

## Legal opinion on the compatibility of Section 2 of the Renewable Energy Sources Act (EEG) with constitutional and EU law

### 1. Starting point and subject matter

The subject of the opinion is the legal assessment of **Section 2 of the Renewable Energy Sources Act (EEG)** in the version applicable since 2023. The provision stipulates that the expansion of renewable energies is "**in the overriding public interest**" and serves public safety. According to the opinion, this legal provision is not merely a statement of intent, but claims to have a **direct controlling effect** on administrative and court decisions.

The report examines whether this provision is compatible with the **constitutional requirements of the Basic Law** and with **EU law**. The focus is not on considerations of energy or climate policy expediency, but exclusively on the **legal structure and effect** of the provision.

The central question addressed in the opinion is whether Section 2 of the EEG effectively replaces or pre-empts the constitutionally required **open-ended weighing of interests** in planning, approval and court proceedings.

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### 2. Central thesis of the opinion

The opinion concludes that **Section 2 EEG in its current form is unconstitutional** because it:

- makes a **decision on the balance of interests that is predetermined by law**,
- thereby **devaluing the constitutionally required weighing of individual cases**,
- and violates central structural principles of the Basic Law.

In the opinion of the report, the provision does not merely set an **important target**, but rather a **systematic priority decision** that, in practical application, **replaces weighing up with a predetermined outcome**.

### 3. The requirement to weigh up interests as a fundamental constitutional principle

The opinion makes it clear that German constitutional law requires an **open, outcome-neutral balancing procedure** in numerous contexts. This applies in particular to:

- conflicts between fundamental rights,
- competing public interest concerns,
- interference with property, freedom and municipal planning sovereignty.

According to constitutional doctrine, weighing up interests does not merely mean formal "consideration", but **genuine freedom of decision** based on the circumstances of the individual case. Legislative predeterminations must not override this freedom.

According to the expert opinion, Section 2 of the EEG crosses this line by **giving** the expansion of renewable energies **the highest weighting in law** and assigning it across the board to public safety.

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### 4. Effect of Section 2 EEG in administration and case law

The expert opinion analyses in detail the **controlling effect** of the norm in administrative practice and in court proceedings.

According to its assessment, Section 2 EEG leads to the following:

- authorities effectively **no longer feel free** to give equal consideration to competing interests,
- courts often treat the weighing of interests as **already decided by law**,
- other protected interests (nature conservation, health, property, municipal planning) are regularly **only** given **residual** consideration.

The norm thus shifts the decision-making logic from a **weighing** to an **executive** administration.

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## 5. Democracy and separation of powers

A central line of argument concerns the **limits of legislative control**.

The report emphasises that although the legislature may set political goals, it may **not itself replace the weighing of interests in individual cases**. The specific weighting of conflicting interests is, under constitutional law, the task of the **administration and the courts**, not the legislature.

In the opinion of the report, Section 2 of the EEG constitutes an inadmissible interference by the legislature in this division of powers and **shifts decision-making power from the executive and judiciary to the legislature**.

This contradicts the **principle of separation of powers** and the principle of democracy, as the preliminary legal decision is not subject to a **specific, verifiable allocation of responsibility**.

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## 6. Implications for fundamental rights

The opinion examines the effects of Section 2 EEG on several fundamental rights, in particular:

- property (Article 14 of the Basic Law),
- Freedom of occupation (Art. 12 GG),
- General freedom of action (Art. 2 (1) GG),
- local self-government (Art. 28(2) GG).

The central criticism is that, as **a result** of the statutory priority decision, **interventions are no longer justified on an individual basis** but are legitimised across the board.

Interventions in fundamental rights thus lose their **case-by-case justification standard**. According to the opinion, the proportionality test is **rendered meaningless** because the predominance of an interest is already fictitiously established by law.

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## 7. Article 20a GG (state objective of environmental protection)

A separate section is devoted to Art. 20a GG. The opinion clarifies that the protection of natural resources is a **constitutionally recognised state objective** that guides state action.

At the same time, however, it emphasises that Article 20a GG:

- does **not** establish **absolute priority** over other constitutional values,

- **does not** justify **automatic supremacy** over fundamental rights,
- does **not** constitute an **independent basis for intervention**,
- and does **not** allow for **the suspension of the requirement to weigh up interests**.

In the opinion of the report, Section 2 of the EEG exceeds the constitutional limits of the state's commitment to its objectives by turning a **goal that guides the weighing of interests** into a **quasi-binding decision-making requirement**, thereby replacing the necessary weighing of interests in individual cases.

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## 8. Local self-government

The opinion attaches particular importance to **municipal planning sovereignty**. This is protected under constitutional law and requires **independent, locally based consideration** of the interests concerned.

According to the report, Section 2 of the EEG leads to the following:

- local government decisions are **effectively pre-programmed**,
- local interests can still be identified, but can **no longer** be **weighted equally**,
- and municipalities **substantially lose** their planning freedom.

The provision thus acts as a **structural intervention** in Article 28(2) of the Basic Law, which is no longer compensated for by case-by-case consideration.

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## 9. Union law dimension

The opinion also sees considerable problems under EU law. It refers in particular to:

- the **EU principle of proportionality**,
- the obligation to **take competing protected interests into account**,
- and the requirements for **effective judicial protection**.

In the opinion of the report, a statutory priority decision such as that in Section 2 of the EEG is at odds with these requirements, as it:

- reduces **the depth of judicial review**
  - and effectively reduces the weighing of interests to an **enforcement review**.
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## 10. Legal consequences, interpretation and overall result

Finally, the opinion draws clear legal consequences from the problem identified.

The central statement is that **Section 2 EEG may not replace a binding balancing decision**. According to the opinion, the provision **cannot be applied in a manner consistent with the constitution** if it is understood as a mandatory priority rule.

According to the opinion, Section 2 EEG is only constitutional if it:

- is interpreted merely as **one important consideration among several**
- **expressly leaves the weighing of individual cases open,**
- and does not bind either the administration or the courts to a predetermined result.

However, if Section 2 EEG is used as a substitute for weighing up the interests involved, the opinion considers this to be a **violation of the Basic Law and of EU law**.

The expert opinion expressly clarifies that neither authorities nor courts are entitled to fall back on Section 2 EEG in order to avoid making their own assessment. Responsibility for the specific decision remains entirely with the deciding bodies.

The opinion concludes that Section 2 EEG is **not legally viable** in its current application and requires a **constitutionally compliant limitation**. Otherwise, the norm is not suitable for supporting legally secure decisions.

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**Note: Only the complete legal opinion is authoritative.**

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**The rule of law is about weighing up interests.**

**Citizens have no chance – does the wind industry always win?**

**Where a law stipulates this, the courts are discredited.**

In 2021/22, wind industry companies were officially asked about the factors that were slowing them down. The lobby promised to exert influence. The legal regulations on which the so-called energy transition is based are conspicuous in other areas as well. It is clear that an attempt has been made to shield the entire project from outside interests. In addition to blanket priority rules, there are acceleration clauses, fictitious approvals, and exclusionary effects that shorten the deliberation process and effectively bring forward decisions. Preclusion rules and procedural shortcuts structurally weaken effective legal protection and municipal planning authority. Cui bono? The resulting need for research and review is also currently being addressed.