EXECUTIVE SUMMARY

Study for the AFCO committee

European Parliament

Towards a Climate and Energy Union [1]

The constitutional basis for a sustainable transformation

This study explores **the legal space for the creation of an EU Climate and Energy Union**. As to the concept of an actual Climate and Energy Union, this study relies on the two main targets laid down in the European Climate Law, being a reduction in greenhouse gas (GHG) emissions of 55% percent compared to emissions in the 1990's in 2035, and achieving net-zero emissions by 2050. Climate Union in this study, therefore, refers to the totality of actions required to ensure the EU meets its legally binding targets under the Climate Law, as well as any additional obligations under international law.

The core findings on the current legal space for such a real Climate and Energy Union are as follows. Firstly, the EU already possesses expansive, broadly formulated competences on the environment and energy under Articles 192 and 194 TFEU. The flexibility and relatively open-ended nature of these legal bases, moreover, enables these competences to evolve over time as new challenges arise, especially as these legal bases are linked to even more broadly formulated underlying objectives.

Consequently, Articles 192 and 194 TFEU, as interpreted by the CJEU, generally provide the EU with **expansive and flexible competences** to create an effective EU Climate and Energy Union. What is more, as seen in the Fit for 55 package, other legal bases including Articles 113, 114, 122(1) and (2) and 175 TFEU can provide additional legal space, with Article 352 TFEU providing a final fall-back option. Consequently, for most of the measures one needs to take to create an actual Energy and Climate Union, a competence can in principle be found in the current Treaties if the political will to do so can be found as well.

At the same time, **certain limits on the EU's legal space to create a Climate and Energy Union** do exist. The first and most apparent limits are contained in Articles 192 and 194 TFEU themselves. In environmental policy, these limits are of a procedural nature. Under article 192(2) TFEU, a procedural limit is imposed for certain sensitive areas that require unanimity, being provisions primarily of a fiscal nature, measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources and measures affecting land use, with the exception of waste management. In energy policy, there are limits of both a procedural and substantive nature. Similar to Article 192(2) TFEU, Article 194(3) TFEU requires unanimity in Council for legal acts that are primarily of a fiscal nature, whilst only requiring consultation of the European Parliament for such acts. Article 194(2) TFEU imposes one substantive limit, as it prohibits the adoption of EU energy policies that '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

[1] Full study in English: https://www.europarl.europa.eu/RegData/etudes/STUD/2024/764399/IPOL_STU(2024)764399_EN.pdf

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energy supply (…).' The analysis in this study shows, however, that the CJEU so far does not seem to police these limits stringently.

Another related limit on the legal space for an effective Climate and Energy Union concerns Article 4(2) TEU. The CJEU, however, has so far given a highly restrictive interpretation to Article 4(2) TEU. Consequently, under the current case law of the CJEU, it does not seem likely that Article 4(2) TEU will pose a significant limit to the creation of a Climate and Energy Union at the EU level. The major potential limit to the legal space for a Climate and Energy Union from Article 4(2) TEU, however, would come from national courts. An increasing number of these courts are developing defensive lines against EU integration, trying to shield a certain minimum core of national powers from EU integration, often relying on Article 4(2) TEU as an EU law anchor.

Moreover, given that an effective Climate and Energy Union will require enormous financial resources, the relatively limited funding currently available for an EU Climate and Energy Union, and the relatively limited capacity of the EU to raise significant additional funds quickly or more structurally, including through its own resources, form some of the most acute and perhaps fundamental limits to the legal space for an EU Climate and Energy Union.

Other limits to an effective Climate and Energy Union may arise from fundamental rights (in particular the right to property as, amongst others, protected by Article 1 protocol 1 of the ECHR and the right to an effective remedy, which can lead to significant delays as parties opposing certain climate measures pursue the national and international remedies at their disposal). In addition, democracy itself may hinder the development of an effective Climate and Energy Union, as it requires sufficient policy space for national and EU electorates to make their own choices, which may delay or block effective climate measures.

Concerning enforcement, an effective Climate and Energy Union may be hindered by reluctance on the part of national governments to implement EU climate policy.

In addition to identifying these different limits to an effective Climate and Energy Union, this study also analyses possible **ways of addressing these limits**. It first concludes that it does not seem feasible to rely on formal Treaty change to create more legal space for an effective Climate and Energy Union. Instead, it seems more fruitful to look at different solutions, including use of the **passerelle clauses** and **informal Treaty change**.

The last sentence of Article 192(2) TFEU contains a so-called passerelle clause allowing a shift towards QMV even on the sensitive topics currently requiring unanimity. Article 194 TFEU can benefit from the generic passerelle clause in Article 48(7) TEU. The use of these passerelle clauses, even if still far from simple, is far less cumbersome than a full Treaty revision, and specifically targets one of the key limits on the competences of the EU to create a Climate and Energy Union.

Much of the required evolution or change in EU law, moreover, may take place via informal Treaty change. This evolution is in part allowed by the teleological, effectiveness-focused case law of the CJEU, allowing the EU to develop alongside the challenges facing it. As the EMU and COVID crises demonstrated, moreover, such informal constitutional change can also modify the budgetary and financial functioning of the EU in a significant manner.

COVID provides a particularly clear example and potential model for informal constitutional change for a Climate and Energy Union, particularly through the adoption of the NGEU recovery plan, which was based on an extensive use of Articles 122(1) and (2) and Article 175 TFEU as legal bases. In order to extend the NGEU approach to a Climate and Energy Union, it would have to be clarified whether climate change in a broad sense could be considered not just an emergency, but also an exceptional, one-off event, as was the case for the COVID pandemic.

As there are several differences between the situation of COVID and climate change, utilizing Article 122 TFEU would require a certain level of creative thinking as well as political will, but it does not appear impossible, also taking into account the lessons from the EMU crisis and the EU's response to the Russian invasion of Ukraine so far.

The final question addressed in this report is if an **individual, fundamental right to accessible and sustainable energy for every EU citizen** already exists, or can be in some way construed from EU primary or secondary law, including from the Charter and the ECHR. This study concludes that there currently is no enforceable individual right to sustainable energy under EU or ECHR law, although there is a basis for developing the law so as to achieve greater protection for the climate through sustainable energy. Overall, it seems unlikely that a specific right to sustainable energy would be created via the doctrine of positive obligations, notwithstanding the major developments in this field over the last couple of years. To a large extent, this is due to the understandable hesitation of national and European courts to step in and dictate to governments which acts they should specifically take to achieve their (binding) climate and energy objectives. Consequently, courts are increasingly forcing States to take sufficient actions to meet their climate objectives, but for now leave the precise policy measures to be deployed to the democratically elected officials. In the case of access to sustainable energy, this approach has the added benefit that a sudden individual right to sustainable energy would be impossible to meet, creating a situation where States are forced to violate such an individual right.

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