

Are provisions on public procurement and buildings renovation in the proposal for the Energy Efficiency Directive (EED)¹ unconstitutional?



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Some Member States have been arguing that certain Articles of the proposal for EED, namely on energy efficiency in public procurement (Article 5) and buildings renovation (Articles 3a and 4), are 'unconstitutional'. Their specific concern is not clear as the term 'unconstitutional' is vague. Hiding behind this accusation could be a question of EU competence to legislate on energy efficiency in public procurement and buildings renovation or perhaps accusations of non-compliance with the principles of subsidiarity and proportionality.

Competence of the EU under the Lisbon Treaties to adopt EU provisions on energy efficiency in public procurement and in relation to buildings renovation

The legal basis for the EU to legislate on energy efficiency is Article 194 of the TFEU, which reads in that respect:

'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: [...] promote energy efficiency and energy saving [...]'.¹

Particular limits to EU competence on energy efficiency are provided for in Article 194(2) sub-paragraph 2 of the TFEU: EU energy 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'. Provisions in the EED imposing energy efficiency measures in public procurement and in the buildings sector do not tie Member States' hands in those areas. Specifically:

- Energy resources are not exploited for the purpose of saving energy and increasing energy efficiency, therefore conditions for exploiting energy resources are not impacted.
- Even if energy efficiency is often called 'the cheapest energy source' it is clear that this must be understood in a figurative way. Therefore, there is no impact on Member States' choice of energy source.
- Energy efficiency and savings could lead to a reduced need for energy supply but in any case they do not require any change in energy supply structure.

¹ Proposal by the European Commission: Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC, COM(2011) 370 final, 22.6.2011; Proposal adopted by the ITRE committee of the European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE472.358>

The EU is also competent to legislate in the area of public procurement and energy efficiency of buildings. Both these issues are already subject to EU legislation, namely Public Procurement Directives (PP Directives)² and Energy Performance of Buildings Directive (EPBD)³.

The fact that an issue is already partially regulated in one piece of EU legislation, does not mean that provisions relating to particular aspects of that issue cannot be included in another piece of EU legislation, especially if these two pieces of legislation complement each other. In the case of the PP Directives and the EED, the PP Directives set out a framework for 'how to buy', not 'what to buy'. Therefore, it is entirely appropriate for sector-specific legislation, such as the EED, to impose requirements in relation to procurement in particular sectors where procurement is one of the tools being used to achieve a specific objective. An example of sectoral legislation that already sets mandatory procurement requirements is Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles⁴. Likewise, the EPBD is complementary to the EED, with the EPBD focussing on energy performance requirements for particular buildings⁵ while the EED establishes further requirements, such as an annual target for renovation of public buildings, to make sure that the EU 20% energy savings target is achieved.

To conclude, the EU clearly has the competence to legislate on energy efficiency in public procurement and buildings renovation.

Subsidiarity

The principle of subsidiarity, expressed in Article 5.3 of the TEU, reads:

'[...] in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

Energy efficiency, an EU shared competence, has implications with important international aspects (climate change, security of supply, competitiveness) which cannot be satisfactorily regulated by Member State action. Purely national, regional or local actions could conflict with Treaty requirements to avoid restrictions on trade or distortions of competition, also they would not be sufficient to address the issue of security of supply

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1, as amended; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award public of works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114, as amended.

³ 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, p. 13, 18.6.2010.

⁴ Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120, 15.5.2009, p. 5.

⁵ Minimum energy performance to be ensured through buildings' major renovation, national policies and measures to stimulate the transformation of buildings that are refurbished into nearly zero-energy, obligation that all new buildings are nearly zero-energy.

nor, as shown in an assessment by the European Commission⁶, be sufficient to secure the achievement of the EU's 20% savings target.

As energy efficiency is a cross-sector concept, assessing compliance of the energy efficiency provisions with the subsidiarity principle requires an assessment of whether areas in which energy efficiency is addressed (including public procurement and buildings renovation) can be better achieved at EU level than Member State level. The above arguments concerning energy efficiency in general apply also to energy efficiency in public procurement and building renovation. Moreover, in relation to public procurement, leaving Member States to introduce national energy efficiency criteria into public procurement policies could lead to varied approaches which carries the risk of creating legal and policy barriers to cross-border procurement and could therefore impede the full benefits of the internal market being achieved.

Proportionality

The principle of proportionality, expressed in Article 5.4 of the TEU, reads:

'[...] the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

The main question to address here is about the content of the proposed EU action. Are detailed provisions on energy efficiency in public procurement and buildings renovation necessary to promote energy efficiency and energy saving in the context of the establishment and functioning of the internal market and with regard to the need to preserve and improve the environment? As the EU objective in that regard has been expressed as 20% energy savings target and the EU is not on track to achieve this objective, the inclusion in the EED of more detail on how certain measures are to provide for the achievement of this objective is clearly justified. Therefore, provisions on energy efficiency in public procurement and buildings renovation in the EED proposals comply with the proportionality principle.

For more reading see also two ClientEarth briefings by E. Maitre: "The principle of subsidiarity and the Proposal for an Energy Efficiency Directive" and "Is Article 5 of the proposed Energy Efficiency Directive contrary to the existing or future EU Public Procurement legislation?"

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For further information please contact: Marta Toporek (mtoporek@clientearth.org)

⁶ See: 1.1, paragraph 2 of the Explanatory memorandum to the Commission's proposal COM(2011)370 final.