

EU Fleet Regulation Contrary to EU Law

Legal expert opinion

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Introduction*

By way of the fleet regulations, European legislators are attempting to set the automotive industry on a sustainable course. However, they themselves are unwilling to introduce modern emission methods that facilitate the life cycle of a vehicle being taken into consideration and would deserve a “sustainable” rating. The outdated measuring method contradicts European primary law and damages the environment and economy alike. It should be withdrawn without delay.

I. Road transport as an environmental headache

1. German deficits

Germany has had varying degrees of success in combating climate change. In some sectors, such as industry,¹ efforts to reduce CO₂ emissions have been making notable progress while other sectors are seeing stubbornly high emission levels. The latter also includes transport rolling along German roads in the form of motorised passenger or freight transport. Although passenger cars and lorries have become more energy-efficient overall, increasing vehicle registrations and growing road freight transport are putting the efficiency gains into reverse:² Traffic-related CO₂ emissions are consequently 23% above 1995 levels. The share of transport in German emissions overall has been increasing since 1990, namely from 13 % to 19.4 % in 2021.³ In brief, the transport headache calls for urgent action if the German federal government

* All internet sources were available on 25.01.2023.

¹ UBA (German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection), Calculating the greenhouse gas emission data for 2022 according to KSG (German Federal Climate Protection Act), 2023, p. 8.

² UBA, Traffic emissions, <https://www.umweltbundesamt.de/daten/verkehr/emissionen-des-verkehrs#verkehr-belastet-luft-und-klima-minderungsziele-der-bundesregierung>.

³ UBA, footnote 2.

is to avoid a repeat of the imposition of immediate measures by the courts on 30.11.2023.⁴

2. European parallels

The trend in emissions is not specifically a German phenomenon, but rather a Europe-wide one: At Union level, road transport-related emissions also increased between 1990 and 2021 by 21 %.⁵ National and European strategies aimed at reversing this trend have not been effective to date even though the EU set itself the goal of an energy-efficient transport sector with lower CO₂ emissions in a framework strategy as early as 2015.⁶ This was followed up just three years later with Regulation (EU) 2018/842 to replace the existing dependencies on fossil fuels in the transport sector and in other areas with a “Comprehensive Concept” to reduce greenhouse gas emissions.⁷ In the strategy for sustainable and smart mobility dated 09.12.2020, the European Commission reaffirmed this path to low-emission driving, and holds out the prospect of “The fuels used in transport becoming CO₂-neutral and the necessity of introducing large-scale sustainable, renewable and CO₂-low fuels.”⁸

In light of the fact that the weak emissions in past years increased pressure for action in the EU, the European Commission decided to change the strategy

⁴ *Higher Administrative Court Berlin-Brandenburg*, judgement dated 30.11.2023 -11 A 11.22, 11 A 27.22, 11 A 1.23.

⁵ *StBA (Federal Statistical Office of Germany)*, https://www.destatis.de/Europa/DE/Thema/Umwelt-Energie/CO2_Strassenverkehr.html.

⁶ COM(2015) 80 final, p. 15 et seq.

⁷ Regulation (EU) No. 2018/842 of the European Parliament and of the Council, dated 30.5.2018, on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, Official Journal 2018 L 156, 26, consideration 12.

⁸ COM(2020) 789 final, marginal note 18.

to boost the sluggish transition process. By way of the “EU Climate Act”⁹, it has, therefore, set ambitious reduction targets that were last taken up in Regulation (EU) 2023/851. By 2050, Europe aims to reduce transport sector emissions by 90 %.¹⁰

II. Emission reduction via the EU fleet regulation

The European legislator has issued various regulations to reduce transport sector emissions. In that respect, it works with a combination of limiting values for new vehicles and an obligation to pay in the case of exceeding emissions. This is to be set out using the regulations for passenger cars and light commercial vehicles.

1. Limiting values for passenger cars and light commercial vehicles

a) Normative origins

The European legislator’s regulatory approach since 2009 has focussed on setting emission standards for new vehicles and has initially left existing vehicles out of the equation. The share of emission-intensive old vehicles is to be phased out over time.

To regulate the new registrations, since Regulation (EC) 443/2009, the EU has been pinning its hopes on a so-called fleet value specified for each passenger car and lorry. This is a limiting values that is determined in grams (g) of CO₂ for each kilometre (km), and may not be exceeded by a certain

⁹ Regulation (EU) No. 2021/1119 of the European Parliament and of the Council, dated 30.06.2021, establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 Official Journal, 2021 L 243, 1.

¹⁰ Regulation (EU) No. 2023/851 of the European Parliament and of the Council, dated 19.04.2023, amending Regulation (EU) 2019/631 as regards strengthening the CO₂ emission performance standards for new passenger cars and new light commercial vehicles in line with the Union’s increased climate ambition Official Journal, 2023 L 110, 5, consideration 6.

percentage of the manufactured vehicles on average.¹¹ The limiting value of 120 g CO₂/km¹² from 2012, therefore, did not apply to each individually manufactured vehicle. Moreover, models with particularly high emissions could be produced insofar as the CO₂ emissions that were exceeded were absorbed by other models.¹³ In addition, the EU legislator also specified emission bonuses. In accordance with Article 6 Regulation (EC) 443/2009, emission limits for individual vehicles could be reduced by 5 % up until 31.12.2015 insofar as such vehicles were built so that they could be operated using a mixture of petrol and bioethanol with a bioethanol content of 85 % ("E 85"). Furthermore, at least 30% of the petrol stations in the Member State in which the vehicle was registered was required to offer this type of alternative fuel that met the sustainability criteria for biofuels according to the relevant Community legal requirements.

A comparable regulatory structure was put in place in Regulation (EC) 510/2011. However, a limiting value of 147 g CO₂/km applied here.

b) Initial tightening via Regulation (EU) 2019/631

From 2020, the fleet regulations provided for in the stated regulations for passenger cars and light commercial vehicles were merged to form a single regulation (Regulation (EU) 2019/631¹⁴) and combined with more stringent emission limiting values. The existing limiting value level was retained up

¹¹ The percentage staggering still provided for in Article 4 Regulation (EC) 443/2009 is no longer relevant today. The fleet refers regulation now refers to the entire production line (100%).

¹² See Article 1 Regulation (EC) 443/2009. A limiting value of 95 g CO₂/km was provided for from 2020.

¹³ Special regulations also apply to small manufacturers (de minimus requirement) and emission pools (Pooling). In this respect see *Schmidt-Kötters/Held*, NVwZ (New Journal for Administrative Law) 2009, 1390 (1391).

¹⁴ Regulation (EU) 2019/631 of the European Union and of the Council dated 17.4.2019 setting CO₂ emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011, Official Journal, No. L 111, 13.

until 2024 to avoid disruptions.¹⁵ Only then will two additional tightening steps apply that are not to be expressed in absolute figures, although it would have been simpler, but rather in percentage reductions in relation to a specific reference date. Accordingly, Article 1(4), Regulation (EU) 2019/631 provides for a limiting value from 01.01.2025 that arises from a 15% reduction in the 2021 limiting value. Article 1(5), Regulation (EU) 2019/631, which has a similar structure, then specifies that from 01.01.2030 a further tightened limiting value is to apply, which corresponds with 37.5 % of the 2021 limiting value for passenger cars and 31% for light commercial vehicles. Specifically, from 01.01.2025 these are 80.75 g CO₂/km for passenger vehicles and 124.95 g CO₂/km. for light commercial vehicles. From 01.01.2030, only 59.375 g CO₂/km may be emitted by passenger cars in average fleet consumption, while a target figure of 101,43 g CO₂/km applies to light commercial vehicles.

As in the previous regulations, Regulation (EU) 2019/631 also provides a bonus, which can increase the limiting value by up to 5%, for manufacturers particularly committed to environmental protection. However, placing manufacturers in a better position in this way is now geared towards certain percentages of zero-emission or low-emission¹⁶ new vehicles. The granting of privileges in accordance with Article 1(6), Regulation (EU) 2019/631, in conjunction with Annex I, Part A, No. 6.3. of the Regulation takes for granted that from 01.01.2025, 15 % of the vehicles will be worthy of the distinction zero-emission or low-emission. From 01.01.2030, in accordance with Article 1(7), Regulation (EU) 2019/631, in conjunction with Annex I, Part A, No. 6.3., of the Regulation, these are an ambitious 35 % of passenger cars and 30 % of light commercial vehicles.

Surprisingly, vehicle manufacturers are no longer granted credits for their quotas when using fuels produced via renewable energy. The potential

¹⁵ Regulation (EU) 2019/631, consideration 2.

¹⁶ In accordance with Article 3(1), Point m), Regulation (EU) 2019/631, a low-emission vehicle may at emit 50 g CO₂/km at most.

contribution of using synthetic and advanced alternative fuels from renewable energy sources towards reducing CO₂ emissions is merely the subject matter of an obligation to review and report in accordance with Article 15(2), Regulation (EU) 2019/631. However, the European Commission has not honoured this obligation.

c) Significant further tightening via Regulation (EU) 2023/851

As set out above,¹⁷ it is clear that transport sector's ailing condition had continued into 2023 in respect of reducing emissions. The European legislator, therefore, continues to prescribe the same medicine for the patient, albeit in a higher dose. In accordance with Article 1(5), Regulation (EU) 2023/851, from 01.01.2030 passenger car manufacturers shall be required to reduce emissions by 55 % (instead of 37.5 % previously) and light commercial vehicle manufacturers by 50 % (instead of 31 % previously). In addition, in accordance with Article 1(5a), Regulation (EU) 2023/851, vehicles in both classes may no longer emit any CO₂ emissions from the start of 2035. Production must then have switched completely to all-electric vehicles or vehicles using hydrogen as fuel. However, the latter version will probably not play a role in the foreseeable future for passenger cars or light commercial vehicles.¹⁸

Options in respect of respect of increasing limiting values are also being scaled back. Relief of up to 5% can only be cited by those who from 01.01.2025 have at least 25 % of their passenger cars or 17 % of their light commercial vehicles on the market as zero-emission or low-emission models within the meaning of Article 3(1), Point m), Regulation (EU) 2019/631. From 01.01.2030, such a shift in limiting values will be superfluous because only zero-emission vehicles will be able to meet the European limiting values anyway.

¹⁷ See the above comments in I, 2.

¹⁸ *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 8 (footnote. 7).

The consequences of the new regulations are brought into focus when the emission limiting values are translated into fuel consumption.¹⁹ The average consumption of passenger cars running on petrol will only meet the 2020 limiting value in the case of 3.97 l/100 km, and the limiting value from 2025 only in the case of 3.37 l/100 km while the limiting value from 2030 will merely be met in the case of 1.79 l/100 km.²⁰ Putting passenger cars on the market that require petrol will no longer be possible from 2035 at the latest. Similar figures apply to diesel vehicles. From 2020, the limiting value is 3.55 l/100 km, from 2025 it will be 3.02 l/100 km while from 2030 it will be 1.60 l/100 km. Use of such fuel sources will ultimately end from 2034.²¹

2. Levies in the case of emissions that are exceeded

The emission limiting values defined in accordance with Union law do not trigger any regulatory requirements or bans that are to be met or honoured per se.²² Moreover, the European legislator links the emission requirements to economic incentives aimed at rendering environmentally harmful conduct more expensive.²³

a) Regulatory mechanism

Even following adoption of Regulation (EU) 2023/815, the Union law incentive levy continues to be provided for in Article 8, Regulation (EU)2019/631. The 2019 Regulation had displaced the previous requirement resulting from Regulation (EC) 443/2009. The current legal situation specifies that the Commission may impose a levy on a manufacturer for exceeding

¹⁹ This can be set out using passenger cars as an example.

²⁰ *UNITI*, Effects of the EU CO₂ fleet limiting values on fuel quantities that can be used in the future in relation to diesel and petrol, 18.07.2023, . 5 et seq.

²¹ *UNITI*, Effects of the EU CO₂ fleet limiting values on fuel quantities that can be used in the future in relation to diesel and petrol, 18.07.2023, . 3 et seq.

²² *Seiler*, EuR 2010, 67 (80).

²³ *Schmidt-Kötters/Held*, NVwZ (New Journal for Administrative Law), 2009, 1390 (1392).

emissions if the average specific CO₂ emissions exceed its target. According to Article 8(2), Regulation (EU) 2019/631, the amount of the levy is € 95 for each gram of CO₂/km. This figure is then multiplied by the number of newly registered vehicles.

If one applies this formula to the registration and emission data of the German Federal Motor Transport Authority from 2022,²⁴ it produces the following levy amount for vehicle manufacturers in the passenger car segment alone: Actual CO₂ emission of 109.6 g CO₂/km less the EU limiting value of 95 g CO₂/km = 14.60. The factor 14.6 x €95 x 2.65 million passenger cars = € 3.68 billion! The billion-euro payment to Brussels could quickly double were the 2023 trend of 121.0 g CO₂/km to continue and the number of new passenger car registrations to increase, as the German Federal Motor Transport Authority's interim survey suggests²⁵.

However, this considerable amount payable by German vehicle manufacturers does not flow into the federal or state budgets, but rather in accordance with Article 8(4), Regulation (EU)2019/631, is deemed revenue for the Union's general budget. The Commission specifies the greater levying terms and conditions in accordance with Article 8(3), Regulation (EU)2019/631, by way of the Implementing Act.

b) Deficits in relation to legal competence

The European Parliament and the Council continue to base the environmental law incentive levy on the Union law competence of

²⁴ German Federal Motor Vehicle Authority, Vehicle registrations in December 2022 – annual survey, press release No. 1/2023 dated 04.01.2023; https://www.kba.de/DE/Presse/Pressemitteilungen/Fahrzeugzulassungen/2023/pm01_2023_n_12_22_pm_komplett.html?snn=3662144&fromStatistic=3889316&yearFilter=2022&monthFilter=12_Dezember.

²⁵ German Federal Motor Vehicle Authority, Vehicle registrations in June 2023 – six-monthly survey, press release No. 27/2023 dated 5.7.2023; https://www.kba.de/DE/Presse/Pressemitteilungen/Fahrzeugzulassungen/2023/pm27_2023_n_06_23_pm_komplett.html?snn=3662144&fromStatistic=4241250&yearFilter=2023&monthFilter=06_Juni.

environmental law in accordance with Article 192, TFEU (ex Article 175 Treaty on Establishing the European Union). They draw attention to the fact that Regulation (EU) 2019/631 – including the levy regulation– would define and implement environmental objectives.²⁶ Given the fact that Article 8 Regulation (EU) 2019/631, is an incentive levy and not a tax, one will probably be able to base the introduction of the levy on Article 192(1), TFEU, but not, however, on Article 192(2), p .1, Point a), TFEU, which is specified solely for tax regulations and for which the tax is not intended as a supplementary instrument, but rather takes centre stage.²⁷

A distinction is to be made between the introduction of the incentive levy and the question of *revenue sovereignty* or revenue entitlement (see Article 8(4), Regulation (EU) 2019/631), and the right to determine levying terms and conditions (see Article 8(3), Regulation (EU) 2019/631).²⁸ However, there are no indications of this. The transfer of the revenues to the EU's general budget is similarly not covered by competences. Article 175, TFEU, and no other regulation of primary law is in a position to support this order.²⁹ Article 8(4), Regulation (EU), is, therefore, in addition to Article 8(3) Regulation (EU), similarly contrary to the treaty.³⁰

3. Outmoded limiting value determination in the EU

Not only the determination of the emission limiting values have a controlling effect. The measurement methods can have a similarly

²⁶ In this respect, see *Schulte-Braucks*, EuZW 2009, 393.

²⁷ See also *Calliess*, in: *Calliess/Ruffert*, TEU/TFEU, 6th Ed. 2022, Article 192, marginal note 29; *Kahl*, in: *Streinz*, TEU/TFEU, 3rd Ed. 2018, Article 192, marginal note 21.

²⁸ *Schmidt-Kötters/Held*, NVwZ (New Journal for Administrative Law), 2009, 1390 (1393).

²⁹ *Seiler*, EuR 2010, 67 (87); *Schmidt-Kötters/Held*, NVwZ (New Journal for Administrative Law), 1390 (1393 et seq.).

³⁰ See also *Nettesheim*, in: *Grabitz/Hilf/Nettesheim*, The Law of the European Union, 80th Ed., Aug. 2023, Article 192, marginal note 38.

considerable effect, the basis of which determines whether or not the emission values are complied with or exceeded. Depending on the chosen method, even certain drive systems or special fuels (in an economic sense) can be displaced from the market by way of a levy on excessive emissions.

a) Measuring exhaust emissions

Although in the past 15 years the European regulations aimed to adapt at all times in line with current developments in respect of combating road transport CO₂ emissions, in measuring emission pollution they still are still adopting the tailpipe approach, which was already applicable in Regulation (EC) 443/2009, but is now outmoded: Namely, in conjunction with Regulation (EU) 2017/1151³¹, they use the term emissions, which accordance with Annex IIIA No 1.2.10, in conjunction with No. 1.2.12, means “Gaseous exhaust elements from the exhaust pipe of a vehicle.”

Narrowing the field of vision to solely include emissions that can be measured at the exhaust pipe of a passenger car or light commercial vehicle corresponds to a so-called tank-to-wheel approach, which masks the additional CO₂ pollution of a vehicle and, therefore, its genuine detrimental effects on the environment and in doing so distorts the evaluation basis according to modern standards. Emissions as well as CO₂ savings, which arise during vehicle production (cradle-to-gate phase), during fuel production (well-to-tank phase) as a consequence of decommissioning a vehicle (end-of-life phase), therefore, are not picked up on the testing grid and are then lacking

³¹ Commission Regulation (EU) No. 2017/1151 dated 01.06.2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Commission Regulation (EC), No 692/2008, Official Journal, 2017, Nl. L 175, p. 1.

in respect of facilitating a timely and complete so-called life-cycle analysis (LCA).

b) Delayed life-cycle approach

The European legislator has known for some time that a better method of levying CO₂ vehicle emissions is possible. In Regulation (EC) 443/2009, for example, it draws attention itself to certain alternative fuels “In the [future] well-to-wheels perspective offering significant CO₂ reductions.”³² This is probably one of the reasons why a special reason to promote alternative fuels was introduced in Article 6, Regulation (EC) 443/2009.³³

In the subsequent Regulation (EU) 2019/631, the European legislator also is very insistent about the significance of the life cycle analysis and in consideration reason 50 determined: “The emissions from passenger cars and light commercial vehicles **must** be assessed at Union level during their entire life cycle.”³⁴ However, the clear words are then followed by a very soft work order directed to the Commission, which, in accordance with Article 7(10) Regulation (EU) 2019/631, would be required to review the “Possibility” during a window in excess of 3.5 years of whether or not a common Union method could be developed, “In accordance with which the CO₂ emissions during the entire life cycle of passenger cars and light commercial vehicles put on the market in the Union could be assessed and reported in a uniform manner.”

In response to a parliamentary question, the then Vice-President of the European Commission, *Franciscus Timmermans*, replied that the Commission would comply in good time with this order resulting from Regulation (EU) 2019/631.³⁵ However, the European Commission has not really lived up to its

³² Regulation (EC) 443/2009, consideration 15.

³³ See also the above comments in II, 1, a.

³⁴ Highlighting not in the original text.

³⁵ See the EU documentation E-002631/2020(ASW (Working Group for Safety in the Economy)) dated 07.07.2020.

own claim: Its life cycle analysis (LCA) investigations were broken off early on. In a Commission working paper from 2021, the Commission determines the following after considering different testing methods: “However, the methodology developed is not immediately suited for calculating the individual life cycle emissions of individual vehicles, which would require an even more detailed and disaggregated approach.”³⁶ In other words, a life cycle analysis takes for granted comprehensive testing methods (and, therefore, we are no longer pursuing this).

The premature capitulation in light of the challenges of a more complex testing method has not, however, been able to conclusively calm down the European daily operations. The need for a life cycle analysis was emphasised in the consultations on Regulation (EU) 2023/851. For example, the Committee on Industry, Research and Energy determined: “To counter this risk of regulatory fragmentation, your rapporteur would prefer a broader carbon accounting system considering the life cycle of vehicles and fuel/energy, which would better reflect the true environmental impact of the various technologies involved.”³⁷

Irrespective of all the advice provided by the committees, specific proposals for the legal implementation of the life cycle analysis were put on the back burner and a rather innocuous provision was incorporated in Article 7a, Regulation (EU) 2023/851. Accordingly, the Commission undertakes by 31.12.2025 to publish a report describing methods on the basis of which the die CO₂ emissions can be assessed and reported during the entire life cycle of passenger cars and light commercial vehicles (sub-section 1), and in addition is urged to define a common Union method, by way of a delegated act, in

³⁶ Commission Staff Working Document, Impact Assessment – Part 2 dated 14.7.2021, SWD (2021) 631 final, p. 100.

³⁷ Comments of the Committee on Industry, Research and Energy dated 29.04.2022 in the legislative procedure to amend Regulation (EU) 2019/631, COM(2021)0556 – C9-0322/2021 – 2021/0197(COD).

accordance with which the CO₂ emissions can be assessed and reported during the entire life cycle of passenger cars and light commercial vehicles. However, it is important to note that in accordance with Article 7a(3) Regulation (EU) 2023/851, from 01.06.2026 the manufacturers shall forward the data about CO₂ emissions to the Commission solely *on a voluntary basis*. In other words, the LCA shall remain a subject matter of reporting obligations and theoretical considerations, may (!) be used as a testing method from the middle of 2026 and the resulting knowledge may be reported to the Commission. However, there are *no* legal consequences linked to the collected data: There is no crediting, in particular, of positive knowledge from an LCA to the outmoded and shortened measurement alone of the exhaust pipe emissions (tailpipe approach).

c) Contradiction of the EU's own approach to technological openness, in particular to the detriment of e-fuels and other alternative approaches

Continually dragging out the life cycle analysis from Regulation to Regulation has serious practical consequences: The combination of very strict CO₂ limiting values, placing limiting values at the exhaust pipe of a vehicle and levying a charge in the event that emissions are exceeded result in the discontinuation of production of internal combustion engine vehicles (ICEV) at the latest in 2035, if not a lot sooner, and will need to be noticeably restricted if manufacturers want to avoid becoming uneconomical and, therefore, irrational.³⁸ The technically demanding combustion engine is, therefore, about to reach the end of the road, even if it is not powered by fossil fuels but rather with renewable fuels, so-called e-fuels.

The production of e-fuels is characterised by the withdrawal of CO₂ from the atmosphere. This means that they can be used in conventional vehicles with combustion engines such as petrol or diesel.³⁹ In the combustion process,

³⁸ In this respect see the maximum fuel consumption figures, which are hardly achievable well before 2035, in detail see above II, 1, c.

³⁹ See ADAC, Testing the fuel of the future: Are e-fuels really environmentally-

they release the *previously* stored CO₂ back into the atmosphere, which can be measured at the vehicle's exhaust pipe. In the overall consideration of fuel production (well-to-tank) and fuel use (tank-to-wheel), these fuels are nevertheless CO₂-neutral.⁴⁰

It is obvious that the ecologically interesting, technical features of e-fuels, in particular if they are produced using green electricity, will not come into play if they are assessed exclusively on the basis of their exhaust pipe emissions. The outmoded measurement of CO₂ emissions, which is solely based on the vehicle exhaust pipe, therefore hinders the economic development opportunities of these fuels on route to modern, environmentally-friendly and sustainable mobility of the future. After all, it only sheds light on a single segment of the CO₂ assessment of different mobility forms and, therefore, distorts the overall picture. Therefore, the fate of e-fuels is representative of all alternative technical procedures, which, in the case of a forward-looking life cycle analysis, could potentially open up new viable prospects for climate protection but are, however, at a disadvantage because of the distorted measurement approach. In this formation, Regulation (EU) 2023/851 in conjunction with Regulation (EU) 2019/631, is, therefore, regressive and limited to certain drive systems in the transport sector that have no CO₂ emissions at the exhaust pipe (so-called Battery Electric Vehicles, BEV).

This finding is surprising.⁴¹ It not only contradicts earlier European Commission strategy papers, which emphasised the opportunities of different technical concepts for vehicle types and used fuels.⁴² It does not do justice, in

friendly?, dated 06.12.2022, <https://www.adac.de/verkehr/tanken-kraftstoff-antrieb/alternative-antriebe/e-fuels-test/>.

⁴⁰ ADAC, Testing the fuel of the future: Are e-fuels really environmentally-friendly?, dated 06.12.2022, <https://www.adac.de/verkehr/tanken-kraftstoff-antrieb/alternative-antriebe/e-fuels-test/>.

⁴¹ Critically also *Schwintowski*, EWeRK 2019, 182 (187).

⁴² See for example the "Strategy for sustainable and smart mobility: putting European transport on track for the future" dated 09.12.2020, COM(2020) 789 final, marginal note 18 et seq.

particular, to its own claim of technological neutrality, which the European Parliament and the Council themselves claim to be authoritative. In the consideration reason 10 of the Regulation (EU) 2023/851, they refer namely to the fact that “[T]he tightened CO₂ emission standards [...] (are) technology neutral in relation to achieving the specified fleet targets.” However, a closer examination of the Regulation revealed the opposite.

III. Life cycle assessment as the EU standard for an environmental impact assessment

The design of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, not only contains regulatory contradictions in relation to openness to technology. It is also difficult to integrate in the overall architecture of the remaining secondary Union law.

1. Modern fuel approach of RED III Directive

There is an obvious conceptual contradiction between Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, and Article 25, RED III-Directive⁴³. In Article 25 RED III, electricity generated from renewable sources is equated with both biofuels and renewable fuels that are not biogenic in terms of origin. The diverse approach is not a randomly occurring product, but rather is explicitly set out in the RED III Directive. In consideration 72, the legislator explicitly states that “The use of renewable fuels and electricity from renewable sources in transport (can) play a part in the cost-effective decarbonisation of transport in the Union and, inter alia, support the diversification of energy supply in this economic sector.” In that respect, an

⁴³ Directive (EU) 2023/2413 of the European Parliament and the Council dated 18.10.2023

on amending the Directive (EU) 2018/2001, the Regulation (EU) 2018/1999 and the Directive 98/70/EC in light of the promotion of the use of energy from renewable sources and to rescind Directive (EU) 2015/652 of the Council, Official Journal 2023, No. L dated 31.10.2023, p. 1.

important field of application should be “Modes of transport that are difficult to electrify, such as maritime and air transportation.” Without limiting the area of application here, “Renewable fuels [meaning: advanced biofuels and biogas as well as renewable fuels of that are not biogenic in terms of origin] with the lowest possible environmental impact are to be increasingly used.” The legislator of the RED III Directive is, therefore, seeking the most effective areas of application for various energy sources without limiting itself technologically in advance.

2. LCA assessment according to the Taxonomy Regulation

Furthermore, the testing method described in the outdated testing method of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, which excludes a holistic view of passenger car and light commercial vehicle transport, cannot be harmonised with the basic orientation of the Taxonomy Regulation.⁴⁴ The standards there are significantly more dynamic and up-to-date.

In that respect, it should be noted in advance that the Taxonomy Regulation is woven into the overarching fabric of the European Green Deal⁴⁵ and is geared towards creating a uniform and binding classification system at Union level to determine the environmental sustainability of an economic activity.

According to Article 17(2), Taxonomy Regulation, the classification of the activity to be assessed is to take into consideration its entire life cycle, which includes, in particular, production, use and end of life and also extends to products and services brought about by the economic activity.⁴⁶ In the case of

⁴⁴ Regulation (EU) 2020/852 of the European Parliament and the Council dated 18.06.2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, Official Journal 2020, L 198, p. 13.

⁴⁵ See *Burgi*, NVwZ (New Journal for Administrative Law), 2021, 1401 (1401 et seq.); *Franzius*, KlimaR 2022, 2 throughout.

⁴⁶ *Kment*, in: Fellenberg/Kment (publisher), Taxonomy Regulation 2024, Article 17,

motor vehicles, the EU Commission holds the view that this should specifically include assembly, transportation and the pollution caused by use of the vehicle, as well as appropriate disposal at the end of its life.⁴⁷ Therefore, the examination of the life cycle of an activity or its products and services is to be cast as broad as possible, taking into consideration the precautionary principle in accordance EU law, and corresponds with the so-called “Cradle-to-grave approach.”⁴⁸

If an attempt is nevertheless made to falsely assess non-ecologically sustainable activities positively by examining the life cycle too closely (so-called “Green washing”), the European legislator has even inserted a dynamic component in Article 17(2) of the Taxonomy Regulation in the form of “In particular” to close the last loophole. In line with the system, the standards used to assess environmental sustainability must of course also “Take into consideration the life cycle and the findings of existing life cycle assessments” (see Article 19(1), p. 1, Point g, Taxonomy Regulation)⁴⁹ and be continually geared towards scientific and technological developments; see Article 19(5), sub-paragraph 3, Taxonomy Regulation.⁵⁰ Regulation (EU) 2023/851 and Regulation (EU) 2019/631 fall noticeably short of these high standards of the Taxonomy Regulation, as is clearly demonstrated by the comparison.

marginal note 25.

⁴⁷ Commission Notice, Technical Guidelines on the application of the “Do no significant harm” principle as part of the Recovery and Resilience Facility Regulation (2021/C 58/01).

⁴⁸ *Kment*, in: Fellenberg/Kment (publisher), Taxonomy Regulation 2024, Article 17, marginal note 28.

⁴⁹ *Kment*, *GewArch* 2023, 178 (181).

⁵⁰ *Reiter*, in: Fellenberg/Kment (publisher), Taxonomy Regulation, 2024, Article 19, marginal note 61.

3. LCA review in accordance with the Batteries and Waste Batteries Regulation

A comparison with the new Batteries and Waste Batteries Regulation shows the same deplorable findings.⁵¹ The latter is dominated by the concept of life cycle assessment, which, in relation to the batteries assessed in accordance with Annex II, No. 4, starts with the procurement and pre-treatment of the used raw materials and, via the manufacture of the main product and distribution, ultimately ends with the end of the service life and recycling of the batteries. Unlike Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, which is criticized here, the Batteries and Waste Batteries Regulation, therefore, adopts a cradle-to-grave perspective, whereby as part of the Batteries and Waste Batteries Regulation the European legislator is proceeding very sensitively, in particular in relation to the mobility of the future, the actual core topic of Regulation (EU) 2023/851 - which should make one take notice - because it identifies the fact that “(T)he large-scale use of batteries in sectors such as mobility and energy storage [. ...] will probably lead to a reduction in CO₂ emissions. To maximise this potential, it is [...] necessary for batteries to have a small carbon footprint throughout their life cycle.”⁵² Therefore, Article 7(1)(e) of the Batteries and Waste Batteries Regulation specifies that the carbon footprint of an electric vehicle battery must be broken down into the life cycle phases described above to facilitate its appropriate environmental assessment. Ultimately, the full carbon footprint of an electric vehicle battery determined in this manner may not exceed the limits set out in Article 7(3) of the Battery and Waste Batteries Regulation in conjunction with the delegated acts enacted in this respect. The extent to which Regulation (EU)

⁵¹ Regulation (EU) 2023/1542 of the European Parliament and the Council dated 12.7.2023 on batteries and waste batteries, on amending the Directive 2008/98/EC and the Regulation (EU) 2019/1020 and on rescinding the Directive 2006/66/EC, Official Journal, 2023 L 191, p. 1.

⁵² Consideration 27, Regulation (EU) 2023/1542. Similarly, see considerations 2, 10, 12, 28, 35, 83, 102 with reference to the LCA.

2023/851, in conjunction with Regulation (EU) 2019/631, falls short of these standards is astonishing.

IV. Negative consequences of the EU fleet regulation

Criticism of legal provisions aimed at serving environmental protection⁵³ quickly gives rise to the suspicion that environmental protection concerns are being wilfully sacrificed for other interests. Therefore, the negative consequences of the EU fleet regulation in its current iteration, in particular from an environmental perspective, shall be outlined below.

1. Ecological damage caused by an outdated measurement methodology

An outdated measurement technique that has a narrow focus inevitably runs the risk of inadequately identifying the overall environmental impact caused by different forms of mobility, and, therefore, encouraging misjudgements and creating false incentives. The following example makes this very clear: a battery-powered vehicle (BEV) must, at all times, perform better in a direct comparison with a vehicle with an internal combustion engine (ICEV) if merely the CO₂ gas emissions from the vehicle's exhaust are measured. Ultimately, a BEV does not emit any CO₂ because of the lacking combustion process in a passenger car.

a) CO₂ emissions at the beginning and end of the life cycle

This comparison directly discloses the considerable distortion risks of the current measurement method, which the European legislator continues to specify, including under the regime of Regulation (EU) 2023/851: If one takes a look at the vehicle manufacturing process, one can see that BEVs are at a disadvantage compared with classic cars with combustion engines,⁵⁴ in

⁵³ See Regulation (EU) 2023/851, consideration 8.

⁵⁴ *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see

particular if their batteries, as in the case of 80 % of all models,⁵⁵ are produced in China. The impact of BEVs is approximately three times higher than that of ICEVs.⁵⁶ There is no relief if CO₂ emissions are produced in other EU countries (such as China) because the fight against *global* climate change does not permit solely national or European considerations.

In other respects, in addition to the CO₂ pollution, it would also be desirable to consider other environmental pollution that occurs during the manufacturing, end-of-life or recycling processes. On occasion, battery production (lithium) and the handling of used batteries in developing countries, in particular, reveal considerable ecological problems.⁵⁷

b) CO₂ pollution caused by the generation of drive energy

A further, even clearer, distinction between the drive systems can be identified in the generation of drive energy: While the CO₂ share of ICEV models is negligible, this is sometimes even the core burden of battery electric vehicles.⁵⁸ The extent of the specific CO₂ impact on the environment depends crucially on the proportion of renewable energies used to generate the

https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 17 et seq.

⁵⁵ *Popien* inter alia., Comparison of lithium-ion battery supply chains - a life cycle sustainability assessment, CIRP 116 (2023), p. 131 et seq.

⁵⁶ *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 17 et seq. *Schwintowski*, EWeRK 2019, 182 (186) merely assumes CO₂ pollution that is twice as high. It refers to *Schrader*, The Ecological Outcome of E-Mobility, Spektrum Wissenschaft 5/18, p. 12 (14).

⁵⁷ *DW*, Lithium Mining in Africa dated 18.11.2023; see <https://www.dw.com/de/lithium-mine-in-afrika-zeigt-schattenseite-grüner-energie-auf/a-67459734>; *Deutschlandfunk*, Hazardous Lead Recycling in Africa dated 13.1.2024; see <https://www.deutschlandfunk.de/gefaehrliches-blei-recycling-in-afrika-es-muessen-minimale-100.html>.

⁵⁸ In that respect see *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 17 et seq.

electrical energy.⁵⁹ If one considers that, according to the German Federal Environment Agency, the impact on the climate in the Federal Republic of Germany in 2022 even *increased* further to a total of 256 million tons of CO₂ equivalents⁶⁰ because irrespective of the use of renewable energies to moderate the end result, the “Increased use, above all of coal and lignite, to generate electricity (has) increased emissions,”⁶¹ the CO₂ impact of BEVs can actually be significant.

c) Effect on existing vehicles

The wide-ranging effect of the technological course set by the EU for the production of new vehicles also affects existing vehicles. As a result of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, focussing entirely on the production of new BEV vehicles by way of its measurement approach,⁶² it renders alternative drive technologies and fuels (e.g. e-fuel) unattractive, which could have significantly reduced the CO₂ burden of existing vehicles in the coming years.

2. Detrimental effects on vehicle and e-fuel manufacturers

a) ICEV manufacturers

The regulatory technology applied as a result of Regulation (EU) 2023/851, described above, does not prohibit the construction of vehicles with a certain drive type. Nevertheless, it has a prohibitive effect in relation to internal

⁵⁹ Revealing *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 21 et seq.

⁶⁰ Press release 11/2023 dated 15.03.2023, <https://www.umweltbundesamt.de/presse/pressemitteilungen/uba-prognose-treibhausgasemissionen-sanken-2022-um>.

⁶¹ Press release 11/2023 dated 15.03.2023, <https://www.umweltbundesamt.de/presse/pressemitteilungen/uba-prognose-treibhausgasemissionen-sanken-2022-um>.

⁶² In this respect see also below in II, 1, c.

combustion engines because it works with the levy in accordance with Article 8, Regulation (EU) 2019/631, once the normatively defined (low) limiting value of CO₂ emissions at the exhaust of a vehicle is reached⁶³. As stated above, the latter⁶⁴ results in billions of euros of financial burdens annually in the passenger car segment of German manufacturers alone. Therefore, one can assume that even before 2035, when the permissible CO₂ emissions will be set to zero, the production of combustion engines will no longer be economically viable, even if the overall ecological assessment of vehicles with combustion engines is better than that of BEVs. Accordingly, major European car manufacturers have already publicly announced the end of the combustion engine.⁶⁵

b) e-Fuel manufacturers

These developments in the manufacture of motor vehicles also impact the manufacturers of alternative fuels that can only be used in combustion engines. If the manufacture of internal combustion engines is to be rendered more economical in the coming years by way of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, the market for this development branch will also collapse before a serious market ramp-up can even occur. Although the option of supplying the marine and aviation sectors remains according to the European legislator,⁶⁶ the industry is losing its largest customer in the form of the combustion engine in road transport. The announcement by the EU to provide for the registration of vehicles running

⁶³ In that respect see comments above in II, 2.

⁶⁴ See the above comments in II, 2, a.

⁶⁵ See as an example: Mercedes-Benz intends to produce all-electric passenger cars only from 2025 (<https://media.mercedes-benz.be/de/mercedes-benz-stellt-weichen-fuer-vollelektrisches-zeitalter/>); BMW has determined that the end of 2027 will see the end of the combustion engine (<https://www.tagesschau.de/wirtschaft/unternehmen/bmw-e-autos-100.html>).

⁶⁶ Consideration 11 Directive (EU) 2023/2413 - RED III.

on CO₂-neutral fuels for the period after 2035⁶⁷ cannot, insofar, provide any relief either. Given the internal combustion engine will (probably) be abandoned well before 2035, technologies based on it that require e-fuels will probably no longer exist after 2035. This theoretical development path, for which the prospect is held out in the consideration reasons of Regulation (EU) 2023/851,⁶⁸ is, therefore, not feasible for alternative CO₂-neutral fuels. In addition, concentrating primarily on supplying existing vehicles will not be very lucrative undertaking for e-fuel manufacturers given the number of such vehicles will gradually decrease and will not facilitate the opening up a growth market for e-fuels.

V. Fleet regulation contrary to Union law

The inappropriate nature of a set of rules or its contradiction in relation to the concepts or premises of other legal principles does not, in itself, necessarily establish that it is unlawful. To that end, moreover, a contradiction with a legal principle of a higher order needs be demonstrated. In the case of the Regulation (EU) 2023/851, which is under review here in conjunction with Regulation (EU) 2019/631, i.e. in an EU law context, it is, therefore, necessary to look for a conflict with European primary law.

1. Disregard of Article 191, TFEU

The proximity to the topic presents the opportunity to consider a violation by Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, of Article 191, TFEU. This article ultimately establishes the legal basis for Regulation (EC) 2023/851 and Regulation (EU) 2019/631 in the European regulatory framework.

⁶⁷ Consideration 11 Regulation (EU) 2023/851.

⁶⁸ Consideration 11 Regulation (EU) 2023/851.

a) Objectives of Article 191(1), TFEU

However, assuming a violation of Article 191(1), TFEU, will probably not be possible in view of the normative abstract nature of the description of the Union's tasks⁶⁹ set out in Article 191(1), TFEU, which are to a certain extent similar to state objectives and which are accompanied by a fairly broad scope for action by the European secondary legislator,⁷⁰. Although Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, does not raise the potential for effective environmental protection because of the outdated measurement methodology and its lacking technological neutrality, the regulations do address environmental protection concerns.

b) Disregard of the preventive and precautionary principle in accordance with Article 191(2), TFEU

By contrast, the compatibility of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, appears to be much more problematic with the legally binding and organisational central principles of European environmental policy, which are enshrined in Article 191(2), TFEU.⁷¹ These include, in particular, the principles of prevention and precaution, both of which call on the European environmental policy to adopt a preventive and anticipatory approach to environmental protection rather than a repressive one.⁷² This is aimed at ensuring that environmental damage is prevented in advance instead of having to subsequently combat its effects.⁷³ This also includes conducting the necessary actual surveys (in advance),⁷⁴ as is the case

⁶⁹ *Calliess*, in: the same/Ruffert, TEU/TFEU, 2022, Article 191, marginal note 50; *Schmitz*, *The EU as an Environmental Union*, 1996, p. 148 et seq.

⁷⁰ *Nettesheim*, in: Grabitz/Hilf/Nettesheim, *European Union Law*, Status: Aug. 2023, Article 191, marginal note 63.

⁷¹ *Winter*, ZUR 2003, 137; *Calliess*, in: the same/Ruffert, TEU/TFEU, 2022, Article 191, marginal note 54.

⁷² *Epiney*, in: Landmann/Rohmer, *Environmental Law*, Status: Sept. 2023, Article 191, TFEU, marginal note 28.

⁷³ *Kahl*, in: Streinz, TEU/TFEU, 2018, Article 191, marginal note 77.

⁷⁴ See *Kahl*, in: Streinz, TEU/TFEU, 2018, Article 191, marginal note 79.

with environmental impact assessments ⁷⁵ or life cycle analyses in the Taxonomy Regulation⁷⁶.

Conversely, it can, therefore, be concluded that the data collection, fact-finding and measurement methods that are recognisably outdated, one-sided and, therefore, faulty⁷⁷ deprive the preventive and precautionary principle of its working basis. They divert events away from a high level of ecological protection ⁷⁸ envisaged in primary law and, therefore, do not meet the requirements of Article 191 TFEU. This reservation must be accepted by Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, must comply with this reservation if, contrary to the holistic, Union-wide, modern life cycle assessment that is applied ⁻⁷⁹ it chooses a narrow measurement method that is limited to merely a single segment in the ecologically relevant impact spectrum of a vehicle.

There is no room here for an argument against this in that Regulation (EU) 2023/851 has taken up the possibility of life cycle assessment and has already incorporated it in Article 7a, Regulation (EU) 2023/851. As set out above,⁸⁰ Article 7a, Regulation (EU) 2023/851, does not provide any substantial changes in respect of the relevant exhaust gas measurements. At best, it distracts from the repeatedly delayed updating of the measurement

⁷⁵ These are introduced, in particular, via the EIA Directive (in the case of projects) and the SEA Directive (in the scope of plans); on EIA: Directive 2014/52/EU of the European Parliament and of the Council dated 16.04.2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal, 2014 L 124, p. 1; on SEA: Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Official Journal, 2001 L 197, p. 30.

⁷⁶ In that respect see above comments in III, 2.

⁷⁷ In this respect, see above in II, 3.

⁷⁸ To that end, *Epiney*, in: Landmann/Rohmer, Environmental Law, Status: Sept. 2023, Article 191, TFEU, marginal note 18.

⁷⁹ In that respect, see above comments in III.

⁸⁰ See above comments in II, 3, b.

methodology. This obvious undesirable development cannot be cushioned or put into perspective by way of the room for manoeuvre by the executive bodies of Union⁸¹ either.

2. Violation of EU fundamental rights and EU principles

In addition to the objectives of Article 191, TFEU, Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, must also be measured against European fundamental rights and principles. A closer look is taken at Articles 16, 20 and 37, Charter of Fundamental Rights of the European Union.

a) Freedom to conduct a business (Article 16, CFREU)

aa) Meaning and area of protection

The freedom to conduct a business in accordance with Article 16, CFREU, with the freedom to select an occupation in accordance with Article 15, CFREU and the guarantee of property in accordance with Article 17, CFREU, constitute the central fundamental economic rights.⁸² In addition, it serves the objective principle of free competition within the meaning of Article 119(1) and (3), TFEU.⁸³ The area of protection of Article 16, CFREU, covers companies or entrepreneurial activity, i.e. economic or business activities.⁸⁴ This means entities that provide goods and render services in a market free of charge, regardless of their legal form and financing;⁸⁵ in principle, the activity must also be independent. The manufacturers of cars undoubtedly honour this characteristic. It also applies to manufacturers of alternative fuels.

⁸¹ To that end, ECRU, legal matter C-284/95, Safety Hi-Etch, collection 1998, I-4301, marginal note 48 et seq.

⁸² *Rengeling*, DVBl (German Administrative Journal), 2004, 453 (455); *Schwarze*, EuZW 2001, 517 (518).

⁸³ *Blanke*, in: Stern/Sachs, GRCh, 2016, Article 16, marginal note 8; *Jarass*, EuGRZ 2011, 360 (360).

⁸⁴ ECRU, C-101/12 – Schaible, 17.10.2013, marginal note 25.

⁸⁵ *Bernsdorff*, in: Meyer/Hölscheidt, GRCh, 2019, Article 16, marginal note 11; *Blanke*, in: Stern/Sachs, GRCh, 2016, Article 16, marginal note 6.

bb) Direct and indirect intervention

Regulation (EU) 2023/851 and Regulation (EU) 2019/631 interfere with the scope of protection of Article 16 CFR to the detriment of both vehicle manufacturers and alternative fuel producers. This is comparatively easy to determine in the case of vehicle manufacturers because they are the direct addressees of the levy regulation of Article 8, Regulation (EU) 2019/631, and are, therefore, subject to levies when manufacturing motor vehicles that exceed certain CO₂ emission limits at the exhaust pipe.⁸⁶

It is more complex to explain the intervention for manufacturers of alternative fuels. The latter suffer market-economic disadvantages indirectly because their sales markets break away as a result of vehicle manufacturers' reactions to the sanction regulations of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631. In such a case of indirect effects, an interference with EU fundamental rights can nevertheless be assumed if the detrimental effect is attributable to the addressee of the fundamental rights (i.e. EU institutions) and is not primarily the result of a solely market-based development.⁸⁷ Even if entrepreneurial activity must inevitably expect uncertain market conditions,⁸⁸ the tax burden, which is triggered by Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, and must be taken into account is so overwhelming that one can speak of a foreseeable,⁸⁹ regulatory forced exit from the combustion engine, which does not (primarily) emanate from changed market conditions. Similarly, the cuts in the area of activity of manufacturers of alternative fuels are, therefore, to be qualified as interventions in Article 16, CFREU,

cc) Lacking justification

⁸⁶ In this respect see comments in II, 2, a.

⁸⁷ EuGH, C-4/73 – Nold, Slg.1974, 491, marginal note 15; *Jarass*, GRCh, 2021, Article 16, marginal note 14.

⁸⁸ *Jarass/Kment*, EU Basic Rights, 2019, Section 21,1 marginal note 10.

⁸⁹ In that respect see above in II, 2, a.

The normative fundamental right of Article 16, CFREU, gives the Union legislator considerable regulatory and design options.⁹⁰ Nevertheless, interference with this fundamental right in accordance with Article 52(1), Sentence 2, CFREU, is ruled out if it is disproportionate.⁹¹ In this respect, the burdens triggered by Regulation (EU) 2023/851 and Regulation (EU) 2019/631 give rise to legal doubts. The interventions in the area of protection of Article 16, CFREU, are based - as explained above -⁹² on an outdated measurement method that distorts the true ecological balance of propulsion systems. This means that the interventions triggered by both regulations are disproportionate because they are unsuitable in respect of achieving the objective, but in any case are not necessary.

The suitability of a deleterious measure can only be attested if it actually corresponds to the restriction objective.⁹³ In light of the fact that both Regulation (EU) 2023/851 and Regulation (EU) 2019/631 are geared towards achieving climate neutrality in the EU,⁹⁴ the fleet regulation they introduce, combined with a compensation payment obligation, appears to be appropriate in principle and, therefore, unobjectionable. Ultimately, vehicles with higher CO₂ emissions will, as a final consequence, no longer be built in the future. However, justified doubts arise as to the suitability of the measures if one considers that an outdated and limited measurement methodology is used to assess compliance with the CO₂ limiting values, which distorts and incompletely represents the CO₂ emissions of the vehicles to be assessed because it does not record all CO₂ emissions and also does not permit

⁹⁰ ECRU, C-283/11, EuZW 2013, 347, marginal note 46; similar ECRU, C-200/96, collection 1998, I-1953, marginal note 21.

⁹¹ ECRU, C-283/11 - Sky Austria, 22.01.2013, marginal note 48; C-101/12 - Schaible, 17.10.2013, marginal note 29.

⁹² See above comments in II, 3.

⁹³ ECRU, C-283/11 - Sky Austria, 22.01.2013, marginal note 50; C-101/12 - Schaible, 17.10.2013, marginal note 36.

⁹⁴ See for example consideration 8, Regulation (EU) 2023/851; consideration 4, 6, Regulation (EU) 2019/631.

offsetting against CO₂ reduction (i.e. a negative CO₂ assessment). The inadequate data basis does not provide the necessary serious assessment basis to set the right steering impulses towards climate neutrality in the Union. The EU is essentially myopic because it does not collect the key information for a life cycle assessment of various drive systems.

If one wishes to counter this finding by arguing that even an incorrect selection of CO₂ emitters in the burden of compensation payments is still a suitable selection for climate protection, as CO₂ emitters will disappear from the market in the foreseeable future in any case,⁹⁵ the measures ordered by Regulation (EU) 2023/851 and Regulation (EU) 2019/631 will probably lack necessity in any case: Neglecting the LCA will, in any case, force technologies out of the market which, on occasion, have better values in the overall CO₂ assessment than the currently favoured BEVs.⁹⁶ Their burden of financial penalties is, therefore, not required to achieve the restriction target,⁹⁷ in particular in relation to combustion engines using CO₂-neutral e-fuels. Moreover, it is detrimental to the objective.⁹⁸ In view of this, Regulation (EU) 2023/851 and Regulation (EU) 2019/631 impose disproportionate burdens and, therefore, violate Article 16, CFREU.

⁹⁵ This position is not shared here.

⁹⁶ See *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 21 et seq. This currently applies in Germany - due to the type of electricity generation - even for the "Normal" combustion engines to "Normal" fuel use ratio. See also *Schwintowski*, EWeRK 2019, 182 (186 f.), who rightly points out that the efficiency level of a technology should not be confused or confused with the carbon footprint.

⁹⁷ Illustrative *Frontier Economics Limited*, Expert opinion on the necessity of a life cycle analysis in the fleet regulation, 2023, see https://www.uniti.de/fileadmin/user_upload/RPT-Frontier-UNITI_LCA_Studie-18-08-2023_stc.pdf, p. 26. See also Regulation (EC) 443/2009, consideration 15, , in which the "Significant reduction in CO₂ emissions" via e-fuels has already been recognised.

⁹⁸ *Schwintowski*, EWeRK 2019, 182 (187).

b) Equality before the law (Article 20, CFREU)

The outdated tailpipe approach, which was introduced under Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, not only leads to a violation of civil liberties but also of equality rights. Article 20, CFREU, guarantees namely that comparable situations must be treated equally and must not be subject to unjustified differentiation.⁹⁹ However, this guarantee is unable to comply with Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631.

For their part, vehicle manufacturers, ICEV producers, in contrast to BEV producers, are subject to a compensatory levy in accordance with Article 8, Regulation (EU) 2019/631, although a life cycle analysis shows that the CO₂ impact values of both drive systems - at least at the current time, given the predominant type of electricity generation in Germany - do not show any relevant differences.¹⁰⁰ When using alternative fuels (e-fuels), combustion engines are currently even proving to be more CO₂-friendly.¹⁰¹ Such unequal treatment of ICEV manufacturers cannot be justified by narrowing the relevant measurement method to the section of a vehicle's life cycle in which BEV vehicles enjoy a design-related advantage, while the other areas, which are also ecologically relevant, in which BEV vehicles "lose" their advantage are (wittingly) ignored. Consequently, a violation of Article 20, CFREU, applies to the detriment of ICEV manufacturers.

c) Principle of environmental protection (Article 37, CFREU)

The already proven disregard of the precautionary principle within the meaning of Article 191 (2), TFEU,¹⁰² ultimately leads to a violation of Article

⁹⁹ ECRU, C-217-91, collection 1993, I-3923 Rn. 37; ECRU, C-127/07, collection 2008, I-9895, marginal note 39; ECRU, C-356/12, marginal note 43.

¹⁰⁰ In this respect, see presentation above in V, 2, a, cc.

¹⁰¹ See also *Schwintowski*, EWeRK 2019, 182 (186 et seq.).

¹⁰² See above comments in V, 1, b.

37, CFREU.¹⁰³ Although the principle of environmental protection has binding force for the EU institutions as an objective, it does not provide an enforceable subjective right.¹⁰⁴ It will, therefore, be of little significance in a dispute over the legality of Regulation (EU) 2023/851 and Regulation (EU) 2019/631.

3. No primacy of other EU provisions

The following should only be noted before rounding off the legal consideration: The fact that Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631, does not select the same measurement methodology as other EU regulations and EU directives does not mean that an outdated measurement methodology would, *ipse iure*, be replaced by its modern counterpart. There is no starting point for the principle of *lex posterior derogat legi priori* insofar as there is no conflict with Regulation (EU) 2023/851 in relation to Directives and Regulations with a more modern, broader, approach (LCA) because of major differences in the scope of application of the standards. However, the latter would be necessary to justify a loss of validity of Regulation (EU) 2023/851, in conjunction with Regulation (EU) 2019/631.

V. Conclusion: Urgent need for change

The EU has established a legal framework by way of which it intends to put mobility in the Union on a completely new footing. These steps are necessary to permanently reduce emissions from the transport sector to a sustainable level. However, the European legislator relies on an outdated measurement methodology in the relevant regulations on the so-called fleet regulation - Regulation (EU) 2023/851 and Regulation (EU) 2019/631 - to respond to the considerable challenges of the future and drive forward the decarbonisation

¹⁰³ *Winkler*, in: *Sachs/Stern, CFREU*, 2016, Article 37, marginal note 11.

¹⁰⁴ *EuG – PAN Europe/Commission*, legal matter T-600/15, *ECLI:EU:T:2016:601*, Ruling dated 28.9.2016, marginal note 47; *Schwerdtfeger*, in: *Meyer/Hölscheidt, CFREU*, 2019, Article 37, marginal note 18.

of transport.¹⁰⁵ The tailpipe approach used only permits a regulatory response to a section of a vehicle's CO₂ emissions in the product's life cycle, but ignores upstream and downstream environmental impacts (including CO₂ reduction). This favours certain drive forms or fuels and disadvantages others - even those that are very innovative from an ecological point of view. This applies, in particular, to alternative fuels of which sight has been successively lost in the modification process of the European regulations. The tailpipe approach not only contradicts the requirements set out in Regulation (2023)/851 and Regulation (EU) 2019/631 on technological openness, it falls far behind modern life cycle analyses of other European regulations (RED III Directive, Taxonomy Regulation, Battery and Waste Batteries Regulation). Furthermore, the outdated test method also gives rise to violations of European primary law: Article 191(2), TFEU, is violated, as are Articles 16, 20 and 37, CFR. In light of this, advice is urgently required to address the acute problems of the transport sector by way of a contemporary measurement methodology, and the tailpipe approach should be put where it belongs: in the past.

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¹⁰⁵ It would be more accurate to speak of "Defossilisation" because the use of carbon is environmentally-friendly as long as it is done in a closed cycle. By contrast, using fossil fuels and releasing carbon into the atmosphere in the process is harmful to the environment.