

# Energy Taxation Directive

## Identifying the appropriate legal basis

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### **FACTUAL BACKGROUND AND SYNTHESIS**

This short memo deals with the legal basis that the EU can rely upon in the revision of the Energy Taxation Directive (ETD).

It will first discuss two cases of the CJEU (C-626/18 & C-482/17) that have dealt with the question of the applicable legal basis within the context of the revision of EU directives.

It will then proceed to outline the legal reasoning to rely on in order to promote the adoption of the ordinary legislative procedure in the revision of the ETD. As assessed in details below, we believe that:

- Both cases C-626/18 & C-482/17 resulted in negative outcomes for the applicants and confirmed the consistency in EU case law in relation to the legal basis of EU measures.
- A legal basis can be found in both article 192(1) and (3) TFEU. However, the most compelling argument would find its base in article 192(1) TFEU, according to which the revision of the ETD is predominantly inspired by environmental concerns and as a consequence, the ordinary legislative procedure should be applied as the environmental objectives listed in article 191 TFEU are being pursued.

### **ASSESSMENT OF THE RELEVANT CASE LAW**

#### **I. Case C-626/18**

##### **1. Background**

The Republic of Poland had seized the court to partially annul several provision of the revised posting of workers Directive and alternatively, to annul the revised directive in its entirety. The Polish government

was not keen on the newly introduced guarantees for posted workers in the EU, as it would dull its competitive edge that was maintained through low cost labour.

## 2. The applicant's claim (Republic of Poland)

Poland's position in regard to the incorrect legal basis on which the revised posting of workers Directive relied, was that the objective envisioned in the contested articles was not to facilitate the pursuit of self-employed activities, but rather the opposite. Poland therefore challenged the reliance on article 53(1) and 62 TFEU as the legal basis, arguing that the true objective pursued by the contested Directive did not correspond with those provisions.

## 3. The Court's findings in relation to the legal basis

The CJEU first stated that the choice of a legal basis must always rest on objective factors that are amenable to judicial review, which include the aim and content of the envisioned measure. In case where the measure can serve multiple purposes, and one of those purposes can be identified as the predominant purpose, this particular purpose should reflect the legal basis. The CJEU also added that for the determination of the legal basis, the legal framework within which the rules are situated can be taken into account when practicable to clarify the objective pursued by the measure. In addition, when dealing with a directive that amends existing legislation, account should also be taken of the objectives of that existing legislation, although this is not the sole factor to be considered. Finally, building on existing case law (Judgment of 12 February 2015, Parliament v Council, C-48/14, EU:C:2015:91, paragraph 36), it is mandatory to found measures on specific provisions of the Treaties when applicable.

# II. Case C-482/17

## 1. Background

The Czech Republic, supported by Hungary and the Republic of Poland, had seized the Court with the request to annul, or in the alternative partially annul, Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. The Czech Republic was of the opinion that the prohibition to possess certain semi-automatic firearms and magazines had no link with the isolated shortcomings in the functioning of the internal market.

## 2. The applicant's claim

In relation to the legal basis, the Czech Republic first argued that art. 114 TFEU does not constitute the appropriate legal basis for the adoption of the contested directive. Namely, art. 114 TFEU can only serve as a legal basis when the measure concerns the primary objective of approximating Member State's laws in relation to the free movement of goods and can thus not be used in the field of prevention of crime and terrorism. In addition, Hungary added that for the determination of the legal basis, the act in which the legislation in question is incorporated should be examined as a whole, and that the Court should not limit itself to the objective of the amended act.

## 3. The Court's findings in relation to the legal basis

The Court first reiterates that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review, which include the aim and content of that measure. It also reiterates that when multiple objectives can be identified, and one of those objectives proves to be predominant and the other(s) incidental, the measure should be founded on a single basis reflecting the predominant objective (Judgment of 23 January 2018, Buhagiar and Others, C-267/16, EU:C:2018:26, paragraph 41). The Court once again confirmed that the legal framework within which the rules are situated can be

taken into account when practicable to clarify the objective pursued by the measure. The Court concluded the matter by stating that it is necessary to identify, in this case, the legal basis on which the contested directive had to be adopted by taking into account, in particular, both the context constituted by the amended directive and the rules stemming from the amendments made to it by the contested directive. Applying the aforementioned criteria, the Court ruled that the EU legislature did not exceed its margin of discretion conferred on it by the legal basis of art. 114 TFEU when essentially restricting the trade in certain semi-automatic firearms.

### III. Conclusions inferred from the case law

Both cases resulted in negative outcomes for the applicants and confirmed the consistency in EU case law in relation to the legal basis of EU measures.

The following conclusions can be noted:

- The choice of a legal basis must always rest on objective factors, such as the aim and content of the envisioned measure.
- When there are multiple objectives, and one objective can be identified as the main objective, the legal basis must be found on that single predominant objective.
- The legal framework within which the rules are situated can be taken into account to clarify the objective pursued by the measure.
- It is mandatory to found measures on specific provisions of the Treaties when applicable.
- The context of both the amended measure and the amending measure should be taken into account when determining the objective and legal basis. This would include the old Energy Taxation Directive which has a predominantly fiscal background, as well as the environmental mindset of the (to be) revised directive.

## ARTICLE 192 AS A LEGAL BASIS

The objective is to establish a legal avenue towards enabling the EU legislators to use the ordinary legislative procedure instead of the procedure requiring unanimity from the Council.

In relation to environmental matters, two options exist. One is to found the legal basis on art. 192(3) TFEU, and the other is to found that legal basis on art. 192(1) TFEU.

The challenge to overcome is the requirement of the above case law that it is mandatory to found measures on specific provisions of the Treaties when applicable, which for the revision of the ETD entails considering the fiscal-specific provisions found in art. 113 and 192(2) TFEU.

An argumentation based on article 192(3) TFEU, which requires the adoption of general action programmes setting out priority objectives, seems promising at first, as a connecting factor can be established with the European Green Deal, as embedded in the proposal for the 8th Environment action programme of the EU. However, art. 192(3) TFEU is clear in its wording that it must concern the adoption of these action programmes themselves, and not measures which can be seen as a contributing factor to the achievement of those programmes. It therefore seems unlikely that art. 192(3) TFEU can serve as the legal basis to advocate an ordinary legislative procedure.

However, article 192(1) TFEU also provides for an ordinary legislative procedure when it concerns the achievement of the objectives set out in art. 191 TFEU, where paragraphs 1 and 2 mention objectives of

“prudent and rational utilisation of natural resources”, “promoting measures at international level to deal with regional or worldwide environmental problems” and “Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.”

A convincing argument can be made that, in the overarching background of the EU Green Deal, the revision of the ETD is predominantly inspired by the objective of environmentally responsible behaviour and thus, the removal of fiscal measures that stimulate the use of polluting fuels.

This argument is clearly supported by the EU Commission, who in its Impact Assessment on the revision of the ETD [Ref. Ares(2020)1350088 - 04/03/2020] has stated the following on page 2:

*In line with the European Green Deal communication, the review of the directive should focus on environmental issues. Therefore, it is possible to use Article 192 of the Treaty (environmental measures including measures of fiscal nature) that allows European Parliament and the Council to adopt proposals in this area through the ordinary legislative procedure by Qualified Majority Voting rather than by unanimity in the Council*

While the Commission does not specify the specific paragraph of article 192 that is references, there can be no doubt that it supports the adoption of the ordinary legislative procedure, which certainly serves ClientEarth’s position.

**Thus, to conclude, a legal basis can be found in both article 192(1) and (3) TFEU. However, the most compelling argument would find its base in article 192(1) TFEU, as the Commission can argue that the revision of the ETD is predominantly inspired by environmental concerns and as a consequence, the ordinary legislative procedure should be applied as the environmental objectives listed in article 191 TFEU are being pursued.**

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