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Committee on Legal Affairs  
The Chair

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7.9.2023

Mr Cristian-Silviu Buşoi  
Chair  
Committee on Industry, Research and Energy  
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (COM(2021)0557 – C9-0329/2021 – 2021/0218(COD))

Dear Mr Chair,

By letter of 1 June 2023<sup>1</sup>, the Chair of the Committee on Industry, Research and Energy (ITRE) requested the Committee on Legal Affairs, pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the amended legal basis of the proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652<sup>2</sup> under interinstitutional number 2021/0218(COD) (hereinafter the “first proposal”).

JURI committee considered the above question at its meeting of 7 September 2023.

## **I - Background**

The Committee on Industry, Research and Energy (ITRE) is currently in the process of finalisation of the revision of the first proposal amending, *inter alia*, Directive (EU)

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<sup>1</sup> D(2023)306107

<sup>2</sup> COM(2021)557 of 14.7.2021.

2018/2001<sup>3</sup> (hereinafter “the Renewable Energy Directive”). The proposal aims to increase the use of energy from renewable sources, to foster better energy system integration and to contribute to climate and environmental objectives.

The Commission based the first proposal on Articles 114 and 194(2) TFEU. In its mandate for negotiations, Parliament did not amend the legal basis proposed by the Commission. The Council in its general approach did not change the legal basis either.

Subsequently, as a reaction to the war in Ukraine, the Commission published a new proposal, “REPowerEU” (2022/0160(COD))<sup>4</sup>, introducing additional targeted amendments to the Renewable Energy Directive as well as an additional new legal base reflecting certain new environmental elements: Article 192(1) TFEU.

ITRE decided to merge the additional amendments of the Renewable Energy Directive from the REPowerEU proposal with the first proposal to amend the Renewable Energy Directive. Merging the two procedures in that aspect entailed adding Article 192(1) TFEU to the two legal bases of the first proposal, mentioned above. During the interinstitutional negotiations, merging of the two proposals, including the addition of the third legal base, has been provisionally agreed by the co-legislators.

While the validity or appropriateness of any of the legal bases has not been disputed as such, there is a change of the legal basis through the addition of another legal basis in the first proposal, hence ITRE is in essence seeking an opinion on the appropriateness of that addition.

## **II - The relevant Treaty Articles**

Chapter 3 of Title VII of Part three TFEU, on “Approximation of laws” reads, inter alia, (emphasis added):

*Article 114  
(ex Article 95 TEC)*

- 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.***
- 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.*
- 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to*

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<sup>3</sup> Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82).

<sup>4</sup> COM(2022) 222 of 18.5.2022.

*achieve this objective.*

4. *If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*
5. *Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*
6. *The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.*

*In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.*

*When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.*

7. *When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*
8. *When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.*
9. *By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.*
10. *The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.*

Title XX of Part three TFEU, on “Environment” reads, inter alia, (emphasis added):

*Article 192  
(ex Article 175 TEC)*

1. ***The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.***
  
2. *By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:*
  - (a) *provisions primarily of a fiscal nature;*
  - (b) *measures affecting:*
    - *town and country planning,*
    - *quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,*
    - *land use, with the exception of waste management;*
  - (c) *measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.*

*The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.*

3. *General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.*

*The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.*

4. *Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.*
  
5. *Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:*
  - *temporary derogations, and/or*

- *financial support from the Cohesion Fund set up pursuant to Article 177.*

Title XXI of Part three TFEU, on “Energy” reads (emphasis added):

*Article 194*

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**

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union’s competence<sup>5</sup>.

According to well-established case-law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure<sup>6</sup>.

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<sup>5</sup> *Opinion 2/00 ("Cartagena Protocol")*, ECLI:EU:C:2001:664, para 5.

<sup>6</sup> *Case C-300/89, Commission v Council ("Titanium dioxide")*, ECLI:EU:C:1991:244, paragraph 10.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component<sup>7</sup>. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases<sup>8</sup>. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament<sup>9</sup>.

In addition, in order to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the objective pursued by those rules. Accordingly, with respect to legislation which amends existing legislation, it is important also to take into account, for the purposes of identifying its legal basis, the existing legislation that it amends and in particular, its objective and content<sup>10</sup>.

#### **IV – Aim and content of the proposed Directive**

The aim of the first proposal, put forward on 14 July 2021, was to amend a number of legislative acts, including the Renewable Energy Directive, as regards the promotion of energy from renewable sources in the light of Union's climate ambition.

Renewable energy plays a fundamental role in delivering the European Green Deal and for achieving climate neutrality by 2050, given that the energy sector contributes over 75% of total greenhouse gas emissions in the Union. The first proposal thus aimed to raise the production target so that the share of energy from renewable sources would reach 40% by 2030. All Member States would contribute to that target and to that end, specific targets were proposed for the use of renewable energy in transport, heating and cooling systems, buildings and industry. The main changes proposed were: (i) strengthening the renewable energy target, (ii) promoting the deployment of and investment in renewable energy, and (iii) strengthening the Union's sustainability criteria for the use of bioenergy and providing for specific biodiversity and climate safeguards for forest biomass.

The Commission based the first proposal on Articles 194(2) (energy) and 114 (approximation of laws) TFEU. According to the explanatory statement, the Commission primarily based the proposal on the legal basis for the adoption of acts in the field of energy, while the insertion of Article 114 TFEU as a legal basis was made solely in view of the amendments to Directive

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<sup>7</sup> Ibid. paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

<sup>8</sup> Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; *Opinion 2/00*, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

<sup>9</sup> Case C-300/89, paragraphs 17-25; Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461.

<sup>10</sup> Judgment of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paragraphs 39-40.

98/70/EC relating to the quality of petrol and diesel fuels<sup>11</sup>, which is based on that Article<sup>12</sup>.

On 18 May 2022, when the examination of the first proposal was well advanced in Parliament and in the Council, the Commission adopted the REPowerEU plan as a response to the global energy market disruption caused by Russia's invasion of Ukraine, the overall geopolitical context and the very high energy prices<sup>13</sup>.

As part of the REPowerEU plan, the Commission had proposed a series of targeted amendments to the existing legislation in the field of energy, namely, again, to the Renewable Energy Directive, as well as to the Energy Performance of Buildings Directive<sup>14</sup> and the Energy Efficiency Directive<sup>15</sup>, under the interinstitutional number 2022/0160(COD) (hereinafter the “second proposal”). The purpose of the second proposal was to accelerate energy efficiency and the deployment of renewable energies throughout the Union and thus ensure the achievement of the Union's ambitious climate and energy objectives by 2030 and the objective of climate neutrality by 2050. Most of the targeted amendments contained in the second proposal concerned the Renewable Energy Directive which was already in the process of being amended under the first proposal.

Besides Article 194(2) TFEU (energy), the second proposal was based also on Article 192(1) TFEU (environment), which was, according to the explanatory memorandum accompanying the proposal<sup>16</sup>, added as legal basis in order to enable the amendments to the application of the Union environmental *acquis*.

The amendments to the Renewable Energy Directive, introduced by the second proposal, concern: (i) more ambitious renewable energy targets (Article 1, point (2)), (ii) measures to accelerate permitting procedures for some renewable energy plants (Article 1, points (1), (4), (5), (7), (8) and (9)); and (iii) streamlining the steps of the permit-granting procedures applicable to renewable energy, including the assessment of potential environmental impacts (Article 1, points (6) and (10)).

It was only logical, also in the spirit of better law-making, that during the inter-institutional negotiations on the first proposal, the co-legislators agreed to incorporate the amendments on the Renewable Energy Directive from the second proposal. That agreement also comprised the addition of the environmental legal basis from the second proposed. Consequently, the first proposal as agreed during the interinstitutional negotiations would now be based on Articles 114, 192(1) and 194(2) TFEU.

## **V – Analysis**

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<sup>11</sup> Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC (OJ L 350, 28.12.1998, p. 58).

<sup>12</sup> See point 2 of the explanatory memorandum of the first proposal, as well as recitals 4 and 5 of the text as agreed during the interinstitutional negotiations.

<sup>13</sup> See point 1 of the explanatory memorandum of the second proposal and recital 3a of the text as agreed during the interinstitutional negotiations.

<sup>14</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ L 153, 18.6.2010, p. 13).

<sup>15</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).

<sup>16</sup> See point 2 of the explanatory memorandum of the second proposal.

It is useful to first briefly recall that the first proposal was based on Articles 194(2) and 114 TFEU, which were not contested as legal bases at any point of the examination of that proposal and are not subject of this opinion. The first proposal, for the reasons explained above, did not however include Article 192(1) as its legal basis. Thus, while the reference to that provision as a legal basis was not disputed as such, the addition of Article 192(1) in the final legislative act incorporating elements of the second proposal based on that legal basis amounts nevertheless to a formal change of the original legal basis of the first proposal.

After the second proposal was merged into the first proposal and was amended during the inter-institutional negotiations, the act as agreed during the interinstitutional negotiations is now to contain provisions which derogate from:

- the requirements to carry out an environmental impact assessment set out in Directive 2011/92/EU<sup>17</sup> (Articles 16c(3), 16d(1)),
- the requirement to carry out an assessment of the implication of a project for Natura 2000 sites set out in Directive 92/43/EEC<sup>18</sup> (Articles 15e and 16a(3)), and
- the assessment of the implications on species protection in Directive 92/43/EEC and Directive 2009/147/EC<sup>19</sup>.

In addition, the act as agreed during the interinstitutional negotiations would introduce a presumption that projects for renewable energy plants are in the overriding public interest (Article 16f). Such finding is a precondition under the legislative acts referred to in the indents above for the application of an exemption or a derogation from certain requirements set out in those acts.

The act as agreed during the inter-institutional negotiations would bring changes in the application of the several acts under the environmental *acquis*, all of which are based on the environmental legal basis. As such, the amendments seem to pursue objectives which are part of the legislative acts in the field of environmental protection. It would thus appear that the environmental legal basis of the acts to which the amendments refer to is of relevance when determining the appropriateness of the addition of Article 192(1) in the final act.

It should be noted that according to the settled case-law recourse to multiple legal bases is, in principle, only permissible if procedures laid down for the respective legal bases are not incompatible with each other and do not undermine the right of the European Parliament. In this respect, both Article 114(1) and Article 192(1) TFEU provide for the ordinary legislative procedure; there is thus no incompatibility at that level. A potential conflict that could arise between the procedure provided for in Article 114(5) and (6) and Article 193 does not seem to be of relevance with regards to the present case. In that respect, it should be further noted that the act as agreed during the interinstitutional negotiations is an amending act which amends three different Directives and repeals another one and that, as explained by the Commission in the explanatory memorandum of the first proposal, “*Article 114 TFEU, the internal market*

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<sup>17</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28.1.2012, p. 1).

<sup>18</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

<sup>19</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7).



*legal base, is added in order to amend Directive 98/70/EC on fuel quality, which is based on that Article*". An appropriate mention to that effect in a recital to clarify this aspect could be considered at the finalisation stage of the text in question as agreed in the interinstitutional negotiations.

#### **VI – Conclusion and recommendation**

At its meeting of 7 September 2023 the Committee on Legal Affairs accordingly decided unanimously, by 15 votes in favour<sup>20</sup>, to recommend to the Committee on Industry, Research and Energy that the addition of Article 192(1) TFEU as the legal bases for the act as agreed during the interinstitutional negotiations appears to be appropriate.

Yours sincerely,

Adrián Vázquez Lázara

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<sup>20</sup> The following were present for the final vote: Adrián Vázquez Lázara (Chair), Pascal Arimont, Gunnar Beck, Caterina Chinnici, Ilana Cicurel, Pascal Durand, Ibán García Del Blanco, Virginie Joron, Gilles Lebreton, Antonius Manders, Karen Melchior, Sabrina Pignedoli, Jiří Pospíšil, Emil Radev, Javier Zarzalejos.