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Key features of credible Energy Union governance

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Introduction

In November 2016 the Commission will publish its long-awaited Winter Package, which will contain proposals for the key elements of the 2030 EU climate and energy governance including a proposal for a new 'governance instrument'.



Although the EU's 'governance' debate has focused on the reform of planning and reporting ('P&R')¹ provisions, the post 2020 legislative framework will need to be founded on a sufficiently ambitious process for determining contributions to the 2030 climate and energy targets, as well as the procedural, institutional and other arrangements to support delivery of those targets.

The quality of the governance framework proposed in the Winter Package – whether contained in the new governance instrument or distributed elsewhere in the 2030 acquis – will determine the credibility of the EU's commitment to meeting its 2030 targets and its commitment to implementing the Paris Agreement.

This paper sets out the critical key features for ensuring that post 2020 EU climate and energy governance conforms to principles of good governance – particularly transparency, accountability, and investor certainty.

In Section 1, we highlight the importance of operationalising and ensuring credibility of the 2030 targets.

Section 2 describes the need for a well-designed P&R regime as a crucial means to support target delivery.

Key recommendations:

1. To be credible, all components of post 2020 climate and energy governance should be embedded in legislation;
2. The governance regime should be founded on EU 2030 targets, and supported by arrangements and procedures for delivering those outcomes from the outset. These include credible 'ambition gap-filler' processes to provide confidence that the EU committed, from the outset, to achieve the EU-level renewable energy and energy efficiency targets;
3. Target delivery will need to be supported by binding and appropriately designed provisions governing national planning, reporting, and monitoring processes that will function as key tools of accountability, effectiveness and transparency;
4. In order to ensure legal and investor certainty for national and collective delivery of targets, the governance regime should contain credible compliance systems that grant the Commission powers to take early corrective action to prevent Member States from veering too far off course and to correct discrepancies with climate and energy commitments.

¹ By using the terminology P&R we are referring to key governance arrangements and mechanisms for planning, reporting, and monitoring as well as follow-up procedures, such as compliance mechanisms and reviews.

1 Operationalising and ensuring the credibility of the 2030 targets

While the disaggregation of the climate target into nationally binding targets will be continued to 2030 in the non-ETS sectors (with the proposed Effort Sharing Regulation, or 'ESR'),² the EU-level targets for renewable energy and energy efficiency will be met by collective efforts of the Member States.



² See Proposal for a Regulation of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 for a resilient Energy Union and to meet commitments under the Paris Agreement and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change, COM(2016) 482 final.

The retreat from nationally binding targets for renewables or energy efficiency necessitates credible legal mechanisms and procedures to demonstrate how the collective EU-level targets will be achieved. Provided no nationally binding 2030 targets for renewable energy and energy efficiency are fixed by the EU, the Winter Package will need to provide confidence, from the beginning, that the EU is committed to ensuring delivery of both targets.

Contribution-setting processes should support certainty

The Winter Package will need to demonstrate how the EU can commit to a credible collective pathway to achieving the target, which would include:

A mandatory requirement for Member States to set their own national contributions towards the EU-level targets: The governance regime should contain clear rules and procedures requiring Member States to set their own contributions towards the EU-level energy targets.

Empowering the Commission to provide guidance to Member States when determining and quantifying their national contribution to EU-level targets: Without a reliable framework for agreeing national contributions towards collective targets, the EU's credibility for being able to deliver the targets will be undermined. Hence, the Winter Package should provide for a contribution setting process to ascertain how Member States will set contributions that align with the EU-wide targets. In particular, for EU-wide targets the Commission should be allowed to provide benchmarks based on the principle of 'fair share'. These benchmarks should guide the target setting procedure and promote sufficiently ambitious targets, minimizing the risk of a potential gap.

Requirement to develop trajectories towards national contributions: Member States should be required to establish and make transparent, by 2020, their own national trajectories for delivering their contributions towards the EU-level energy targets.

Use of key indicators to define contributions and trajectories: Member States should be required to use key indicators to help formulate their national contributions to the EU targets and to define the respective target trajectories in quantified terms. In particular, key indicators should be used by Member States to identify sectoral issues and main levers of change that should be taken into account when defining contributions and trajectories to 2030 (and with a view to meeting the 2050 decarbonisations needs).

Ensuring the EU is on track from the outset to meet its EU-level targets: filling a potential ambition gap

The Winter Package should contain mechanisms to ensure that the EU is on track, from the planning stage, to meeting its EU-level targets:

Empower the Commission to assess national contributions: The Commission should be able to assess upfront whether collective contributions from Member States are sufficient to deliver the EU renewables and energy efficiency targets. This is essential for placing the EU on a realistic path towards target achievement.

Empower the Commission to ensure that national contributions amount to a fair share of the EU energy targets: The Commission should be empowered to address the potential scenario that proposed national targets do not collectively put the EU on track to deliver the renewables and energy efficiency targets. If such an ambition gap arises, there should be a clearly defined decision-making process between the Member States (potentially via the Council) and the Commission, and a clear methodology for determining the remaining fair share to be assumed by Member States. If necessary, the Commission/Council should have a clear mandate to require (through a decision) additional measures from Member States (either individually or collectively/regionally). The ambition gap-fillers for renewables and energy efficiency may require their own fit-for-purpose, yet complementary and coherent, processes to guarantee that national contributions amount to the EU-level target.

2 A well-designed P&R regime to support the delivery of the climate and energy targets for 2030

Target delivery will need to be supported by a well-designed P&R regime rooted in legislation. Thus far, the EU climate and energy governance debate has focused primarily on ‘streamlining’ of P&R. In this context, extensive analysis has looked at possible architectures and options for how P&R could be streamlined to alleviate administrative burden while also ensuring better governance outcomes.³



³ See for instance ClientEarth (2015), “Streamlining Climate and Energy Planning and Reporting: Understanding the options, risks and opportunities”, ClientEarth, London; Sartor, O, M. Colombier, T. Spencer (2015), “Designing planning and reporting for good governance of the EU’s post-2020 climate and energy goals”, IDDRI, Paris; Umpfenbach, Katharina (2015): “Streamlining planning and reporting requirements in the EU Energy Union framework. An opportunity for building consistent and transparent strategies”, Ecologic Institute, Berlin.

However P&R is streamlined, it should be embedded in legislation to ensure that it supports target delivery, ensures enforceability, and provides legal certainty.

2.1 Streamlining must not weaken legal arrangements for P&R or result in a loss of necessary detail

Streamlining is not a danger in itself, where it simply reduces administrative burden or enhances transparency. However, if excessively or poorly designed, streamlining could weaken planning, monitoring and accountability, compromising the EU's ability to ensure delivery of the 2030 targets. Hence, the governance regime must include the following:

P&R obligations should provide a level of detail that is necessary to demonstrate which measures will be used to achieve the targets: If P&R is streamlined into a centralised instrument, it should require a level of detail at least equal to current sectoral legislation. Losing that detail could endanger achievement of the 2030 targets and other Energy Union objectives and impair the EU power to monitor their implementation or effectiveness.

Need to maintain dedicated P&R in separate instruments: Integrating P&R obligations into one streamlined document will not replace the need to maintain certain dedicated P&R in separate instruments to support specific planning needs in different sectors. For example, technical planning obligations (e.g. relating to security of supply and infrastructure planning) can hardly be streamlined into an integrated plan, if at all.

2.2 Plan-making must support investor certainty

Post 2020 planning arrangements must instil confidence in investors and other outside stakeholders that Member States and the EU are committed to delivering the 2030 targets and long-term climate commitments under the Paris Agreement. In order to ensure this, the Winter Package must contain:

Mandatory planning requirements: In its October 2014 Conclusions on a 2030 Climate and Energy Policy Framework, the European Council committed to “[building] on existing building blocks”. This commitment should be interpreted to mean that the binding nature of plan making must not be lost, regardless of how it is streamlined.

A requirement to develop National Energy and Climate Plans (‘NECPs’): Member States should be required to develop NECPs that provide predictability for outside stakeholders, including investors, regarding the Member States’ medium and long-term climate and energy strategies. NECPs should be based upon a detailed and transparent framework that sets out the direction of national energy and climate policies in a way that is coherent with the delivery of the 2030 targets and objectives.

A requirement to develop NECPs that are coherent with the long-term goal of reducing GHG emissions by 80-95% by 2050: NECPs should establish stronger links between national 2030 strategies and the EU's long-term 2050 climate goals. Embedding a 2050 perspective into planning will ensure that short- and medium-term planning is consistent with a 2050 vision. NECPs should also contain national visions for implementing the 2050 decarbonisation goal in order to anticipate barriers to achieving the EU's long-term decarbonisation target, to avoid stranded assets, and to limit further high-carbon lock-in.

Requirement to match projections with policies and measures: Member States should be required to develop projections for 2040, and at least until 2030, on the basis of a comparable methodology, and to explain the links between their (planned) policies and measures and their projections. In this context, the governance framework should provide for a harmonised methodology to match projections with planned policies and measures.

Enhancing GHG planning to address non-ETS emissions: Member States should be required to explain how they will address non-ETS emissions in their NECPs, sector-by-sector.⁴ Specifically, the Winter Package should contain provisions to ensure sufficient detail to guarantee that certain sectors, such as agriculture, waste, and transport, are well integrated into national GHG planning.

Binding and sufficiently detailed planning template: A binding and sufficiently detailed planning template for national policies, measures, and projections is essential to ensure a sufficient level of transparency for investors and national level operators. In addition, the template should provide clear rules and consistent methodologies to provide a strong analytical basis for the NECPs and to ensure comparability.

Commission powers to issue recommendations on the Member States plans: The Commission should be empowered to assess and review Member States' draft NECPs through the iterative process. In particular, the Commission should be enabled to provide guidance and recommendations on draft NECPs to (i) ensure draft NECPs are consistent with national contributions; (ii) ascertain a pathway for delivery of 2030 targets while ensuring the 2050 decarbonisation needs are not neglected; and (iii) assess the quality of the projections to estimates and compare information provided by Member States.

Requirement to regularly update NECPs: NECPs should be updated every two or three years to remain current and effective. Regular updates are crucial to encourage Member States to reconsider national pathways (including projections) for 2030 target delivery. The experience of the Renewable Energy Directive has shown that the National Renewable Energy Action Plans, which were only drawn up once by the Member States, have proven inadequate to keep up with national developments and quickly became obsolete.⁵

Requirement to ensure trans-boundary consultation and meaningful stakeholder participation: Member States should be required to cooperate with neighbouring Member States on potential transboundary impacts of their NECPs when drafting them. In addition, stakeholders (e.g. investors, civil society) should be able to exercise their rights under the Aarhus Convention to effectively participate in the development of NECPs. Participation should be ensured through specific requirements for Member States and the Commission to ensure the active involvement of all interested parties in the production, review, and updating of NECPs.

Independent institutional support for Member States and EU planning: The role of independent expert information within the Energy Union governance system should be enhanced in order to provide support to Member States in drafting NECPs and in helping the Commission to evaluate their quality. Independent expertise should provide authoritative and transparent advice to help design credible climate and energy policy and build public support for decisions. Specifically, a new independent EU-level body should be created or, alternatively, the remit of an existing EU-body (e.g. the European Environment Agency) should be expanded and strengthened to include this new role.

⁴ Current planning requirements for the non-ETS sector are weak and hard to consider 'planning' provisions per se. Thus, they are unlikely to push Member States to develop a convincing narrative on how they will meet their GHG targets. See ClientEarth (2016): "A Governance Instrument fit for purpose: is the MMR up to the task?", ClientEarth, London.

⁵ ClientEarth (2015), "Streamlining Climate and Energy Planning and Reporting: Understanding the options, risks and opportunities", ClientEarth, London.



2.3 Binding reporting mechanisms to hold Member States accountable

The post 2020 governance regime must contain credible mechanisms for holding Member States to account for their progress towards meeting their 2030 targets. In particular, legal tools are needed to monitor the implementation of commitments formulated in the NECPs and to detect issues with delivery at an early stage.

Mandatory and regular reporting requirements:

The Winter Package should include annual and biennial reporting requirements for Member States. Annual checks (e.g. reporting on indicators and GHG inventory) are necessary to facilitate early course correction, to allow the Commission to spot 'free riding', and to monitor high level outcomes for core objectives of the Energy Union. In addition, Member States should biennially submit more comprehensive and detailed progress reports so the Commission can assess their progress in implementing policies and measures contained in their NECPs. These reports will provide the Commission with necessary information to accurately monitor progress toward EU-level targets.

Reporting requirements should include binding templates:

Member State reporting on the implementation of policies and measures contained in their NECPs should be underpinned by binding templates. The templates should provide a sufficient level of detail, and build on common methodologies to ensure an accurate and comparable understanding of the quality of the reported data.

2.4 Credible monitoring & reporting by the Commission

The Commission should be required to monitor and assess the overall progress made by the Union and the Member States towards achieving the 2030 targets. Thus, it is important that the governance framework provide the following powers for the Commission:

Ability to review the data submitted by Member States:

The Commission should be required to verify the transparency, accuracy, comparability, and completeness of the information submitted, and whether Member States have complied with common reporting standards and methodologies. If necessary, the Commission should be able to require Member States to resubmit data that is inconsistent with EU-wide standards.

Ability to prepare estimates when Member States fail to report:

Where a Member State does not report required data by an established deadline, the Commission should be enabled to prepare estimates, in consultation and close cooperation with the Member State concerned.

Ability to evaluate progress towards the delivery of the 2030 targets:

On the basis of the data reported annually and biennially by Member States, the Commission should annually determine areas where Member States' performance is improving, deteriorating, or remains unchanged.

Ability to rely on independent expert advice: An independent expert should assist the Commission in collecting and compiling data, evaluating Member States' reports, and carrying out independent performance assessments.

Requirement for the Commission to produce an annual State of the Energy Union report:

The Commission should be required to produce an annual State of the Energy Union report that provides evidence on specific challenges facing EU countries and allow the Commission to prepare a country-by-country analysis of the developments and trends for the five dimensions of the Energy Union. The report should provide necessary policy guidance to Member States to avoid it from becoming a simple 'box-ticking' exercise. The report should also critically examine the Commission's steering role in achieving collective EU-wide targets.

Requirement to ensure transparency and public participation around the State of the Energy Union:

To ensure a high level of transparency, the State of the Energy Union report should be published on a Transparency Platform. The Commission should be required to discuss the State of the Energy Union report with the Council and the European Parliament. In addition, the Commission should be encouraged to set up a process for stakeholder feedback by external stakeholders, such as investors, civil society, and national stakeholders.

2.5 Enabling the Commission to support accountability and correct non-delivery of the 2030 targets

In order to ensure legal and investor certainty, the governance regime should contain a strong compliance system designed to ensure fulfilment of P&R requirements and to hold Member States accountable for persistent failure to deliver or implement their NECPs. More fundamentally, the Commission should have authority to take early action to prevent Member States from veering too far off course and to correct discrepancies with their contributions towards the climate and energy targets.

Ensuring compliance with P&R requirements

Power to enforce noncompliance with binding P&R requirements: The Commission should be able to use its enforcement powers to hold Member States accountable for failure to comply with binding P&R requirements.

Requirement to commit to greater transparency: The Commission should commit to greater transparency in the use of its traditional enforcement authority, for instance through the maintenance of a dedicated Transparency Platform that contains relevant and up-to-date information on enforcement.

Ability to take corrective action

The Winter Package should contain course corrective mechanisms that incorporate a mix of measures based on a two-pronged approach:

Annual corrective action stemming from progress monitoring and evaluation, including:

- **Ability of the Commission to issue Country-specific recommendations (CSRs) to Member States:** The Commission should be empowered to adopt CSRs annually if Member States deviate from their annual emissions allocations and from their trajectories towards the EU energy targets. CSRs would provide guidance to Member States to accelerate efforts and prevent them from falling too far behind. CSRs would also allow Member States to redress the situation as part of a more transparent process without going immediately towards punitive actions. CSRs should be published in the State of the Energy Union report.
- **Ability of the Commission to require corrective action plans:** In addition to the issuance of CSRs, where annual monitoring reveals that Member States are significantly below their 2030 trajectories, the Commission should be empowered to require Member States to submit corrective action plans, which explain how they plan to correct deviations. The Commission could prepare recommendations to inform the development of the corrective action plans. It could also have authority to suggest amendments, provide course of action, or issue a decision against a Member State's corrective action plan if the policies and measures contained therein are insufficient.

Systematic 'Stock-take' and compliance checks of delivery of the EU 2030 targets (including the 'delivery gap-fillers'):

Annual course correction mechanisms cannot be a replacement for formal, stock-taking exercises to (i) check if Member States are on the right trajectory to deliver the 2030 targets and, if necessary, (ii) adopt more stringent corrective measures, including punitive measures. Such mechanisms are crucial to ensure credibility and investor confidence. In particular, the following elements should be embedded in the design of effective compliance mechanism:

- **Stock-take compliance checks and corrective action for nationally binding targets for the non-ETS sectors:** The Commission has a strong legal mandate to introduce strict corrective measures if there is a risk of missing the nationally binding ESR target. However, the ESR proposal suggests that full accounting of target compliance will only take place in 2027, and then again in 2032. This suggests a relatively ineffective compliance system, which would place more pressure on corrective action plans as a way to ensure effectiveness. These compliance checks should be more regular if the aim is to ensure Member States keep on track.
- **Stock-take review and corrective action for EU-level energy targets ('delivery gap-fillers'):** The Commission should be required to regularly review whether the Union is at risk of missing its EU-level energy targets. If there is a lack of delivery through joint contributions, the Commission should be required to evaluate the need for both Member State- and EU-level course correction measures and activate specific instruments to 'fill the gap' (e.g. through the use of EU funds, the proposition of additional legislative measures, or the adoption of nationally binding targets etc.). To provide certainty, the legislation should provide clarity over what these measures will be. The governance regime should also provide for clear rules and procedures on how to assign accountability and responsibility for non-delivery of the EU-level targets. Again, the 'delivery gap-fillers' for renewables and energy efficiency may require their own fit-for-purpose, yet complementary and coherent, arrangements in order to allow for course correction if needed.

2.6 Review of the governance framework

Every five years, the Commission should be required to review the overall governance framework:

Review the functioning of relevant P&R rules:

The Commission should review the functioning of P&R processes to identify implementation issues or lack of compliance.

Evaluate the effectiveness of governance framework:

The Commission should be required to evaluate the effectiveness of the governance framework towards fulfilling the Energy Union objectives, in particular the achievement of the 2030 targets. The timing of such a review clause could align with the EU's legal obligation to assess efforts towards achieving Paris Agreement objectives, and its requirement to ratchet up ambition (i.e. to submit a nationally determined contribution ('NDC') every five years that reflects its highest possible ambition). In particular, the EU-level review could be part of an iterative process to prepare the EU and Member States for a more formal 2023 global stock-take process and the 2025 third round of climate pledges.

Requirement to submit a report and consider further coordinated policies: The Commission's review should be submitted to the European Parliament and to the Council. This report could include proposals to amend P&R rules, or to adopt further coordinated policies in case the regime does not deliver expected results, or if overall ambitions are threatened.



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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw.

We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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