light of the above, it should be concluded that, in order to indicate the legal basis in a manner that allows for determining which procedure is applicable to the adoption of the proposal, it is appropriate to rely on Article 194(2) as the legal basis of the proposal.

This analysis of the legal basis is based on the provisional agreement reached during the interinstitutional negotiations on the proposal and endorsed by the Committee on Industry, Research and Energy on 23 January 2019.

At its meeting of 18 February 2019, the Committee on Legal Affairs accordingly decided, unanimously², by 17 votes in favour, that a specific reference to paragraph 2 of Article 194 TFEU in the legal basis is appropriate and that Article 194(2) TFEU should be confirmed as the legal basis for the Proposal.

Yours sincerely,

Pavel Svoboda

(Affects all language versions.)

² The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada, Mady Delvaux (Vice-Chair), Gilles Lebreton (rapporteur for opinion), Max Andersson, Joëlle Bergeron, Kostas Chrysogonos, Jytte Guteland, Heidi Hautala, Sajjad Karim, Sylvia-Yvonne Kaufmann, António Marinho e Pinto, Julia Reda, Evelyn Regner, Axel Voss, Tiemo Wölken, Tadeusz Zwiefka.