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Legal Opinion

on the EU-Conformity of national SAF shares for aviation kerosene set out by § 37 lit. a (4a) BImSchG with regard to the Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport (ReFuelEU Regulation)

drawn up on request
of Transport & Environment

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A. Executive Summary

As it will be shown § 37 lit.a (4a) BImSchG[1] (Federal Immission Control Act of Germany) remains applicable although the European Legislator did rule on SAF-Shares as well.

I. Firstly, the ReFuelEU Regulation[2] states only a **minimum harmonization measure** and therefore the regulation itself gives Member States the opportunity to rule on more stringent measures by fulfilling more than the required minimum obligation set out by the ReFuelEU Regulation (*see below under C.*).

II. Secondly, even if one might argue, that there is a conflict between the German legal act and the ReFuelEu Regulation, Member States would have **the right to deviate** from this European Legal act **under Art. 193 TFEU**, since the ReFuelEU Regulation must be based solely on the competence norm of Art. 191 ff. TFEU, addressing climate and environmental protection. Therefore, Member States are free to deviate from European requirements to take more stringent measures for environmental protection (*see below under D.I.1.*).

III. Thirdly, even if one might argue that Art. 191, 192 TFEU, the environmental policies, are not solely the correct competence norm and therefore, Art. 100 (2) TFEU, the EU-competence norm for the internal transport market, states a mandatory additional competence norm for the ReFuelEU Regulation Art. 193 TFEU the deviation clause for environmental measures remain applicable, since the **SAF shares established under the regulation intend environmental protection** (*see below under D.I.2.*).

IV. Lastly, even if one found that Art. 100 (2) TFEU is the solely correct competence norm for the regulation at hand – which is in contrast to the opinion presented above – **under the chapeau of Art. 114 (4) TFEU preexisting national law relating to the protection of the environment**, as § 37 lit.a (4a) BImSchG, **remains applicable** (*see below under D.II.*).

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[1] Bundesimmissionsschutzgesetz as promulgated on 26 th of September (BGBl. I, p. 3839), as last amended by Act of 26th of July 2023 (BGBl. I, p. 202).

[2] Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport (ReFuelEU), not yet published in the OJ.

B. Subject to the Legal Review

In 2021 the German Government and concerned economic associations agreed on the so called PtL-Roadmap ("Power to liquid Roadmap") to set up and expand the production of sustainably generated PtL kerosene in the future years.[3]

Air traffic has a particularly strong impact on the climate,[4] but based on the current state of science and technology the air traffic cannot be electrified due to a lower energy density in batteries and a resulting higher weight which at best allow short-range flights.[5] Therefore, there is a strong need to develop sustainable drop-in fuels to bring air services in accordance with environmental and climate needs. Since, biomass available is constricted and as there is a particular demand of all economic sectors, electricity-based kerosene from green hydrogen is a seminal technology for sustainable air fuels.[6]

To establish an innovation-friendly environment, especially to ensure the marketability at a later time for those companies who are already developing those sustainable e-fuels today, the German legislator set out, based on the PtL-Roadmap, § 37 lit.a (4a) BImSchG which states that "*obligated parties pursuant to paragraph 2 shall ensure a minimum share of fuel replacing aviation kerosene from* ***renewable energies of non-biogenic origin****. The amount of the proportion specified in sentence 1 shall be*

1. *from the calendar year 2026 0.5 percent*
2. *from the calendar year 2028 1 percent*
3. *from the calendar year 2030 2 percent.*

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[3] https://bmdv.bund.de/SharedDocs/DE/Anlage/G/ptl-roadmap-englisch.pdf?__blob=publicationFile .

[4] https://www.klimaschutz-portal.aero/klimakiller-nr-1/ .

[5] https://bmdv.bund.de/SharedDocs/DE/Anlage/G/ptl-roadmap-englisch.pdf?__blob=publicationFile

[6] https://bmdv.bund.de/SharedDocs/DE/Anlage/G/ptl-roadmap-englisch.pdf?__blob=publicationFile

On EU-Level sustainable aviation fuels in air transport are on the political agenda as well. Within the Fit-for-55-Programm the European Union underlines that "*aviation […] fuels cause significant pollution and also require dedicated action to complement emissions trading*".[7] Therefore, the ReFuelEU Aviation Initiative as a part of the Fit-for-55 Program *"will oblige fuel suppliers to blend increasing levels of sustainable aviation fuels in jet fuel taken on-board at EU airports, including synthetic low carbon fuels, known as e-fuels."*[8]

With the Regulation on ensuring a level playing field for sustainable air transport (ReFuelEU Regulation) the European Union sets out in Art. 4 in conjunction with Annex I shares of SAF:

1. (a) From 1 January 2025, each year a minimum share of 2 % **of SAF**;
2. (b) From 1 January 2030, each year a minimum share of 6 % **of SAF, of which:**

    (i) for the period from 1 January 2030 until 31 December 2031, an average share over the period of **1,2 % of synthetic aviation fuels**, of which each year a **minimum share of 0,7 % of synthetic aviation fuels**;

    (ii) for the period from 1 January 2032 until 31 December 2034, an average share over the period of **2,0 % of synthetic aviation fuels**, of which each year a minimum share of 1,2 % from 1 January 2032 until 31 December 2033 and of which a minimum share of **2,0 % from 1 January 2034 until 31 December 2034 of synthetic aviation fuels**;

3. (c) From 1 January 2035, each year a minimum share of 20 % of SAF, of which **a minimum share of 5 % of synthetic aviation fuels**;
4. (d) From 1 January 2040, each year a minimum share of 34 % of SAF, of which **a minimum share of 10 % of synthetic aviation fuels**.

[7] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3541.

[8] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3541.

(…)

Hence, the European Union sets out lower shares for non-biogenic fuels within the future years: Under European Law fuel suppliers will be obliged to add synthetic or e-fuels first time in 2030 with a minimum share of 0,7 % and a minimum share of solely 1.2 % in average for the years 2030 and 2031. In contrast, under the current German legislation, the obligation to use non biogenic e-fuels begins already in 2026 with 0.5 % up to 2 % already in 2030.

Therefore, the question at hand is whether Germany can still follow its ambitious path and therefore oblige fuel suppliers for aviation kerosene to add more non biogenic e-kerosine than set out by Art. 4 in conjunction with Annex I of the ReFuelEu Regulation, or if this European legislation act supersedes more elevated shares of SAF in flight-kerosene in national legislation.

By the view taken here, the ReFuelEU Regulation contains a minimum harmonization measure regarding SAF shares, which offers Member States the opportunity to rule on higher shares of SAF by implementing more stringent measures **(C.)**. Even if one might argue that the German legislation of § 37 lit.a (4a) BImSchG is conflicting with the RefuelEU Regulation it will be shown that Germany has a right to deviate from this regulation by maintaining higher shares of non-biogenic fuel **(D.)**.

C. SAF Shares set out by the ReFuelEU Regulation as a Minimum Harmonization Measure

The ReRuelEU Regulation states a minimum harmonization measure regarding minimum shares of SAF for the aviation sector and therefore offers Member States a maneuver in implementation.

Whether a European legal act intends a full harmonization or a partial harmonization and therefore offers Member States a maneuver on implementation, must be examined by an analysis of the wording, systematic and aim of the concerned legal act.[9]

As well-known under Art. 288 (3) TFEU European Directives "*shall be binding, as the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*". Hence, European directives often offer a maneuver on implementation, since directives address mainly the regulatory result which shall be achieved but not the legal instruments.

In contrary, a European regulation has a ubiquitous binding nature and therefore rules on the form and methods to reach the desired achievement.[10] However, a European regulation must not be concluding and can therefore state a minimum harmonization act which gives Member States the opportunity to rule on own measures, as long as they are still in accordance with the European Treaties.[11] European regulations offering Member States a maneuver on implementation are well-known as they contain so called "*opening clauses*"; the prominent example states the General Data Protection Regulation "GDPR".[12] Hence, the European

[9] ECJ, Decision of 25.4.2002, ECLI:EU:C:2002:255, recital 25; With further references: *Schröder* in Streinz, EUV/AEUV, 2018, Art. 114, Rn. 46.

[10] *Sensburg*, VR 2023, 181 (183).

[11] *Leidenmüller*, EuR 2019, 383 (394); *Riehm* states that „gold-plating" within the scope of an European legal act is in accordance with European Law as long as the concerned European act allows a deviation for example by implementing a so called "opening clause", *Riehm* JZ 2006, 1035 (1036). With further reference to "*gold-plating*" regarding directives: *Habersack*, JZ 1999, 913 (914 ff.).

[12] *Leidenmüller*, EuR 2019, 383 (Fn. 72); *Sensburg*, VR 2023, 181 (183).

legal act itself must allow the Member States to rule on a specific question individually.[13]

Therefore, it is crucial whether the ReFuelEU Regulation intends a full harmonization or does only state a partial harmonization rule. In this context it is paramount to understand that every single aspect of the legal act in question must be regarded isolated, so Member States may be bound by full harmonized rules and minimized harmonized rules within the same legal source[14]. Therefore, Member States may have the right to establish or maintain national rules for some aspects which are subject to a regulation and for other aspects not.

It is undeniable that the ReFuelEU Regulation states several full harmonized aspects, as e.g. Art. 8 which rules on "*Aircraft operator claiming of use of SAF*" by stating that "*aircraft operators shall not claim benefits for the use of an identical batch of SAF under more than one greenhouse gas scheme."*

However, regarding the wording of the SAF shares set out in Art. 4 in conjunction with Annex I of the ReFuelEU Regulation it is undoubtful that the regulation only rules on a minimum share of SAF for aviation kerosene, even if the European legislator had the opportunity to rule on fix shares. The European legislator obviously renounced the right to set out a binding minimum and maximum share, which would lead to a fully harmonized internal market regarding aviation fuel. Taking the wording of Art. 4 in conjunction with Annex I of the ReFuelEU Regulation seriously, the European legislator states, that upward deviations within different Member States are permissible. Therefore, by an analysis of the wording, the European legislator did not intend a full harmonization of the internal transport market, as solely minimum standards of SAF shares were introduced.

Furthermore, the aim of the ReFuelEU Regulation is to "*take measures to prevent that the introduction of SAF affects negatively the competitiveness of the aviation sector by defining harmonized requirements across the Union*."[15] Those negative effects on the competitiveness of the aviation sector would result, if one or more Member States did not rule on a minimum level of SAF within their regulatory system and therefore tankering strategies might occur and countermine all SAF ambitions of willing Member States. This would not solely lead to a marked

[13] *Burmeister/Staebe* EuR 2009, 444 (446).

[14] *Schröder* in Streinz EUV/AEUV, Art. 114 AEUV, Rn. 46.

[15] Recital 9, ReFuelEU Regulation.

distortion, the aim of the ReFuelEU initiative to decarbonize the air transport sector for combating climate change would be undermined if some Member States did not rule on any SAF within their national law, since, it even might be economically reasonable for air service operators to lift up fuel only in those Member States which did not implement any SAF shares.

However, as long as Member States are bound by the minimum shares, as set out by the ReFuelEU Regulation, SAF ambitions of willing Member States do not run dry and cause a market distortion. A more elevated share set out by a member state, higher than the share set out by the regulation, does not disturb the internal market as such, since this would solely lead to reverse discrimination which is the necessary consequence of a partial harmonization and therefore does not conflict with European Law[16].

With regard to recital (5) of the regulation, the European legislator aims to avoid that some "*aircraft operators are able to use favorable aviation fuel prices at their home base as a competitive advantage towards other airlines operating similar routes*". Therefore, the legislator does solely address the case of a market distortion by establishing an advantage within one Member State to favor the own air operators. The avoidance of a reverse discrimination is not expressively covered by this aim.

However, one might argue that solely identical SAF rulings may avoid tankering strategies and therefore, the European legislator intended a full harmonized ruling on SAF shares as recital (5) states: "*Fuel tankering increases aircraft's fuel consumption and results in unnecessary greenhouse gas emissions*." However, as the European legislator ruled solely on minimum shares, it is part of the political decision-making process to consider which measure is sufficient to reach the desired goal. Hence, it can be assumed that the European legislator well considered if minimum shares of SAF are sufficient to avoid tankering strategies, since, ruling on harmonized minimum shares of SAF within the whole European Union might decrease a potential price gap between different Member States to avoid tankering strategies effectively even if the pricing level is not identical in every Member State.

Hence, tankering strategies only arise when a certain price differential is reached, since both a potential detour to a favorable gas station and an additional fuel load due to the higher flight weight itself generate costs. Therefore, minor price

[16] See: *Schröder* in Streinz EUV/AEUV, Art. 114 AEUV, Rn. 49.

differences are not suitable to favor tankering strategies. The European legislator will have considered to set the minimum levels in such a way that a significant price gap is not presumably, as some supporting member states will strive for a little higher level since other member states are bound by the minimum shares. Within this consideration, whether minimum shares and to which extent such shares are sufficient, the legislator has a prerogative of evaluation by designing the legal act.

Since, the SAF shares set out by Art. 4 in conjunction with Annex I ReFuelEU Regulation solely contain a minimum harmonization standard regarding SAF shares, Member States remain free to establish or maintain stricter rules.

D. Member States Competence to deviate from European Law

Even if one might argue – in contrast to the view taken here – that the ReFuelEU Regulation intends a full harmonization and therefore § 37 lit.a (4a) BImSchG is conflicting with the European regulation, Germany has a right to deviate from European Law.

In general, a valid European regulation, Art. 288 (2) TFEU, has primacy of application over national law[17]. Hence, a national rule is no longer applicable, if it contradicts with an EU regulation.[18] Therefore, prima facie, the Refuel-EU Regulation and its SAF-shares seem to supersede the SAF-shares set out by § 37 lit.a (4a) BImSchG (Federal Immission Control Act of Germany). However, the European Treaties state different rights for the Member States to deviate from European Law, especially the general rule in Art. 114 (4 and 5) TFEU and Art. 193 TFEU within the field of environmental protection law. Whether a deviation clause and consequently which deviation clause is applicable depends on the exercised EU competence of the legal act in question.[19] In general deviation clauses allow the Member States to deviate from European Law, even if the

[17]; *Ruffert* in Callies/Ruffert, EUV, AEUV, 2022, Art. 288, Rn. 20; *Schröder* in Streinz, EUV/AEUV, Art. 288, recital 39.

[18] ECJ Decision 15. June 1964, ECLI:EU:C:1964:66 (Costa/E.N.E.L.); *Hwang*, EuR 2016, 355, 355 ff.; *Ruffert* in Callies/Ruffert, EUV/AEUV, 2022, Art. 1 EUV, recital 18.

[19] See *Kahl* in Streinz, EUV/AEUV, 2018, Art. 193 AEUV, Recital 10; *Nettesheim* in Das Recht der EU 2023, Art. 193 AEUV, recital 5.

European act intends a harmonization, hence, such clauses are applicable if the European law itself does not offer a maneuver in implementation.[20]

In the case at hand the European legislator based the ReFuelEu Regulation on Art. 100 (2) TFEU, the European transport policy. Since the concerned regulation establishes SAF shares to decarbonize the air traffic sector, to fulfill unions obligation under the Paris Agreement on climate change and follows the European Green Deal the main aim and subject of the regulation is environmental protection and not, as stated by the European legislator, the transport policy.

Thus, it must be seen that Art. 191 TFEU, the environmental policy, is the correct legal basis for the regulation at hand **(I.)**. Even if one might argue that Art. 191, 192 ff. TFEU are only additionally to Art. 100 TFEU (the transport policy) applicable this does not exclude the applicability of Art. 193 TFEU in the case at hand **(II.)**. Therefore, Member States can without any further requirements maintain or even establish more stringent protective measures as e.g. a higher share of e-kerosene fuel as set out by § 37 lit.a (4a) BImSchG. Furthermore, even if one were to argue, contrary to the view taken here, that Art. 100 TFEU is solely the correct competence norm, a derogation by the Member States would be permissible under the regime of Art. 114 (4) TFEU **(III.)**.

I. RefuelEU – within the Deviation Competence of Art. 193 TFEU

For legal acts based on the competence of environment policy, Art. 191 f. TFEU, the deviation clause of Art. 193 TFEU is applicable which states that "*the protective measures adopted pursuant to Article 192* ***shall not prevent any Member State*** *from* ***maintaining or introducing more stringent protective measures****. Such measures must be compatible with the Treaties. They shall be notified to the Commission*." Hence, within the field of environmental law, Member States have a wide range of action to decide on more stringent protective measures as long as they act in accordance with the European Treaties to effectuate environmental protection law.[21]

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[20] *Callies* in Callies/Ruffert, EUV/AEUV, 2022, Art. 193 AEUV, recital 5; *Heselhaus* in Pechstein/Nowak/Häde, Frankfurter Kommentar EUV/GRC/AEUV, 2017, Art. 194 AEUV, recital 8.

[21] *Ziehm*, ZUR 2018, 399 (433); *Däupner/Lachmann*, EnWZ 2018, 3 (11); differentiating: *Spieth*, NVwZ 2015, 1173 (1176), who states that the deviating measure must follow the same specific protection mechanism.

1. The ReFuelEU Regulation within the Scope of Environmental Policy, Artt. 191, 192 TFEU

Actually, the EU legislator expressis verbis based the regulation on Art. 100 (2) TFEU, the competence for air transport, however, due to the aim of environmental protection Art. 100 TFEU cannot state the competence norm for this regulation.

According to the well-established case law, the relevant competence rule results from the objective focus of the concrete measure.[22] Anyway, if several competence norms come into consideration, it must first be examined whether one objective or component predominates the others.[23] If this is the case, the legal act shall be based on the legal basis of the predominant objective or component. [24] Therefore, it has to be seen that, if the legal act only incidentally, i.e. as an indirect consequence, brings about a harmonization of market conditions within the Union, this is not the subject matter of the legal act.[25] However, only if the objectives or components are of equal importance and inseparable, then the acting body must base the legal act on all relevant competence norms and cite all relevant legal bases.[26]

Art. 191, 192 TFEU is the correct competence norm for the RefuelEU Regulation, as Art 191 (1) TFEU states that the Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

- (…)

- prudent and rational utilisation of natural resources,

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[22] Settled case law, with further references: ECJ, Decision of 6 November 2008, ECLI:EU:C:2008:605, (Parliament/Counsel), recital 34.

[23] Settled case law, with further references: ECJ, Decision of 6 November 2008, ECLI:EU:C:2008:605, (Parliament/Counsel), recital 35.

[24] Settled case law, with further references: ECJ, Decision of 6 November 2008, ECLI:EU:C:2008:605, (Parliament/Counsel), recital 35.

[25] ECJ, Decision of 17 March 1993, ECLI:EU:C:1993:98, (…), recital 7, 19.

[26] ECJ, Decision of 17 March 1993, ECLI:EU:C:1993:98, (…), recital 19.

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

In the case at hand, it is undeniable that the ReFuelEU Regulation aims at climate protection by using sustainable fuels to decarbonize the air transport sector to protect the environment. The ReFuelEU Regulation is a result of the Fit-For-55 package which aims at the reduction of EU emissions by at least 55% by 2030 and a climate-neutral EU by 2050 and refers expressis verbis to the "*European Climate Law*".[27]

Although the ReFuelEU Regulation addresses SAF for the air transport sector, this regulation is not mainly covered by Art. 100 TFEU, as this competence norm covers the entire process of creating transport services as well as the sovereign measures regulating transport,[28] even if it might address components of environmental protection as well.[29] As a consequence of Art. 11 TEU environmental protection requirements must be integrated into the definition and implementation of all Union's policies and activities, in particular with a view to promoting sustainable development.[30] However, the so called "*cross-section clause*" of Art. 11 TFEU does not somehow affect the general balance of competences within the European Treaties.

Therefore, the EJC held in Community policies and activities', such protection must be regarded as an objective which also forms part of the common transport policy. The Community legislature may therefore, on the basis of Article [100 TFEU] and in the exercise of the powers conferred on it by that provision, decide [solely] to promote environmental protection.[31] However, the ECJ hold that this does not lead to any primacy of Art. 100 TFEU, since, "*lastly, it must be borne in mind that, according to the Court's settled case-law, the choice of legal basis for a*

[27] https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/.

[28] *Maxian Rusche/Kotthaus/Kullak/Ruete* in Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 90 AEUV, Rn. 377.

[29] ECJ, Decision of 23 of October 2007, ECLI:EU:C:2007:625, recital 60.

[30] *Leidenmüller*, EUR 2019, 383 (389).

[31] ECJ, Decision of 23 of October 2007, ECLI:EU:C:2007:625, recital 60.

Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure".[32]

Therefore, a regulation which deals mainly with the harmonization of the internal transport sector may be based on Art. 100 TFEU and address some environmental aspects as well, as the European Union must integrate environmental protection requirements by performing its competences. Therefore, Art. 100 TFEU is the correct competence norm if the environmental aim is subordinated.

Furthermore, the ReFuelEU initiative does not intend the harmonization of the internal transport market with regard to economic obstacles, in contrary the regulation deals with the consequences of an environmental measure and intends not to disadvantage any Member State by setting out mandatory environmental standards. If one Member State would be allowed to rule on lower SAF standards tankering strategies would occur and the aim of environmental protection could not be reached. In this context the ECJ decided that "*it appears from the Court's case-law that recourse [to the market competence] […] is not justified where the measure to be adopted has only the incidental effect of harmonizing market conditions within the Community*"[33].Therefore, the harmonization of the transport sector may not serve as the objective focus of the regulation.[34]

Even though the ReFuelEU Regulation has undeniably a certain effect on the internal transport market, the obligation to use SAF within the aviation sector mainly intends climate protection by an effective decarbonization of the air transport sector to achieve the Unions climate goals by a reduction of CO2-Emissions as it is set out in the European Green Deal and under the Paris Agreement. Hence, the main objective of this regulation is climate protection and

[32] ECJ, Decision of 23 of October 2007, ECLI:EU:C:2007:625, recital 61.

[33] ECJ, Decision of 17 March 1993, ECLI:EU:C:1993:98, recital 19.

[34] Without further justification the ECJ hold that directive EU 2003/87/EC Scheme for greenhouse gas emission allowance trading, is based correctly on Art. 191 TFEU, even if it solely addresses the integration of air transport into the EU-ETS, Decision of 21 December 2011, ECLI:EU:C:366/10, recital 128.

therefore the protection of the environment, which is governed by Artt. 191 ff. TFEU.

Hence, Art. 100 (2) TFEU, the transport policy, is not the correct competence norm, as the regulation must be based on Art. 191, 192 TFEU, the environmental competence. Thus, Art. 193 TFEU, a deviation clause for Member States for environmental measures, is applicable and gives Member States the right to deviate from European Law by maintaining or even introducing more stringent protective measures. As the European Law establishes lower shares of SAF and e-fuels than the German legislation under § 37 lit.a (4a) BImSchG, the German Law can remain as it sets out a higher level of environmental protection.

Anyway, it must be seen that the right to deviate is not an automatic legal consequence in the case at hand. If the EU legislator did not base a legal act on the correct competence norm the act is void.[35] Therefore, it must be challenged with the action of annulment, under Art. 263 TFEU.[36] As the unlawfulness of the regulation is only based on the wrong choice of the competence norm, the ECJ can, according to Art. 264 (2) TFEU, uphold the legal act for reasons of the protection of legitimate expectations until a legal act with the same content could be adopted on the basis of the correct competence norm. When the European Legislator finally corrected the regulation all Member States will have the full right to deviate under Art. 193 TFEU. However, the ECJ may decide that the regulation does not have primacy over national law to the extent of e-fuel shares for the Member State which brought the case before the court.

With regard to the Member State which brought the actions regarding a certain measure to the Court, the EJC is able to rule on specific exemptions to the limitation of the temporal effect ordered under Art. 264 (2) TFEU[37]. Mainly the ECJ used this legal method in preliminary ruling procedures under Art. 267 TFEU[38]. However, apparently the ECJ never yet stated such an exemption within an action for nullity

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[35] *Dörr*, Das Recht der EU, 2023, Art. 263 AEUV, Rn. 163; *Pechstein/Görlitz* in Pechstein/Häde/Nowak, FK EUV/GRC/AEUV, Art. 263 Rn. 176 ff.

[36] See for further references: *Dörr* in Das Recht der EU, 2023, Art. 263 AEUV, Rn. 1 ff, 27 ff.

[37] *Cremer* in Callies/Ruffert, EUV/AEUV, 2022, Art. 264 AEUV, Rn. 5; *Ehricke* in Streinz, EUV/AEUV, 2018, Rn. 6; *Dörr* in Das Recht der EU, 2023, Art. 264, Rn. 13.

[38] *Cremer* in Callies/Ruffert, EUV/AEUV, 2022, Art. 264 AEUV, Rn. 5, 6; see also: *Dörr* in Das Recht der EU, 2023, Art. 264, Rn. 14, 15.

under Art. 263 TFEU, even if this would be legally possible and desirable as this would support the effectiveness of European Law and Member States competence given by Art. 193 TFEU to deviate from European Law.

2. The ReFuelEU Regulation within the Scope of Environmental Policy, Artt. 191, 192 TFEU and the Transport Policy, Art. 100 TFEU

Even if one might argue, in contrast to the view taken here, that the objectives of transport and environmental protection are of equal importance and inseparable, and therefore both competence norms of Art. 100 TFEU (transport policy) and Artt. 191, 192 TFEU (environmental policy) are applicable, Art. 193 TFEU, the deviation clause for environmental measures still gives Member States the right do deviate from the SAF shares set out by the regulation to establish more stringent measures for environmental protection within national law.

It is disputed in which range Art. 193 TFEU is applicable if the legal act is based on more than one competence norm.[39] Some scholars argue that Art. 193 TFEU is applicable to the whole legal act, so Member States are always free to deviate from all aspects of the regulation if they intend more stringent measures.[40] Others state that Art. 193 TFEU is only applicable for the certain legal aspects or certain clauses of a legal act which are based on Art. 191, 192 ff. TFEU and address environmental protection.[41]

Since, the laid down clause establishing the SAF shares in Annex I intends to protect the environment by establishing a minimum share of SAF within the aviation sector, this clause must be regarded as an environmental measure. Hence, Art. 193 TFEU is applicable in any case since both interpretations lead to the same result.

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[39] *Heselhaus* in Pechstein/Nowak/Häde, FK Kommentar EUV/GRC/AEUV, 2017, Art. 193 AEUV, Rn. 25.

[40] Not differentiating within the scope of Art. 193 TFEU for example: *Callies* in Callies/Ruffert, EUV/AEUV, 2022, Art. 193 AEUV, Footnote 22; with further references: *Kahl* in Streinz, EUV/AEUV; 2018, Art. 193 AEUV, Rn. 12 ff.

[41] *Nettesheim* in Grabitz/Hilf/Nettesheim, Das Recht der EU, 2023, Art. 193 AEUV, Rn. 9.

As regards the completeness, a legal act which is not based on all concerned competence norms is not lawful. Hence, it can be referred to the recitals above: The legal act can be challenged with the action of annulment, Art. 263 TFEU.

II. ReFuelEU within the Deviation Clause of Art. 114 (4 and 5) TFEU

Even if one does not agree to the here stated opinion, and therefore argues that exclusively Art. 100 TFEU is the correct competence norm for the regulation, the German law rule of § 37 lit.a (4a) BImSchG is still in accordance with European Law and therefore can maintain applicable.

If the legal act is not based on the competence for environmental policies of Art. 191 TFEU but on a rule harmonizing the internal market, the European Treaties offer rights for deviation measures under Art. 114 (4 and 5) TFEU.

1. Applicability of Art. 114 (4 and 5 TFEU)

Even if the legal act is based on Art. 100 TFEU, Art. 114 (4 and 5) TFEU are still to be considered applicable.

Actually, it is disputed if Art. 114 (4 and 5) TFEU are applicable by an analogue application for all areas of European legislation.[42] An analog application of a legal act requires a regulatory loophole within the regulatory system.[43] Therefore, with regard to Art. 114 (4 and 5) TFEU it is disputed whether the Member States as the Masters of the Treaties did intentionally not include deviation clauses for all areas of European legislation or if this circumstance must be regarded as an error in drafting.

However, this dispute is not relevant to the case at hand, as the transport policy is an element of the internal market and Art. 114 (4 and 5) TFEU remain applicable[44] even without the legal construction of an analogue application.

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[42] Persuring the investigation, with further references: *Heselhaus* in Pechstein/Nowak/Häde, FK Kommentar EUV/GRC/AEUV, 2017, Art. 193 AEUV, Rn. 23.; *Kahl* in Callies/Ruffert, Verfassungsrecht der Europäischen Union, 2007, Art. 95 EGV, Rn. 40.

[43] See with further references: *Maus*, ZfPW 2023, 25 (25 ff.).

[44] Implicit *Leidenmühler*, EuR 2019, 383 (397) who states that Art. 114 TFFEU is applicable to all measures regarding the internal market of Art. 26 TEU.

Systematically, Art. 114 (4 and 5) TFEU refer to Art. 26 TFEU establishing the internal market, which includes the internal transport policy of Art. 91 TFEU. However, some scholars argue, that Art. 114 (4 and 5) TFEU are solely applicable if the conflicting European legal act is based on Art. 114 (1) TFEU,[45] as deviation clauses have an exceptional character.

By the view taken here, the Artt. 114 (4 and 5) TFEU must be applicable for all European legal acts based on different internal market policies and their specific competence norms, as long as the treaties do not rule explicitly different on this question, since the wording of Art. 114 TFEU shows that the deviation clauses remain applicable, the systematic of the treaties support this interpretation and the evolution of the internal transport market policy pleads for this interpretation as well.

The wording of Art. 114 (1) TFEU states that "*[s]ave where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26*." Whereas Art. 26 TFEU states that: Firstly, "the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties." And secondly, *"the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*."

Art. 90 ff. TFEU are not a final and a conclusive regulatory complex. This policy solely rules on a specific framework for the internal transport market and all general rules regarding the internal market remain applicable, as long as this is not explicitly addressed differently within the Artt. 90 ff. TFEU.[46] Hence, the Artt. 90 ff. TFEU state a partially more specific regulation for a sub-category of the internal market policy of Art. 26 TFEU.[47]

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[45] *Schröder*, in Streinz EUV/AEUV, 2018, Art. 114 AEUV, Rn. 85;

[46] *Martinez* Callies/Ruffert, EUV/AEUV, 2022, Art. 90, recital 13, 14; persuring the investigation of the relation between Artt. 90 ff TFEU and Art. 26 TFEU: *Kainer/Persch* in EuR 2018, 33 (33 ff.); *Epiney* in Dauses/Ludwigs, Hdb. Des EU-Wirtschaftsrechts, 2023, L. Verkehrsrecht, recital 6; *Khan* in Geiger/Kotzur/Kirchmair, EUV/AEUV, 2023, Art. 90 AEUV, recital 1.

[47] *Martinez* in Callies/Ruffert EUV/AEUV, 2022, Art. 90, Rn. 12; *Schäfer* in Streinz EUV/AEUV Art. 90 AEUV, Rn. 8.

Therefore, it must be noted that only the Art. 100 TFEU is a more specific competence norm than Art. 114 (1) TFEU and therefore takes primacy over the competence laid down in Art. 114 (1) TFEU.[48] However, Art. 114 (1) TFEU explicitly states that Art. 114 TFEU remains applicable within the aims of Art. 26 TFEU, as long as specific rulings within the European Treaties do not take primacy. Since, the Artt. 90 ff. TFEU remain completely silent on deviation clauses, Art. 114 TFEU is applicable within the transport policy as well, except the competence clause of Art. 114 (1) TFEU.

Systematically, it must be seen that specific clauses of the European Treaties ruling on the internal market address explicitly the relation between European and national Law in the case of conflicting interests and therefore systematically exclude the general rule of Art. 114 (4 and 5) TFEU. For example, Art. 43 (4) TFEU (agriculture and rural development) states an independent rule for this regulatory complex which is stricter than the general rule in Art. 114 (4 and 5) TFEU and therefore implicitly excludes the applicability of the general rule. As well as Art. 51 TFEU which excludes the applicability of the whole chapter of the Freedom of establishment, "*so far as any Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority*". Therefore, it is obvious that Art. 114 (4 and 5) TFEU are not applicable in any measure ruling on the internal market if there are more specific rulings. However, the European Legislator saw this conflict and therefore, even implicitly, excluded the general rule for those provisions. Within the transport sector the treaties remain silent on this issue, therefore, the general rule remains applicable.

Furthermore, Art. 114 (2) TFEU shows that Art. 114 (4 and 5) TFEU are independent to the competence clause of Art. 114 (1) TFEU, since the Masters of the Treaties stated that solely "*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*." Hence, the rest of Art. 114 TFEU, which does not expressis verbis refer to sub. (1) must remain applicable. This shows that the Masters of the Treaties intended an independent applicability of the different sections of the general clause of Art. 114 TFEU. Otherwise, they would have excluded not only Art. 114 (1) TFEU, but the whole regulatory system of Art. 114 TFEU.

[48] *Khan* in Geiger/Kotzur/Kirchmair, EUV/AEUV, 2023, Art. 90 AEUV, recital 2.

Historically, the transport policy under Artt. 90 ff. TFEU and previous provisions aim to overcome national exercised restraint to a liberalized transport policy.[49] Member States were not very willing to overhand sovereign power to the European Union within the transport sector.[50] Therefore, the European Treaties rule on a special regime for state aids within the transport sector under Art. 93 TFEU, or the "stand-still" clause of Art 92 TFEU, to give Member States more maneuver within the integration process. Under this presumption from a historical interpretation of Art. 90 ff. TFEU, it must be seen that, a restrictive application of Art. 114 (4 and 5) TFEU, would countermine this aim, as Art. 114 (4 and 5) TFEU give Member States a right to deviation in case of a harmonization measure. Therefore, a restrictive interpretation of Art. 114 (4 and 5) TFEU is not appropriate since the Masters of the Treaties would have explicitly addressed that in contrary to the aim of giving Member States more rights within the transport sector.

Therefore, by the view taken here, the deviation clauses of Art. 114 (4 and 5) TFEU are applicable, even if one found that Art. 100 TFEU states, contrary to the opinion stated above, the correct competence norm for the ReFuelEU Regulation.

2. The Deviation Clauses of Art. 114 (4 and 5) TFEU

As shown above, Art. 114 (4 and 5) TFEU are applicable in the case at hand, therefore the scope of this deviation clauses must be examined further.

Compared to the deviation clause of Art. 193 TFEU Member States are not that free to decide on deviating measures under the general rule of Art. 114 (4 und 5) TFEU, since any deviation national measure may contradict the harmonization which is the main concern of the internal market policies.[51] However, since the European Union is bound by Art. 11 TFEU, the "*cross-section clause"*, Art. 114 (4 and 5) TFEU offer Member States under certain requirements the right to deviate from a European harmonization measure, if this leads to a higher standard of environmental protection. As in the case at hand, the set out SAF shares state

[49] *Kainer/Persch* in EuR 2018, 33 (35 ff.); *Harter* in Verkehrspolitik für Europa (Footnote 11), p. 119 ff.

[50] *Kainer/Persch* in EuR 2018, 33 (35 ff.); *Harter* in Verkehrspolitik für Europa (Foodnote 11), p. 119 ff.

[51] See *Korte* in Callies/Ruffert EUV/AEUV, Art. 114 AEUV, Rn. 78 ff.; *Schröder* in Streinz, EUV/AEUV, Art. 114 AEUV, Rn. 82 ff.

such an environmental measure, Member States have the right to maintain more stringent national rulings on SAF within the aviation sector.

However, the European law distinguishes between pre-existing national law (Art. 114 (4) TFEU and such national legal acts introduced after the introduction of the conflicting European legal act (Art. 115 (5) TFEU).

Art. 114 (4) TFEU sets out: "*If, after the adoption of a harmonization 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*."

Additionally, Art. 114 (5) TFEU states: "*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.*"

Therefore, already existing national law remains applicable, even if the European legislator decides on a lower harmonization standard and the already existing national law ensures a higher level of environmental protection. Thus, a Member State is in any case not allowed to fall below the standards set out in a regulation, however, with regard to an effective environmental protection the Member State can maintain national provisions to take further steps.

Therefore, it is paramount to notice, that the additional requirements set out in Art. 114 (5) TFEU do not affect the deviation under Art. 114 (4) TFEU.[52] Hence, in the case at hand Germany does not have the burden of prove that there is new scientific evidence nor a specific or individual problem to the Federal Republic of Germany by following the European legislation.

[52] *Schröder* in Streinz, EUV/AEUV, 2018, Art. 114 AEUV, Rn. 93; *Korte* in Callies/Ruffert, EUV/AEUV, 2022, Art. 114 AEUV, Rn. 92.

In conclusion national SAF shares for aviation kerosene set out by §37 BImSchG can remain applicable with regard to the Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport (ReFuelEU).