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Legal options for designing an indicator framework to support a credible Energy Union Governance System

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Executive Summary

This report assesses legal options for ensuring that indicators are appropriately integrated into the Energy Union governance system so that they support good governance – in particular effectiveness, accountability, and transparency.

Indicators as a key component of a new Energy Union Governance System

The European Commission ('Commission') has communicated its intent to propose a legislative initiative, at the end of 2016, on the governance of the Energy Union (the 'Governance Instrument'), which will contain simplified and streamlined provisions for post-2020 climate and energy planning, reporting, and monitoring.

In this new Energy Union governance system, indicators will be an important tool in ensuring that Member States and the EU as a whole are able to meet the 2030 headline targets and wider Energy Union objectives. In particular, indicators should be able to contribute to **strategic planning** and **progress monitoring**, to allow a high level EU political dialogue on progress, and to **support compliance and timely course correction** in case of underperformance.

In its Staff Working Document on a '*Concept and first analysis of key indicators*'[1] in November 2015, the Commission revealed a number of concrete design features of the "indicator framework". Specifically, it has expressed an intention to use the set of key indicators as part of the Energy Union governance in order to (i) monitor progress against the 2030 climate and energy targets and the wider Energy Union objectives, and (ii) to lay the ground for potential accompanying response measures.[2]

However, Commission's Staff Working Document **lacks clarity with regard to legal status of indicators and fails to clearly describe how indicators will be applied in practice**. This raises serious concerns about the quality of the ultimate design of the indicator framework under the Energy Union Governance. Furthermore, the Commission has indicated that non-binding processes for the use of indicators are being thoroughly considered, which could compromise the EU's ability to ensure delivery of EU climate and energy targets and Energy Union objectives.

It is essential that the role and status of indicators are clearly defined in legislation if they are to play a meaningful role in the Energy Union governance system. More fundamentally, there is a need to specify how indicators can be used for policy planning and progress monitoring, in particular in the context of the development and implementation of Member States' National Energy and Climate Plans ('NECPs').

[1] European Commission, Monitoring progress towards the Energy Union objectives - Concept and first analysis of key indicators, Staff Working Document SWD(2015) 243 final.
[2] The Commission suggests a "systematic monitoring with key indicators is needed to assess progress over time and to provide a factual base for potential policy response".

The aim of this report

The report focuses on legal, procedural, and institutional arrangements that should underpin the use of indicators within the Energy Union governance system. Specifically, this report looks at the following:

1. Key, principle-based criteria that should guide the design of a legal framework for indicators;

2. A comparative analysis of the role, use, and legal nature of indicators under selected existing EU indicator frameworks, which should inform the design of the Energy Union indicators; and

3. Concrete legal options for designing an Energy Union "indicator framework" that is reliable, transparent, effective, and contributes to an investor-friendly environment for achieving Energy Union objectives, and in particular the 2030 targets.

The important question of the appropriate choice of key and auxiliary indicators is outside the scope of this paper, since it is discussed extensively elsewhere.[3]

Key Recommendations

In summary, we recommend that the indicator framework under the governance system includes - at a minimum - the following core design features:

1. **Key indicators should be rooted in law and their use should be made mandatory** for Member States at both the planning and reporting stages (i.e. indicators should have (i) an *-ante function* to support transparent and effective plan-making, and (ii) an *ex-post function* to ensure progress toward targets can be appropriately monitored).

2. **Key indicators should be fully integrated into the NECPs plan-making process:**

    - Key indicators should support the NECPs plan-making process, in particular by helping Member States to formulate their own national targets, objectives, and contributions to the Energy Union in quantified terms;
    - To ensure transparent, consistent, and harmonised planning, the list of selected key indicators should be incorporated within a **binding NECP template**;
    - The Commission should be enabled to assess and review Member States' planned contributions on the basis of commitments formulated around the key indicators. Based on these assessments, the governance framework could provide a legal basis for further action by the Commission in cases where (i) a Member State's draft NECP is inconsistent with its contributions/targets or (ii) Member States' joint contributions do not add up to the EU-level targets;

[3] See e.g. IDDRI (2016), *Key indicators for tracking national strategies towards EU decarbonisation: which indicators, why and how*.

3. **Key and auxiliary indicators should have a reporting and monitoring function and serve as a warning system to detect underperformance:**

   - Member States should be required to report data relating to key indicators to the Commission on an annual basis; Member States should also report on auxiliary indicators, which will primarily be used to inform interpretation of individual key indicators and provide a more complete and reliable picture of national and EU-wide progress;
   - Member States' reporting should be underpinned by a **binding reporting template** (as opposed to reporting obligations scattered across the current acquis);
   - On the basis of these indicators, the Commission should annually monitor and assess the progress made by the Union and its Member States towards achieving the 2030 targets and other Energy Union objectives, and detect those areas in which the Member States' performance is improving, deteriorating, or remains unchanged.

4. **The Commission should report annually to the Council and Parliament on outcomes of its monitoring and assessment of the key indicators**, and, where applicable, identify Member States that are underperforming. The **report should feed into the Commission's annual '*State of the Energy Union Report*'**, which should be discussed with Member States, the Council and the European Parliament, as well as with external stakeholders, such as investors, civil society groups.

5. **Key indicators should link to early course correction procedures** if they show that Member States are falling behind in certain areas. Specifically, key indicators could connect to annual course corrective mechanisms (e.g. country-specific recommendations and requirements to submit corrective actions plans) to ensure legal certainty for national-level delivery. In addition, key indicators could provide the factual base needed to perform 'milestone' reviews and formal compliance checks of the delivery of the 2030 targets, which may encompass a range of options - including punitive options - to incentivise compliance if there is a risk of missing Member States' individual and collective targets.

6. The list of indicators should not be static. The experience of the European Semester has demonstrated that **setting indicators in the rule of law does not preclude the possibility of amending the set of indicators**. In the same vein, **the Commission should be granted delegated power to review Energy Union indicators on a regular basis** (i.e. to amend the list of key and auxiliary indicators, where necessary).

7. **The Commission should establish an indicators scoreboard to promote a high level of public and media visibility,** and translate data reported by Member States into clear, comparable, and understandable information.

8. **The role of independent expert information should be enhanced within the Energy Union governance system** to assist the Commission in monitoring and evaluating individual Member States' and collective progress on the basis of key indicators. This could be achieved by 1) assigning specific legal duties to a new (or reinforced) independent expert body, and 2) expanding the mandate of technical and sector-specific EU bodies, such as the Agency for the Cooperation of Energy Regulators ('ACER') and the European Network of Transmission System Operators for Electricity ('ENTSO-E').

Chapter 1: What criteria should be used to shape how indicators are used in the new Energy Union Governance System?

Energy Union indicators will need to be supported by sufficiently robust legal standards to make sure that they comport with good governance principles, namely effectiveness, certainty, transparency, accountability, legitimacy, flexibility, and policy coherence. ClientEarth has translated these principles into a concrete set of criteria that need to be met to ensure that indicator frameworks comply with good governance (see table 1 below). These criteria will help ensure that indicators effectively contribute to credible planning, reporting and monitoring within the new governance legal regime, and to the achievement of overall Energy Union objectives.

Table 1: Criteria to assess compliance of indicator frameworks with good governance

Key principles of good governance	*List of Criteria*
Effectiveness	• *A legally binding framework* • *Clear function of indicators* • *Systematic review of the indicator framework*
Certainty (Reliability of the indicators)	• *Sufficient detail provided by indicators* • *Accuracy and reliability of indicators* • *Comparability and consistency* • *Reliable interpretation and communication*
Transparency	• *Transparency in determining and modifying indicators* • *Transparency in monitoring of progress* • *Transparency in decision-making*
Accountability	• *Requirements to account for action* • *Accountability mechanisms (e.g. enforcement or other corrective action)*
Legitimacy	• *Framework for outside stakeholders involvement* • *Formal co-legislator role for the European Parliament*

	• *Independent expert input*
Flexibility	• *Adaptability of indicators* • *Measuring progress against benchmarks* • *Flexibility in choice of policy responses*
Policy coherence	• *Systemic approach in selecting indicators* • *Consistency with a long-term perspective*

Below, we present a more detailed overview of the principle-based criteria.

1. ***Effectiveness:*** A legally binding regime is needed to make sure that the indicator framework is credible to stakeholders. *First*, the use of a common set of indicators, including the use of templates to plan and report on them, should be mandatory to ensure that Member States provide comparable data and do not ignore certain indicators. *Secondly*, the function of indicators should be clearly defined and should specify how indicators ensure sufficient progress over time. To effectively support target achievement, indicators should have (i) an *ex-ante function* (i.e. by helping to select an achievable outcome and then by determining the most efficient pathway for the selected outcome); and (ii) an *ex-post function* (i.e. comprised of reporting, oversight, and course correction elements). *Thirdly*, the Commission should systematically review the effectiveness of the indicator framework and its suitability to help deliver commonly agreed EU-level objectives.

2. ***Certainty (reliability of the indicators):*** Indicators should be credible in tracking and interpreting progress. As such, the set of indicators should provide a sufficient level of detail to support the monitoring of compliance with agreed national and EU-level targets and objectives. The choice of indicators should respond to the need for accuracy and reliability and indicators should build on common and consistent methodologies and standards to allow a comparison of progress across Member States as well as over time. To avoid misinterpretation of indicators, the data reported by Member States should be assessed and communicated along with relevant background information. Specifically, the legal framework should allow for the collection of additional quantitative and qualitative information (such as by means of auxiliary indicators) that identifies ambiguities or weaknesses in the indicators data that might affect the reliability of the results or aid in their interpretation.

3. ***Transparency:*** There should be a high level of transparency in the process of determining and modifying the rules underpinning the use of indicators. Similarly, the tracking, monitoring, and interpretation of individual Member State and collective progress should be transparent and governed by a process that is open and allows for public scrutiny. Decision-making, including the adoption of preventive or corrective measures as a result of the monitoring of indicators, should be transparent.

4. ***Accountability:*** The legal framework should ensure that Member States regularly report on indicators and submit meaningful information that relates to concrete policy targets and objectives. The Commission should also be mandated to provide effective oversight and report to the European Parliament and the Council on Member State performance towards meeting their national and EU-level commitments. If the monitoring of indicators shows lack of delivery on concrete EU climate and energy objectives and requirements, the Commission should be empowered to take additional national or EU-level remedial action. The latter includes the use of corrective measures (e.g. country-specific recommendations, obligation

to prepare a corrective action plan, suspension from EU funds, or additional EU-level measures) and - if necessary - traditional enforcement.

5. ***Legitimacy:*** Relevant stakeholders such as civil society, investors, and national public authorities should be enabled to share their views on the development of the indicator framework, respond to Member State progress, and identify inconsistencies in the surveillance process. Likewise, the European Parliament should be enabled to provide oversight and input into possible decision-making that may result from the monitoring of indicators. The indicator framework could also grant a formal oversight role to independent expert bodies, which could provide independent expert advice to support the Commission in the development of the indicators regime and provide assistance to Member States in planning and reporting on indicators.

6. ***Flexibility:*** The principle of flexibility should be integrated into the following elements of the indicator framework. *First*, amendments to the indicator framework should be permitted in order to 1) adjust underlying policy commitments, 2) account for possible conceptual and methodological improvements, and 3) account for the need for additional indicators over time. *Secondly*, indicators should allow for implementation in different national contexts, while still enabling comparisons across countries. For instance, benchmarks could be tailored to Member States' national specificities, *inter alia*, by using national trajectories towards a target or by relying on projections and thresholds against which national progress could be measured. *Thirdly*, policy interventions resulting from the monitoring of indicators could differentiate between legally binding and soft provisions (e.g. non-binding recommendations on the one hand, and obligation to prepare a corrective action plan on the other hand).

7. ***Policy coherence:*** The selection of indicators (including auxiliary indicators) should strive to identify and properly reflect key levers of change that are needed to achieve high level policy objectives. In effect, the lack of coverage of certain sectors and technological developments by indicators may fail to capture information that is detrimental for the achievement of overall ambitions and could undermine the reliability and relevance of indicators for the governance regime. Similarly, the set of indicators should support Member States in meeting their short, medium, and long-term targets and identify potential blind-spots around sectors that will be needed to achieve long term goals.[4]

The above listed criteria are used in this paper as reference points to gauge the compliance of selected indicator frameworks with good governance in the following chapter. The criteria are also relied upon to devise recommendations for the design of the framework for indicators under the Energy Union Governance System (Chapter 3).

[4] Detailed options for selecting an appropriate set of indicators are presented in a report produced by IDDR. See IDDRII (2016), *supra* note 3.

Chapter 2: Lessons from the use of indicators in other relevant EU frameworks

In assessing different options for developing an effective legal framework for Energy Union indicators, there is a need to draw lessons from how indicators are used in different policy areas. In this chapter, we will summarize a comparative analysis of selected EU indicator frameworks and identify cross-learning risks and opportunities on the basis of the criteria presented in Chapter 1. In particular, we will look at the use of indicators from the following existing EU frameworks:

Indicators under the Monitoring Mechanism Regulation	The Monitoring Mechanism Regulation ('MMR')[5] is an instrument that regulates streamlined reporting and monitoring requirements of climate policies under the 2020 framework, in particular requirements under the Effort Sharing Decision (the 'ESD')[6]along with other EU polices (e.g. the ETS) and the UN Framework Convention on Climate Change (UNFCCC). **Two different kinds of indicators are used under the MMR**. They are regulated by different legal regimes and will be discussed separately in this paper: **1) Indicators for GHG inventories**: the MMR uses indicators as part of Member States' GHG inventories, which requires Member States to report on their GHG emissions for the year X-2 (Article 7 of the MMR), with specific provisions on indicators enshrined in Article 7(1)(f) of the MMR. Indicators are, as such, one of elements of the GHG monitoring mechanism of the EU. The latter results from the implementation of Article 6(1)(a) for the ESD. **2) Indicators for Policies and Measures (PAMs)**: pursuant to Article 13(1) of the MMR, Member States have to provide the Commission with information on PAMs and on the implementation of EU policies that limit or reduce GHG emissions. This information is to include,

[5] Regulation 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC, OJ 165, 18.6.2013 p 13.
[6] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020. OJ L 140, 5.6.2009, p 136.

	where used, indicators to monitor and evaluate progress over time (Article 13(1)(c)(iv)).
Indicators under the Macroeconomic Imbalance Procedure (European Semester)[7]	The European Semester Process supports monitoring and ensuring overall progress towards the objectives of the Europe 2020 Strategy and the Economic and Monetary Union. It is organised as an annual policy cycle and includes iterative communication and cooperation processes between the European Commission and Member States, including the Council. The European Semester is composed of three pillars, including 1) the EU 2020 Integrated Guidelines under the Europe 2020 Strategy; 2) the Stability and Growth Pact (SGP); and 3) the Macroeconomic Imbalance Procedure (MIP). Indicators play a particularly important role under the MIP to address substantial macroeconomic imbalances in Member States. Under the MIP, the **Commission assesses Member States' macroeconomic performance based on an indicators scoreboard** and identifies early macroeconomic imbalances, which may have harmful spillover effects in other Member States, with a view to preventing and correcting them.

The comparative analysis presented below is not intended to be comprehensive; its purpose is to provide a summary overview of the selected indicator frameworks and to identify good and bad practices *from a legal perspective* (i.e. regardless the ability of selected indicators to accurately measure and reflect key levers of change for the achievement of high level policy objectives).

1 Indicators for GHG inventories under the MMR

A number of indicators are used under the GHG monitoring mechanism to help assess trends and comparability between Member States.

1.1 Strengths of the indicator framework for GHG inventory

The GHG indicator framework has a number of merits that offer potentials for cross-learning for indicators under the future Energy Union governance regime.

- **Binding and regular reporting on indicators.** Pursuant to Article 7(1)(f) of the MMR, Member States are required to annually report to the Commission information on a list of

[7] It is worth noting that the Commission has acknowledged that there will be clear links and complementarities between the 2030 climate and energy governance process and the national policies reported under the European Semester. See European Commission, A policy framework for climate and energy in the period from 2020 to 2030. Communication from the commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM/2014/015 final/2.

priority, additional priority and supplementary indicators for the year X-2. Embedding the indicators in a binding regime means Member States must invest in generating the data necessary to support reporting on the indicators.

- **Common and binding list of indicators.** A common (i.e. applicable to all Member States) and binding list of indicators is presented in Annex III of the MMR. Although there is no indication in the MMR that the Annex is to be used as a template, Member States generally use it as a template and attach it to their national GHG inventory submissions. The nature of the indicators is also more easily understood by all stakeholders because they are easily available. In addition, Annex III includes definitions of indicators as well as guidance on how to measure them.[8] The risk of fragmentation in data collection practices is thereby reduced as well as the risk that different Member States gather different data.
- **Clear purpose of indicators.** Indicators are used alongside the reported national GHG emissions by the EU to comply with its own reporting obligations to the UNFCCC, in particular by preparing the Union GHG inventory and by assessing Member States progress in meeting their GHG targets set out in Article 3 of the ESD.[9]
- **Quality review of reported data.** Member States and Union-level GHG inventories, including the data reported on indicators, are to be checked annually by the Commission for transparency, accuracy, consistency, comparability and completeness. Where requested by a Member State, or where those checks identify significant issues, the annual review may also involve the calculation of the resulting technical corrections necessary, in consultation with the Member States.[10]
- **Technical expert assistance.** Pursuant to Article 24 of the MMR, the European Environmental Agency ('EEA') provides expert, technical assistance to the Commission by compiling the information reported by Member States, and performing quality assurance and quality control procedures to prepare the Union greenhouse gas inventory. The EEA also consults with Member States to clarify data and other information provided. It is also responsible for, *inter alia*, disseminating information collected under the MMR, which it does by (i) publishing national and EU-level data on GHG emissions in the EEA GHG inventories; and (ii) analysis in its annual GHG inventory report.
- **Reviewability of the list of indicators.** Under Article 7(6)(a) of the MMR, the Commission is empowered to add, delete or amend indicators listed in Annex III via delegated acts. The MMR further requires that these alterations be consistent with international developments and relevant decisions adopted by the bodies of the UNFCCC, the Kyoto Protocol, and of agreements deriving from or succeeding them.
- **Reviewability of the indicator framework**. In accordance with Article 27 of the MMR, the Commission is required to regularly review the conformity of monitoring and reporting provisions under the MMR with decisions relating to the UNFCCC and the Kyoto Protocol or other Union legislation. The review may also touch upon indicators to the extent that they are part of the MMR's monitoring and reporting provisions. The Commission can then submit, if appropriate, a legislative proposal to the European Parliament and to the Council.

[8] This includes numerators/denominators. But Member States have to report their own numerators and denominators, if not provided for by the common reporting format (CRF).
[9] Articles 7(5) and 21, MMR.
[10] Articles 19(2) and (4), MMR.

1.2 Shortcomings of the indicator framework for GHG inventory

The GHG indicator framework has a number of shortcomings.

- **Lack of planning role.** Indicators under Article 7(1)(f) of the MMR do not have a planning function. This is a missed opportunity to use indicators as strategic planning tools that could help define Member States commitments and then determine the most efficient pathway for these commitments.
- **Minor role in the monitoring process beyond collecting data.** GHG inventory indicators play a rather passive monitoring role in the MMR/ESD governance system. Although indicators are examined ex-post each year and are used to comply with obligations under the ESD, they do not serve as the main tool to monitor the progress towards Member States' ESD targets (the main tools of the assessment are the national GHG inventories and the reports on the implementation of Member States' policies and measures).
- **No role for using indicators for active policy interventions.** Indicators are not associated with thresholds or benchmarks and do not link to corrective action. This reflects the fact that the MMR, as currently designed, does not contain course correction/corrective powers. While such processes exist under Article 7 of the ESD, they are not explicitly connected to the indicators for GHG inventories.
- **Partial reporting.** The practice of Member State reporting on indicators reveals the lack of stringency of the indicator framework for GHG inventories. In effect, GHG inventories, including data reported on indicators, tend to be submitted late by Member States. While information on priority indicators (including additional priority indicators) is - *for the most part* - provided by Member States, data for supplementary indicator are not always reported, thus denying the Commission the information required to monitor effectively. Our research indicates that the Commission is not trying to enforce Member States' failure to report on these indicators or make the enforcement of procedural requirement a strategic priority. This lack of enforcement could be explained by the fact that indicators are not the central component of MMR reporting, but it certainly sends a clear message to Member States that data collection is less important.
- **Weak reporting by the Commission.** The MMR contains a consequent obligation upon the Commission to report to the Council and Parliament on the basis of national inventories to assess progress made by the Union and its Member States towards fulfilling their obligations under the ESD.[11] However, the report provides specific guidance only to a handful of Member States and seems more like a box ticking exercise on the part of the Commission rather than being used as a key opportunity to provide robust policy signposts to the Member States.
- **Lack of common methodology to measure indicators.** Annex III does not provide for a common methodology to report on GHG inventory indicators. In particular, the comparability of these indicators is undermined by the fact that Member States use sometimes different underlying assumptions to measure indicators.[12]
- **Limitations of the EEA's technical assistance and lack of transparency.** While the EEA provides valuable technical support to the Commission, its role is limited by its

[11] See Article 21 of the MMR in conjunction with Article 6 of the ESD.
[12] The comparability of GHG inventory indicators is limited by the fact that Member States use sometimes different bases for accounting of numerators and denominators. In addition, different reporting formats are used between the MMR, which use absolute figures in kt/indicators, and the ESD, which relies on percentage changes. Thus, additional technical assessments are required to process the information reported by Member States.

narrowly defined legal duties. In particular, the EEA is not empowered to play any formal enforcement role to provide strong recommendations to Member States and the Commission. The EEA's limited mandate may prevent the EEA from highlighting politically sensitive weaknesses in performance by individual Member States or the EU collectively. Additionally, the online database of GHG inventories managed by the EEA lacks of transparency and accuracy. Although national GHG inventories, including indicators, are uploaded on the EEA's website, a large number of GHG inventories are not available for the public and remain under restricted access on the EEA website, thus undermining public scrutiny.

- **Absence of certain key indicators.** Although the GHG indicators cover a list of different sectors and strive to have a global approach to GHG reduction, there is a striking absence of indicators reflecting key parameters of the low-carbon transition in the list of GHG indicators (particularly in relation to energy efficiency, such as commercial and public buildings), which creates uncertainty for Member States and calls into question the effectiveness of the governance regime as a tool for tracking the emission abatement process.[13]

2 Indicators for Policies and Measures under the MMR

The MMR also refers to indicators used to monitor and better understand progress in implementing policies and measures ('PAMs').

2.1 Strengths of the indicator framework for PAMs

A number of the strengths identified in the previous section are also valid for PAMs indicators.

- **Regular reporting on indicators.** Article 13(1) of the MMR requires Member States to biennially submit information on PAMs, which *may* include information on indicators used to monitor and evaluate progress.
- **Clear purpose of indicators.** Indicators are used to monitor and better understand progress of PAMs, which may help the Commission to assess the progress made by the Union and its Member States towards meeting the GHG target set under the ESD.[14]
- **Use of implementing acts to further specify reporting obligations.** The MMR does not establish all details of reporting. Criteria for reporting structure, format and process are established by the Commission via an implementing act,[15] which adds a second legislative layer to MMR monitoring and reporting obligations. Specifically, the Commission provides, in Implementing Regulation No 749/2014,[16] a binding template for reporting on PAMs, which includes space to describe any indicators used and values for such indicators. Those values can be either ex-post or ex-ante values and Member States must specify the year for which the value applies.
- **Technical expert assistance and quality control procedures.** The EEA provides broad expert, technical assistance to the Commission, for instance in compiling and

[13] ClientEarth (2016), *Contribution by energy efficiency to the goals of the Effort Sharing Decision*, p. 12.
[14] Article 21(1), MMR.
[15] Implementing acts are dealt with by Article 291 TFEU. These are to be used where uniform conditions for implementing legally binding Union acts are required. For a more detailed discussion of Implemented and Delegated acts, see ClientEarth (2014), *Introduction to Delegated and Implementing Acts*.
[16] See in Annex XI of Commission Implementing Regulation No 749/2014 of 30 June 2014 on structure, format, submission process and review of information reported by Member States pursuant to Regulation No 525/2013 of the European Parliament and of the Council (MMR), OJ L 203, 11.7.2014, p 23.

performing quality assurance and quality control procedures on the information reported by Member States on PAMs, which may include indicators. The EEA is also tasked with communicating information collected under the MMR.[17]

2.2 Shortcomings of the indicator framework for PAMs

The legal framework for the use of indicators for PAMs is weak as it is based on non-binding arrangements.

- **No mandatory obligation to use indicators.** The MMR does not create a legally binding obligation to use indicators to monitor and evaluate progress in implementing PAMs. In effect, Member States have to provide the Commission with information on indicators only "*where used*".[18] This absence of legal obligation to use indicators has led to a lack of reporting on indicators in biennial reports and to a fragmented understanding within the Commission and the EEA about the state of play in national progress.
- **Lack of a common list of indicators.** In contrast to the indicators used for the GHG inventories, the Commission does not provide a common list of indicators that can be used for PAMs. Member States can develop and use their own indicators that are relevant in their national context. Although the Commission provides a template for reporting on PAMs that includes space to report on indicators, the template does not require the use of a common methodology, and the values reported can be either ex-post or ex-ante values. This does not ensure the comparability of information reported. It also means Member States may count what they are already doing or are good at – rather than monitoring what is really needed to deliver the transition at national level. Thus, PAMs indicators lack the level of transparency and comparability that is necessary for indicators under the Energy Union governance system.
- **Lack of planning role.** Indicators under Article 13(1)(c)(iv) of the MMR have no strategic planning function. In other words, neither the Member States nor the EU is required to link the use of indicators to forward plan-making processes.
- **Minor role in the monitoring process beyond collecting data.** PAMs indicators play a minor monitoring role and do not link to corrective action. Similarly to the GHG inventory indicators, they do not serve as the main tool to monitor the progress towards Member States' ESD targets[19] and are not used for active policy interventions.
- **Lack of transparency of the EEA database.** Member States' reports on PAMs, which may include the data reported on indicators, are contained on the EEA database. Nevertheless, a large number of national reports are under restricted access on the EEA website, and thus do not allow for public scrutiny.
- **Governance defects of implementing acts.** The use of implementing act to design the rules for the structure, format and process for reporting on national PAMs, including the binding reporting template, is very complex, technocratic, and non-transparent. The governance process could be made more visible and open to stakeholder scrutiny, perhaps aided by the Better Regulation agenda.[20] For example, citizens and

[17] Article 24, MMR.
[18] Article 13(1)(c)(iv), MMR.
[19] The main tools of the assessment are the national GHG inventories and the reports on the implementation of Member States' policies and measures.
[20] See ClientEarth (2015), *Making 'Better Regulation' better - ClientEarth's recommendations*.

stakeholders could be allowed to express their views on draft delegated and implementing acts via public consultations.[21]

3 Indicators under the Macroeconomic Imbalance Procedure

Indicators play a key role under the MIP in assessing Member States' macroeconomic performance to prevent and correct macroeconomic imbalances.

3.1 Strengths of the indicator framework under the MIP

The indicator framework under the MIP includes a number of innovative mechanisms that help ensure minimum levels of effectiveness, accountability, and transparency in assessing, preventing, and correcting macroeconomic imbalances in the Member States. In particular, the MIP incorporates enforcement mechanisms that go beyond traditional infringement proceedings normally available to the Commission:

- **A robust legal framework defining the use and purpose of indicators.** The MIP establishes a robust framework for the use of indicators as part of its structured alert mechanism, which is provided for under Regulation 1176/2011.[22] The alert mechanism consists of a scoreboard comprised of headline indicators covering the major areas of macroeconomic imbalances and adjustment issues presented in an annual Alert Mechanism Report (AMR).[23] The scoreboard is used as a tool to facilitate early identification and monitoring of imbalances in the Member States.[24] If an imbalance is found, the Commission must conduct an in-depth review and make it public, including by informing the European Parliament and the Council.[25]
- **A preventive and a corrective arm.** If a macroeconomic imbalance is identified, Countries Specific Recommendations (CSRs) should be addressed to the Member State concerned to provide guidance on appropriate policy responses (*the preventive arm*).[26] CSRs have to be endorsed by the European Council and adopted by the Council. If the Commission concludes that an excessive imbalance exists, the Commission can recommend that the Council places the Member State concerned in the excessive imbalance procedure (*the corrective arm*). The excessive imbalance procedure requires a Member State to develop and implement a corrective action plan, which is monitored and assessed by the Commission and the Council.[27] Moreover, there is a possibility of enforcement, with sanctions as last resort imposed by the Council, in respect of Member States whose currency is the euro.[28]
- **Clear process to develop the indicators scoreboard and report on indicators.** Articles 4(2) and (4) of Regulation 1176/2011 stipulate that the scoreboard should consist of relevant, practical, simple, measureable, and available indicators, which should include indicative thresholds to serve as alert levels. Mandatory reporting on indicators is

[21] Further detail available at: http://europa.eu/rapid/press-release_IP-16-2378_en.htm.
[22] Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances. OJ 2011 L306 p 25.
[23] Article 3(1), Regulation 1176/2011.
[24] Article 4(1), Regulation 1176/2011.
[25] Article 5, Regulation 1176/2011.
[26] Article 6, Regulation 1176/2011.
[27] Articles 7, 8, 9, and 10, Regulation 1176/2011.
[28] In accordance with Articles 3 and 4 of Regulation (EU) No 1174/2011, if the Member State fails to comply with corrective measures in the time period specified by the corrective action. See Regulation 11/74/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area. OJ 2011 L306 p 8.

not provided as such by the MIP and the Commission can publish data reported by Member States pursuant to other relevant EU legislation. Nevertheless, Member States have an obligation under the TFEU to transmit to the Commission details of important measures of their economic policies and any further data considered necessary in order to make surveillance of their economic policy possible.[29]

- **Auxiliary indicators.** The scoreboard is used in combination with auxiliary indicators without indicative thresholds. These auxiliary indicators provide additional relevant information to ensure a non-mechanical interpretation of the 'headline' indicators (as the 'crossing' of an indicator's threshold does not automatically signal a lack of effort). [30]
- **Information transparency.** The MIP establishes a number of rules designed to increase information transparency around the MIP procedures. For instance, the set of indicators, the thresholds, and the auxiliary indicators are to be made public and the Commission has to update the values for the indicators on the scoreboard at least on an annual basis.[31] The Commission has implemented this obligation by providing a dedicated web platform for the scoreboard, presenting up-to-date statistics on the headline and auxiliary indicators.[32] The web platform also provides access to Eurostat source data sets, available legislation, the AMRs, and the methodology used. Furthermore, CSRs, decisions to initiate an excessive imbalance procedure, and corrective plans must also be made public.[33]
- **Reviewability of the list of indicators.** The Commission is empowered to adjust or modify the composition of the MIP indicators scoreboard, where necessary.[34] As a result, new indicators have been included into the scoreboard over time,[35] though the first ten indicators of the scoreboard have not been amended recently.
- **Reviewability of the indicator framework.** The Commission has an obligation to review and report to the European Parliament and to the Council on the effectiveness of Regulation 1176/2011, and, as such, of the mechanisms for the prevention and correction of macroeconomic imbalances.[36] Such review may also encompass indicators to the extent that they are a key element of the MIP's preventive and corrective mechanisms. Where appropriate, the Commission's reports can be accompanied by proposals for amending the MIP framework.

3.2 Shortcomings of the indicator framework under the MIP

The indicator framework under the MIP contains several weaknesses.

- **Top-down process with limited public participation.** The Semester is a fundamentally top-down process, with limited public participation or involvement of national parliaments in Member States. This fails to create national ownership of the process.[37]
- **Limited role for the European Parliament.** Although the European Parliament enjoys enhanced participation in the European Semester through the 'Economic Dialogue'

[29] Article 121(3), TFEU.
[30] Article 3(2), Regulation 1176/2011.
[31] Articles 4(6) and (8), Regulation 1176/2011.
[32] Quarterly data are also shown on the MIP website, when available.
[33] Article 6, Regulation 1176/2011.
[34] Article 4(7), Regulation 1176/2011.
[35] For instance, three employment and social indicators were added in 2016.
[36] Article 16, Regulation 1176/2011.
[37] GBE (2016), *The effectiveness of the European Semester from a governance perspective*, p. 35.

(Article 14 of Regulation 1176/2011),[38] it is not placed on an equal footing with the Council. The European Parliament does not have a say in policy formulation or decision making in the European Semester, which is reserved in the Treaties to the Council and the Commission. Additionally, while the European Parliament is entitled to adopt an opinion on the ongoing Semester Process, including the CSRs that are adopted by the Council, these opinions are non-binding and do not impose any legal obligation on those to whom they are addressed.

- **Reporting on auxiliary indicators is not binding.** Reporting on auxiliary indicators is not binding (and thus not enforceable) and not all Member States have reported on them. This failure to report on auxiliary indicators has the potential to undermine the interpretation of Member States' progress under the MIP.
- **Lack of planning function.** Indicators do not have a forward-looking planning component and do not intend to help define economic policy goals, thus failing to utilise the full potential of indicators.
- **Course correction mechanisms lacking practical effectiveness.** The implementation rate of the CSRs has been very low, and certain issues are no longer addressed by the Commission in CSRs from one year to the next, although they presumably still exist.[39] In addition, experience has shown that the Commission has failed to trigger the corrective arm of the MIP even when it has had grounds to do so.[40] Furthermore, the course correction mechanism in the MIP is effectively linked to the discretion of the Council, which is an even more political body than the Commission and not likely to make implementation more effective. This raises questions about the credibility of the procedure and its ability to hold Member States to account.

4 Summary conclusions of the comparative analysis

The strengths and weaknesses of the indicator frameworks analysed in this Chapter can be summarised as follows:

1. **Creating a common list of indicators ensures Member States provide comparable data.** A common list of indicators is necessary to ensure that Member States report the same essential core data. Failure to provide a common list of indicators, as with the PAM indicators under the MMR, results in Member States making use of their own indicators. The lack of a common framework impedes the Commission's ability to compare or draw policy conclusions from reporting, and undermines comparability and transparency.

2. **Mandatory use of indicators promotes accountability and effectiveness.** Where the use of indicators is mandatory (e.g. the GHG inventories indicators and the MIP indicators), it is easier for the Commission to monitor progress toward target achievement. Similarly, Member States can be more easily held accountable for weak performance (e.g. the PAMs indicator framework). In addition, the mandatory use of indicators ensures that Member States do not diverge from the set of indicators and provide comparable data to the Commission.

[38] Pursuant to Article 14 of Regulation 1176/2011, the European Parliament can - through the 'Economic Dialogue' - invite the President of the Council, the Commission and the President of the Eurogroup to appear before it and discuss surveillance and preventive and corrective decisions taken under the Semester.
[39] GBE (2016), *supra* note 27 p 4. See also European Parliament (2016), IPOL Briefing for Economic Dialogue with Vice-President Dombrovskis and Commissioner Moscovici on the implementation of the Macroeconomic Imbalance Procedure.
[40] For more detailed discussion on the limitations of a Semester-style governance in the climate and energy context, see ClientEarth (2015), *2030 Climate and Energy Governance: assessing an Open Method of Coordination approach*.

3. **Establishing a detailed reporting framework supports credible monitoring of compliance.** Detailed and binding indicator frameworks (e.g. under the MIP), which includes comprehensive procedures for reporting, contribute towards more effective monitoring and assessment of Member States' performance, compared to a weak governance framework, such as under the framework for PAMs indicators.

4. **Granting a formal reporting role to auxiliary indicators assures reliable interpretation of progress.** The use of auxiliary indicators, as under the MIP, provides valuable information to help interpreting 'headline' indicators, and avoids arbitrary judgments of Member State performance.

5. **Using a scoreboard encourages information transparency.** The establishment of an interactive and user-friendly online indicators scoreboard (e.g. under the MIP), appears to be a valid way to increase information transparency and exert political pressure.

6. **Creating links to course correction mechanisms ensures indicators contribute to the achievement of policy objectives.** Indicators under the MMR play a minor and passive monitoring role because they do not directly lead to policy interventions or provide key governance signposts. In contrast, MIP indicators are linked to an innovative course correction mechanism, which incentivises policy delivery.

7. **Using indicators during the planning stage contributes to strategic forward planning.** All indicator frameworks assess in this Chapter lack a proper planning function and are more backward looking that forward looking, thus failing to utilise indicators as strategic planning tool to define commitments, and to help determine the most efficient pathway towards achieving these commitments.

8. **Creating more transparency around Member State non-compliance mobilises peer pressure and supports EU-level oversight.** There is a lack of transparency around Member States failure to comply with mandatory (procedural) requirements to report on GHG inventories and MIP indicators.

9. **Establishing a formal process for stakeholder involvement improves outside scrutiny.** None of the frameworks analysed provide a structured process to ensure transparency and opportunity for public participation or outside scrutiny when indicators are being tracked and Member States' performance is being assessed.

10. **Involvement of technical bodies supports the provision of independent expert advice in policy-making.** The formal involvement of a technical body with a strong analytical role (e.g. the EEA under the MMR) is helpful in providing expert advice and technical support to the Commission. Nevertheless, the mandate of the EEA will need to be strengthened appropriately in order to be able to provide strong recommendations to Member States and the Commission and to highlight the politically sensitive.

The analysis above has pointed out great differences in the quality of indicator frameworks. The analysis demonstrated that PAMs indicators under the MMR are an example of a weak form of governance. If replicated, the framework for PAMs indicators would be incapable of effectively promoting the delivery of the 2030 targets or other EU climate and energy policy objectives such as enhanced coherence and coordination, completion of the Internal Energy Market ('IEM'), or the achievement of a forward-looking climate change policy.

In contrast, GHG inventory indicators and indicators under the MIP include innovative features that establish minimum levels of transparency, accountability, and effectiveness, which could be replicated within the Energy Union governance system. While there may be attractive arguments for adopting some elements of these frameworks, the EU will need to look beyond these to avoid repeating some of their weaknesses and to ensure that the Energy Union can facilitate the delivery of long-term decarbonisation and other EU-level objectives.

Chapter 3: Legal options for using indicators to support credible Energy Union Governance

The previous Chapters have outlined the need to embed the use of indicators in a rules-based legal framework that includes binding procedural and institutional arrangements so that they effectively contribute to the delivery of Energy Union objectives. This Chapter will present concrete design options for embedding a legal framework for indicators into the new governance framework, and into the Governance Instrument in particular.

Drawing on the criteria set out in Chapter 1 and on the lessons learned from other frameworks in Chapter 2, the governance framework should ensure that indicators should have the following core functions:

- **An ex-ante planning function,** as indicators should provide a useful tool in the prospective sense for policy-making and for assessing national commitments; and,
- **An ex-post function** comprised of reporting, oversight, and course correction elements. Legal arrangements should be designed to ensure that indicators can be used to assess policy implementation, serve as a warning system to detect underperformance, and trigger further policy interventions where necessary.

Ex-ante and *ex-post* functions should be underpinned by a two-tier system for indicators in order to function efficiently, based on **1) a limited set of simple, practical, and measureable key indicators** that takes on both an **ex-ante and an ex-post function** and describes key politically agreed EU goals; and **2) a larger set of auxiliary indicators**, which will primarily be used **ex-post** to inform interpretation of individual key indicators by providing a more complete and reliable picture of national and EU progress.

In this Chapter, we identify core legal design features that should be clearly reflected in the way indicators are deployed in the new Energy Union governance legal framework.

Specifically, this chapter looks at:

- How key indicators can support a ***credible plan-making process***;
- What ***reporting and monitoring*** functions should be allocated to indicators;
- How indicators can support ***compliance and respond to lack of progress***;

- What mechanisms are necessary to ***review the list*** of Energy Union indicators on the one hand, and the ***effectiveness of the indicators framework*** on the other hand;
- How ***EU expert bodies*** can support the use of indicators in post-2020 climate and energy governance.

1 Using key indicators to support credible planning (an ex-ante function)

The governance framework should contain provisions defining the function of key indicators at the planning stage and fully integrating key indicators into the NECP development process. Specifically, the governance framework will need to incorporate rules on:

- the clarification of how key indicators will be used to define policy objectives;
- the setting of a pathway for selected policy objectives through the use of trajectories and projections;
- the use of a binding planning template that incorporates a list of common key indicators;
- the initial assessment and review of national commitments laid out in NECPs on the basis of key indicators.

1.1 Key indicators to help define policy objectives

Key indicators should be used by Member States to identify sectoral issues that should be taken into account when developing policies and measures as part of their NECPs. Specifically, key indicators should help Member States formulate their own national target levels, objectives, and contributions to Energy Union objectives in quantified terms.

In particular, the NECPs template could require Member States to set their own 'benchmarks' by **defining goals with respect to key indicators by 2030**.[41] For EU-level targets, Member States should be required to use indicators to help them establish their own national contribution to the collective targets (i.e. the renewable energy and energy efficiency targets). This would facilitate transparency around key components of Member States' national strategies, and support achievement of 2030 climate and energy targets and wider Energy Union objectives.

To fulfil this planning function adequately, **key indicators should be designed to reflect the main levers of change** and be capable of providing an overview of the climate and energy transition all the way to 2050 (including the headlines targets for 2030), as well as capture a wide array of national strategies across the EU.[42] The following table provides an overview of the Commission's first selection of key indicators.

[41] This is with the exception of the annual binding national GHG emissions limits for the period from 2021 to 2030, which will be set by the Commission.
[42] See IDDRI (2016), *supra* note 3.

Table 2: The Commission's first selection of key indicators

Most of the key indicators proposed by the Commission in its Staff Working Document reflect underlying climate and energy goals enshrined in the current acquis. These goals include in particular:

1. well-defined, quantified, and binding targets (e.g. the proposed indicators tracking the 2030 targets and the average CO2 emissions from new passenger cars);

2. less-defined, high-level but binding policy goals, including on energy security, and competitiveness (e.g. the proposed indicator tracking the level of concentration on the electricity market is inherently linked to the implementation of specific binding rules on unbundling under the Third Energy Package); and

3. less defined, high-level, and non-binding objectives (e.g. the indicator attached to low-carbon technologies patents).

It is worth noting that IDDRI has identified this first set of key indicators as rather unsystematic as it fails to reflect key levers of change that are necessary for the low-carbon transition.[43]

1.2 Key indicators to set trajectories and protections

Once Member States have defined their goals with respect to key indicators, **they should be required to use key indicators to set a pathway for the selected policy objectives**. In practical terms, the Governance Instrument should provide a legal basis to ensure that Member States quantify their expectations of how they will achieve their policy goals, in particular through the setting of target trajectories and/or the preparation of projections.

Various documents - including the *Commission's Guidance on NECPs*[44] and the *Conclusions of the European Council of November 2015*[45] - have suggested that the NECPs will contain target trajectories and integrated projections. Target trajectories and projections would be central reference points for the development of NECPs, and would provide 'benchmarks' at national and European levels, ensuring Member States' planned contributions support politically agreed EU climate and energy objectives. This planning function is also essential to enable meaningful reporting ex-post, as one needs ex-ante benchmarks against which to compare indicators.

In this context, key indicators could be regulated in different ways according to the legal nature of the policy goals associated with them. In particular, key indicators could be linked to a mix of

[43] Research has focused on the choice of concrete key and auxiliary indicators and on how to iron out these weaknesses, which goes beyond the scope of this briefing. See IDDRI (2016), *supra* note 3.
[44] The Guidance has confirmed that the NECPs will contain integrated projections as an analytical basis of the plan, including reference and policy scenarios assessing the relevant impacts of the policies and measures proposed for the period until 2030 and beyond for the energy system and for greenhouse gas emissions, including a 2050 perspective. See European Commission, *supra* note 7.
[45] The Conclusions of the European Council of November 2015 stated that the NECPs should "include trajectories for the achievement of binding greenhouse gas targets in line with relevant EU legislation, and set out realistic indicative trajectories for other objectives as well as targets, as or if Member States set them in light of the different nature and scope of the targets and objectives.". See European Council, Conclusions on 2030 Climate and Energy Policy Framework (23 and 24 October 2014), SN 79/14.

hard (for the delivery of binding targets) and soft (for the delivery of less-defined and higher level objectives) planning requirements:

1. **Indicators associated with well-defined and nationally binding targets.** There are strong arguments that Member States should be required to use indicators to help them draw both their own target trajectories and projections. Regardless of whether target trajectories are binding or indicative, they can demonstrate 'how' a Member States intends to meet its nationally binding targets and by when. In addition, projections can be useful tools to inform the development of NECPs and to provide a starting point estimate of what is needed to ensure delivery of a policy goal.

   Indicators associated with less-defined policy goals. Where key indicators are associated with higher level and less-defined targets, avoiding over-burdensome planning and maintaining simplicity and flexibility will be key. Therefore, preparing target trajectories might be inappropriate. Nevertheless, to the extent that the underlying policy goals are binding, the Governance Instrument should at least *encourage* Member States to prepare their own projections.

2. **Indicators associated with EU-level targets.** Member States should be required to use indicators to determine their planned 'pathways' to support implementation of their national contribution to EU-level targets. For binding EU-level targets (such as the renewable energy target), Member States should be required to prepare (indicative or binding) trajectories.

   The Commission should be required to compile Member States' planned contributions into an aggregated EU-level trajectory (e.g. an aggregated trajectory for the share of renewable energy and energy efficiency savings). Aggregated trajectories will be a critical reference point for ensuring that countries are planning adequately to achieve the collective EU targets, as well as a central reference point for monitoring the target's achievement.

The Governance Instrument should contain **a set of common procedures and methodologies to assist Member States in the preparation of** credible and comparable **projections**. Furthermore, substantive rules could ensure that there is a clear link between the establishment of projections and the development of the NECPs, and that projections can be used to help identify problems before they get out of hand.

1.3 Key indicators in a binding planning template

In light of the streamlining agenda, many of the policy goals attached to the proposed key indicators may no longer have sectoral legislative backing post-2020. In addition, the Commission has indicated that non-binding processes, including with regards to the use of a common list of indicators, are being considered.

Hence, to prevent Member States from departing from certain indicators and to ensure common rules apply equally to all Member States, a list of key indicators should be anchored in law. More specifically, to support transparency and investor certainty in the plan-making process, the list of selected key indicators should be **incorporated within a binding NECPs template**.

While leaving Member States free to place different weights on different indicators, according to their own national strategies, the NECPs template should provide for a common harmonised

methodology for measuring indicators. A uniform methodology is necessary to ensure accuracy, reliability, as well as consistent assessment and comparison between Member States.

1.4 Key indicators to assess and review commitments set out in NECPs

The Commission should be empowered to **assess and review Member States' planned contributions** contained in their NECPs through an iterative process using the key indicators. Moreover, the Commission should have the authority to compile national data and to establish aggregate EU-level pictures of Member States planned contributions. In this way, the Commission can ensure that the content of the plans are comparable and in line with the Energy Union strategy.[46]

Likewise, the governance framework could contain review and verification procedures to allow the Commission to measure and assure the quality of the projections prepared on the basis of key indicators and to ensure that the best possible estimates and information are provided by Member States.

Based on these assessments, the **governance framework could provide a legal basis for further action by the Commission** in cases where (i) the measures proposed in a Member State's draft NECP are inconsistent with their contributions and targets or (ii) Member States' joint contributions to not add up to the EU-level targets.

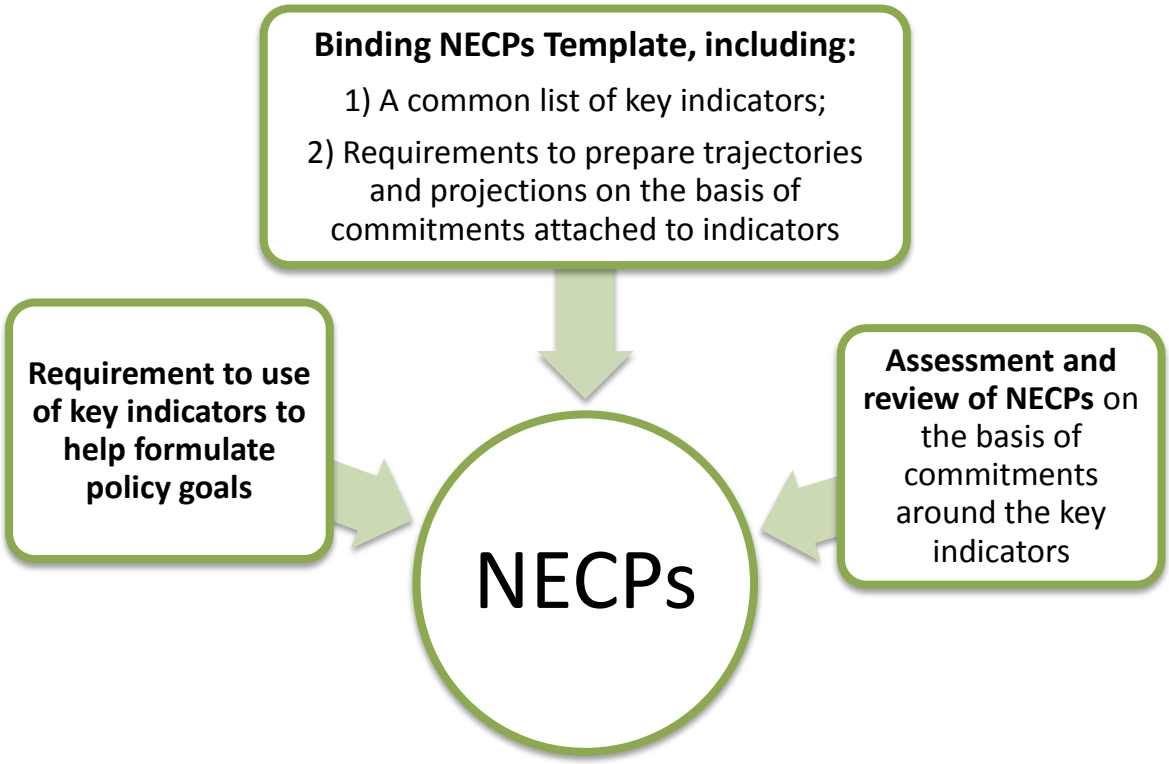
In particular, the Commission could be enabled to provide **guidance and recommendations on draft NECPs** to individual Member States to review their commitments and to ensure the 2030 national and EU-level targets are reached while ensuring the 2050 decarbonisation needs are not neglected.

If, despite the Commission's guidance and recommendations, Member States do not to submit final NECPs that guarantee the delivery of collective EU target(s), the Commission should consider adopting additional measures to prevent the creation of a gap between national contributions and the collective target(s).

A visual summary of how key indicators can be deployed in the NECPs planning process is provided in Diagram 1 below. The three arrows refer to elements of the new governance framework that will use indicators to control how Member States' NECPs are developed.

[46] This is also in line with the Commission's Communication of January 2014, which sets out the first building blocks for a post-2020 climate and energy policy framework, and specifies that the NECPs should aim to, inter alia, "enhance coherence, EU coordination and surveillance, including assessment of plans against Union level climate and energy objectives". See European Commission, *supra* note 7.

Diagram 1: Elements of the new governance framework that use indicators in the NECPs planning process



2 Designing indicators to support transparent reporting and progress monitoring (an ex-post function)

Indicators should be used as a key tool to monitor the implementation of commitments formulated in the NECPs and to detect issues with the delivery of Energy Union objectives at an early stage. For this purpose, the Governance Instrument should contain provisions that allow the Commission to track and monitor national performance and EU-target achievement based on systematic and transparent reporting on indicators over time.

2.1 Legally binding reporting obligations for Member States

The Governance Instrument should require Member States to report data relating to key indicators and to provide the Commission with the information it needs to properly monitor EU-level progress toward targets. It is also essential that Member States report data on auxiliary indicators as the latter are needed to complement the monitoring function of key indicators.

To achieve this objective, the Governance Instrument should contain the following features:

1. **Mandatory, centralised reporting requirements**

Member States should be required to report data on both key and auxiliary indicators via 'centralized' reporting obligations. In its proposed set of key indicators,[47] the Commission currently compiles already available indicators in a 'decentralised' manner: it collects indicators, which are processed by different EU bodies on the basis of data that has to be reported by Member States in accordance with different EU sectoral legislation (for instance ENTSO-E collects the data and populate the proposed indicator "Electricity interconnection capacity").[48]

In the face of the streamlining agenda, it is still unclear whether the current reporting obligations will be merged into the future Governance Instrument, kept in sectoral legislation, or simply repealed. Additionally, the Commission could develop new indicators in the future but it is uncertain whether they will be underpinned by legally binding reporting requirements. Similarly, there is no guarantee that the list of auxiliary indicators (which hasn't been released) will coincide with legally binding reporting obligations.

In order to avoid partial reporting due to the potential lack of sectoral legislative backing post-2020, there is a strong need for the Governance Instrument to require Member States to report 'centrally' on relevant data that can be processed into key and auxiliary indicators. 'Centralised' reporting obligations would also be an important support to transparency in the process and prevent double reporting.

2. **Rules ensuring Member States report on a regular basis**

Data necessary to track key and auxiliary indicators should be reported by Member States annually. These regular checks are necessary, as early knowledge of inaction will facilitate course correction at the earliest possible point. Regular checks will also allow the Commission to

[47] See European Commission, *supra* note 1 at p 81-82.
[48] Similarly, the indicators "Average CO2 emissions from new passenger cars", "Primary energy consumption", and "Final energy intensity in industry" reflect reporting obligations under the current MMR and are being proceeded by the EEA.

spot 'free riding' in relation to the GHG emissions target and the EU-level renewable energy target. It is worth highlighting that annual reporting is already required for a large number of the key indicators proposed by the Commission.[49] Assuming the Commission goes ahead with these indicators, limited additional burden would be imposed on national administrations.

3. **A binding template to report on key and auxiliary indicators**

Member States reporting on data relevant for key and auxiliary indicators should be underpinned by a binding reporting template, which could be contained in an Annex to the Governance Instrument or in an Implementing Regulation. A reporting template should build on common methodologies in order to ensure an accurate understanding of the quality of the reported data.

Assuming Member States report on indicators annually, the template should be distinct from the template designed for the biennial progress report on the implementation of the NECPs. However, to ensure policy coherence, data reported on indicators should feed into the biennial progress reports to the extent that they provide useful information on the effectiveness of implemented policies and measures.

4. **Empower Member States to submit additional information**

The reporting template could allow for Member States to explain their performance on key indicators. As such Member States could provide a short narrative in addition to the data submitted on indicators and describe facts and factors that may help explain a certain result or ranking and could be driving change or eroding progress.

2.2 Empowering the Commission to monitor and assess national performance and EU-target achievement

On the basis of data reported by Member States, the Governance Instrument should require the Commission to annually monitor and assess the progress made by the Union and its Member States under the Energy Union governance system.

Thus, it is important that the Governance Instrument includes at a minimum the following powers for the Commission to ensure accountability for policy delivery:

1. **Annual collection and compilation of data submitted by Member States**

The Governance Instrument should require the Commission to annually collect and compile the data submitted by Member States that are relevant to monitor and interpret key and auxiliary indicators. Where appropriate, relevant EU bodies could provide support to the Commission in collecting data reported by Member States and in processing them into indicators (see Section 5 of this Chapter).[50]

The Governance Instrument could grant delegated power to the Commission to specify further details on the procedures and timescales for the collection and compilation of data. Specifically,

[49] The proposed indicators on "Average CO2 emissions from new passenger cars", "Primary energy consumption", and "Final energy intensity in industry" are reported annually in accordance with reporting obligations under the MMR.
[50] This may require the Commission to make its own calculations (e.g. for the gap between greenhouse gas emissions in the non-ETS sector and targets).

the Commission could have the authority to annually review the data submitted by Member States. As such, the Commission could, according to a specific schedule, verify the transparency, accuracy, comparability, and completeness of the information submitted by Member States.

Where necessary, the Commission could be empowered to ask Member States to re-submit data that is inconsistent with EU-wide standards and methodologies. In cases when a Member State does not report on data required to compile the set of indicators by an established deadline, the Commission should have the authority to prepare estimates, in consultation and close cooperation with the Member State concerned. Additionally, the Commission should be encouraged to enforce Member States' failure to deliver practical compliance with reporting requirements.

2. **A scoreboard to promote a high level of public and media visibility**

The Governance Instrument should require the Commission to establish a scoreboard that will be used to present data reported on key and auxiliary indicators. The scoreboard should serve as an online transparency platform that should (i) translate data reported by Member States into clear, comparable, and understandable information and (ii) promote a high level of public and media visibility. The Commission should have the obligation to update the scoreboard on an annual basis by using the data collected on key and auxiliary indicators.

Because the scoreboard also has an important communication role, it should be available on a user-friendly website and should be kept as simple and straightforward as possible. Various interactive charts could be created to track the evolution of indicators (e.g. a main board for key indicators; a supplementary board for the auxiliary indicators; visuals for the ranking of countries; visuals for comparing two indicators and their evolution across time to see if the two phenomena have had similar fluctuations etc.).

3. **Assess progress on the basis of key indicators**

On the basis of the data reported on key indicators, the scoreboard should serve as a warning system to facilitate the early identification and assessment of potential discrepancies with Energy Union objectives. Specifically, the scoreboard should help the Commission determine areas where the Member States' performance is improving, deteriorating, or remains essentially unchanged.

For this purpose, the Governance Instrument should require the Commission to use reference points, or 'benchmarks', set by Member States against key indicators in their NECPs (e.g. target trajectories) to assess compliance with agreed targets and objectives. The Commission could also cross-examine performance of individual Member States and determine if a country is performing above/under EU average. Indeed, the reporting on key indicators has limited value unless these indicators can be compared to something.

Using the scoreboard, the Commission should be able to identify:

- in which areas **Member States and the EU are progressing well and at a satisfactory pace** (or areas where deviations do not require follow up action as they may be part of a national strategy and may reflect structural policy adjustments);

- the existence of **minor deviation(s)** from individual or collective agreed targets or objectives;
- the existence of **significant deviation(s)** that risks affecting the attainment of the 2030 climate and energy targets and for the functioning of the Energy Union, reflecting inadequate or insufficient Member State action.

The Governance Instrument could incorporate a clear definition of 'deviation(s)' as trends that seriously jeopardise or risk jeopardising the achievement of 2030 climate and energy targets and other Energy Union objectives.

4. Using auxiliary indicators and accompanying analyses to interpret key indicators

Similar to the MIP,[51] the Governance Instrument should facilitate more than just a purely mechanical interpretation when 'reading' the key indicators and assessing the seriousness of potential deviations. This is crucial in order to avoid arbitrary judgments about Member States' performance that could result in unwarranted policy interventions.

In effect, any key indicator can be influenced by a number of exogenous variables and the deviation from a numerical benchmark or the 'breaking' of target trajectory in the scoreboard does not necessarily signal a lack of effort. In addition, the set of key indicators is designed to capture potentially different national strategies, so that reaching 'a higher ranking' in relation to one key indicator may have more relevance for some Member States than for other.

In order to avoid misinterpretations, the assessment of key indicators should be **complemented by auxiliary indicators** that give additional sectoral details to help interpret the key indicators ex-post.

Furthermore, the assessment should be **supported by additional accompanying analyses** that could help understand the outcome of key indicators. These analyses may be particularly relevant where there is a risk that the key indicator itself fails to convey the actual change taking place and to put it into its proper context. As such, the Governance Instrument could enable the Commission to collect additional quantitative and qualitative information at Member State level which will be presented as a short narrative description of facts that may help explain a certain result or ranking. One way of doing this would be for the Commission to:

- **rely on information reported by Member States** pursuant to reporting obligations rooted in other EU sectoral legislation. The Commission should also give due consideration to any other information which Member States consider to be relevant and have communicated to the Commission as well as the policy intentions of the Member States, as reflected in their NECPs.
- **consult national experts in relation to their interpretation of the key indicators**. National experts can provide national perspectives without the same degree of government bias and support the Commission's own assessment of key indicators.[52] Such consultation processes are already performed in other areas of EU policy governance (e.g. under the European Semester) and could presumably be replicated and institutionalised within the Energy Union governance system. It is worth noting that

[51] See Article 3 (2), Regulation (EU) No 1176/2011.
[52] See IDDRI (2016), *supra* note 3.

there is also a case for providing similar, independent expert support to the Commission through the involvement of EU bodies. This is explained in further detail in Section 6 of this Chapter.

On the basis of auxiliary indicators and accompanying analyses, the Commission should be able to determine whether serious deviations from Energy Union objections and targets exist, including whether insufficient collective action poses a threat to meeting the 2030 EU-wide energy targets. If the Commission determines that target achievement is in jeopardy, policy interventions could be envisaged, which are illustrated in Section 4 of this Chapter.

2.3 Mandate annual reporting by the Commission through its State of the Energy Union

The Governance Instrument should require the Commission to submit a yearly report to the Council and Parliament summarising the outcomes of its annual monitoring and assessment of key indicators, and, where applicable, identifying minor and serious deviations from national and EU-level policy goals.

The report should feed into the Commission's annual State of the Energy Union report. In particular, it can provide 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. Data on key indicators could also help the Commission draw together the key governance signposts for the years to come and to outline best practices while identifying free-riding behaviours.

In this context, the Commission may decide to directly integrate the results of its monitoring of indicators into the State of the Energy Union report or to produce a separate annual report that could be treated as an Annex to the main State of the Energy Union report.

The State of the Energy Union report itself should be used by the Commission as a key opportunity to provide robust and specific guidance to the Member States on the basis of their annual progress and to steer the delivery of policy objectives. The report could also critically examine the Commission's steering role in achieving collective EU-wide targets.

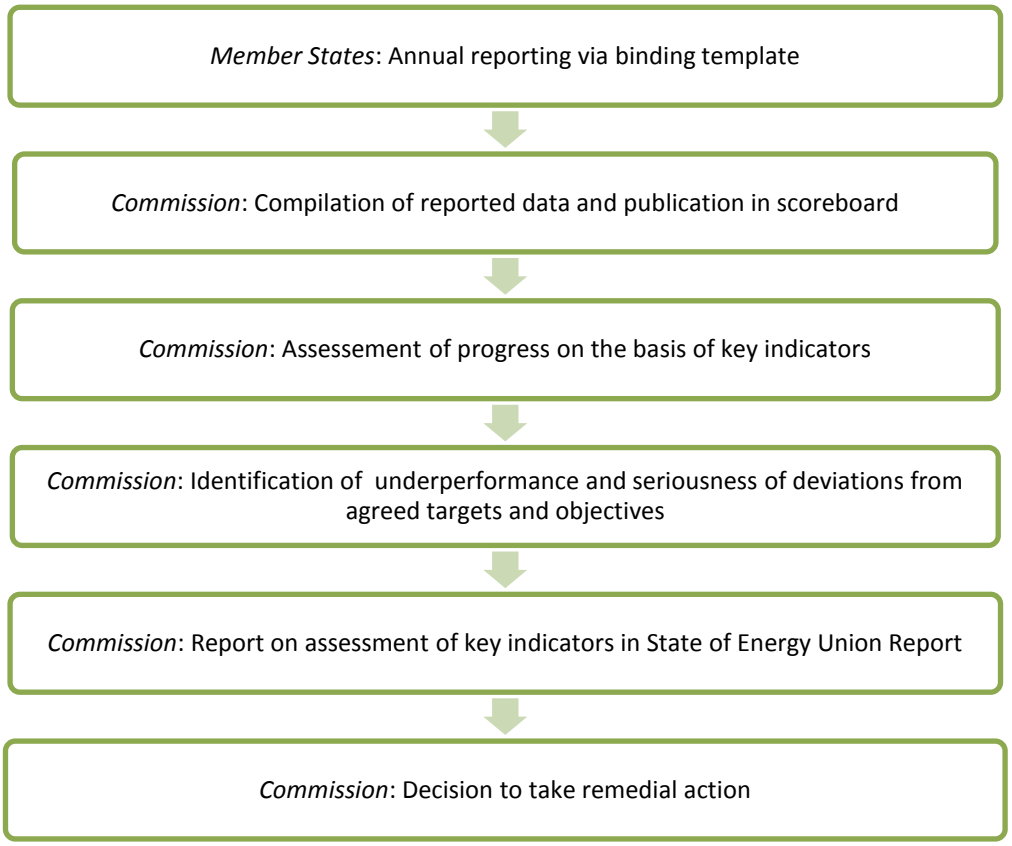
To ensure a high level of transparency, the State of the Energy Union report, and its potentially accompanying reports, should be published on a Transparency Platform. The latter should be separate from the Commission's website and be continually kept up-to-date with all relevant information.

In addition to the above, the Governance Instrument should require the Commission **to discuss** the State of the Energy Union report, including its assessment of overall EU progress towards delivering the 2030 targets, with the Council and the European Parliament.

The Commission should be encouraged to set up a **process for stakeholder feedback** in order to take into account and discuss comments made by external stakeholders, such as investors, civil society, and national stakeholders. Such a process could strengthen public scrutiny and accountability, as Member States would be required to explain changes to national policies and measures, both positive and negative.

Diagram 2 pictures and summarises Member States' and Commission's reporting and monitoring obligations with respect to key indicators.

Diagram 2: The use of key indicators in the reporting and monitoring process



3 A differentiated approach to support compliance and respond to lack of progress

Where the Commission's assessment of key indicators establishes that the achievement of climate and energy objectives and targets is in jeopardy, the future Energy Union governance legal framework should provide procedures for early course correction. In this context, valuable lessons can be drawn from the innovative indicators-based compliance mechanism under the MIP, which suggests that an appropriate level of differentiation between legally binding and soft policy goals can co-exist.

Course corrective mechanisms under the Energy Union governance system could be based on a two-pronged approach, which encompasses:

1. **Annual course correction stemming from regular progress monitoring and evaluation, including:**

    a. ***Country-specific recommendations*** for minor deviations and to keep Member States from falling too far behind;

    b. ***Corrective action plans*** where Member States are experiencing serious deviations that risk jeopardizing the achievement of Energy union objectives and 2030 targets;

2. **'Milestone' reviews and formal compliance checks of the delivery of the 2030 targets:**

    a. ***Nationally binding targets*** (i.e. thus far only relevant for the proposed post-2020 ESD): coercive measures imposed on Member States, including sanctions and alternative accountability tools linked to EU financing opportunities or other incentives;

    b. ***EU-level targets*** (i.e. the renewable energy and the energy efficiency targets): EU-level course correction measures where insufficient or inadequate collective effort puts the attainment of EU-level targets at risk.

These corrective measures should be clear and rooted in law, regardless of whether they are embedded in sector-specific legislation or in the Governance Instrument. Below, we describe in more details how these mechanisms could look, and what legal and institutional arrangements are needed to underpin their use.

3.1 Annual corrective action stemming from progress monitoring and evaluation

The annual monitoring of key indicators should be coupled with a requirement that the Commission/the Council examines the scope for policy response in case of Member States' underperformance.

Course corrective action could incorporate non binding Country-Specific Recommendations ('CSRs') and corrective action plans.

1. Country-Specific Recommendations for minor deviations

Where the Commission's **annual assessment of key indicators shows that minor deviations** risk affecting the achievement of the Member States' individual 2030 targets and other objectives set out in the Energy Union Strategy, the governance framework should provide for appropriate procedures to support the early implementation of action that Member States may need to take to keep them from falling too far behind.

Specifically, the Commission should be empowered to adopt **non-binding CSRs** in order to provide guidance to Member States and to propose strengthened or new measures to accelerate efforts. CSRs would allow Member States to redress the situation as part of a more transparent process without going immediately towards corrective - and potentially punitive - actions.

CSRs should be published in the State of the Energy Union report alongside the results of the assessment of the key indicators. In order to improve the legitimacy of preventive measures at national level, the governance legal framework could also encourage Member States to respond to the CSRs by a particular date and discuss their implementation with national stakeholders.

The Commission could monitor implementation of the CSRs and present progress reports in the subsequent iterations of the State of the Energy Union. In case of repeated failure to take CSRs into account, or if Member State efforts show insufficient impact, the Commission could be empowered to address a policy warning to Member States concerned and require Member States to submit a corrective action plan.

2. Corrective action plans for serious deviations

The reporting on indicators could also lead to the adoption by the Commission/Council of more stringent corrective action where the assessment of the scoreboard indicates **serious deviations that will jeopardize the achievement of its national targets and objectives** (including national contributions towards meeting EU-level targets), to the extent that these targets and objectives are well-defined, quantified, and enshrined in legislation.

In this context, the Commission could be empowered to require Member States to submit a 'corrective action plan' consisting of concrete policy measures, which explain how they plan to correct the deviations. The Commission could prepare recommendations to inform the development of the corrective action plan. It could also arguably have the 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. Depending on the stringency of the targets and objectives, corrective action plans could be **adopted annually or biennially**.

There is potential to develop such corrective measures because Member States have provided the Commission with a political mandate to ensure confidence for the delivery of the targets and objectives enshrined in the Energy Union Strategy. In this regard, corrective action plans are necessary to ensure that Member States' strategies are fully in line with their responsibilities for EU climate and energy governance, including for non-binding objectives.

Corrective action plans are based on flexibility with a view to steering the delivery of policy objectives (i.e. Member States have the freedom to choose the policies and measures set out in

the plans). They are essential because they require Member States to at least reconsider their pathway and strategies and hence reinforce predictability and regulatory certainty.

In light of the urgency of the climate transition, ensuring that such follow-up action can be adopted at the earliest possible point will be critical as the EU cannot afford to wait until 'formal compliance checks and reviews' take place in mid 2020s.

In order to assure the legitimacy of the corrective measures, the Commission could be required to consult with the European Parliament, the Council, and the relevant ministers (energy or environment ministers) of the Member State concerned before it adopts corrective measures. Additionally, investors and representatives of civil society could be allowed to share their views. An institutionalised stakeholder platform could be created for this purpose.

3.2 Milestone reviews and compliance checks for the delivery of the 2030 targets

Annual course correction mechanisms cannot be a replacement for formal, **milestone-based processes 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 reviews and corrective mechanisms are crucial for investors to believe the political sincerity of a radical low carbon transition. Against this background, key indicators can provide a factual base that will be used to review the delivery of the annual binding national emission limits set under the proposed post-2020 ESD and of the EU-level energy targets.

1. Nationally binding targets under the post-2020 ESD

The Commission should be empowered to **assess full quantitative accounting compliance with Member States' annual binding national emission limits** on milestone dates set under the proposed post-2020 ESD.[53] If Member States are deviating from their respective linear trajectory, the Commission should have a strong legal mandate to take more stringent corrective actions to reprimand non-compliant Member States. Alternative avenues could also be envisaged to ensure legal certainty at Member State level, including sticks and/or carrots linking to EU financing opportunities or other incentives.

The compliance clause under the legislative proposal for the post-2020 ESD (Article 9) already entails punitive actions where Member States exceed their annual binding emission allocation. However, **the 'milestone' compliance checks need to be more frequent** if the aim is to ensure Member States keep on track. The proposal suggests that full quantitative accounting compliance with the targets will first be assessed in 2027 (and then again in 2032), which is arguably too late for getting Member States back on track. In addition, this suggests a relatively ineffective compliance system that places more pressure on action plans as a way to ensure effectiveness.

[53] 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.

2. **EU-level targets**

The Commission should also be required to **perform systematic 'milestone' reviews to assess whether the Union is at risk of missing its EU-level renewable energy and energy efficiency targets** and to evaluate the need for EU-level course correction measures. The Commission has a particularly strong mandate to act to ensure that binding EU-level objectives are met (i.e. the EU-level renewable energy target).

Specifically, the Commission should propose **additional legislative measures or activate specific instruments to 'fill the gap'** in case of lack of delivery through joint contributions. There is precedent for such measures in Article 4 of the ESD, which triggered the adoption of the Energy Efficiency Directive.

3.3 Traditional enforcement by the Commission

Course correction measures should complement, rather than replace traditional enforcement mechanisms (i.e. infringement procedures) where Member States fail to comply with (i) binding planning and reporting obligations, and/or (ii) substantial requirements to achieve sectoral binding targets.

In the context of the 2020 climate and energy package, widespread non-compliance and weak enforcement of EU rules were major barriers to investor and public confidence in Europe's ability to lead the transition.[54] There is a need to remediate this failure in the post-2020 regime to ensure effective delivery of the 2030 targets and wider Energy Union objectives.

It is particularly important that the Commission fully utilises its discretionary enforcement powers where the use of non-traditional accountability tools, such as CSRs and corrective action plans, have failed to ensure the implementation and delivery of binding requirements.

4 The ability to review and amend indicators

4.1 Reviewability of the list of Energy Union indicators

Indicators (and auxiliary indicators) should not be static. The comparative study in Chapter 2 has shown that **indicators can be set in the rule of law but still be amendable**. Similarly, the forthcoming Governance Instrument should grant delegated power to the Commission to review Energy Union indicators on a regular basis.[55] Where necessary, the Commission should be able to amend the list of key and auxiliary indicators with a view to revising relevant planning and reporting templates (i.e. the NECPs planning template and the template to report on indicators).

Indicators could be subject to revision in three instances:

[54] ClientEarth (2015). *Streamlining climate and energy planning and reporting. Understanding the options, risks and opportunities*.
[55] Pursuant to Article 290 TFEU, with Delegated Acts the Commission is granted the power to supplement or amend the non-essential elements of the basic act.

1. **Adjusting underlying policy ambitions.** The Governance Instrument could incorporate a clause enabling the Commission and the Member States to adjust underlying policy ambitions upwards and to update associated benchmarks (e.g. targets trajectories).

   This is necessary given uncertainties over future variables such as technology costs and fossil fuel prices but also for setting higher targets and individual commitments to collective EU-level targets. Such a review clause could align with a review mechanism for the future NECPs and with a potential *'ratcheting review mechanism'* to implement the Paris agreement.

2. **Technical adaptations and improvement of the methodology.** Periodic adjustments to underlying methodologies and assumptions for measuring indicators may be necessary in order to take into account evolution and availability of relevant statistics and standards developed at European level.

   At present, the comparability of many of the indicators proposed by the Commission is rather limited due to the use of different accounting methodologies, underlying assumptions, and projection methods.[56] The development of a new Energy Union governance framework should be seized as an opportunity for the Commission (incl. Eurostat) and other European bodies (e.g. ACER, ENTSO-E) to review and improve existing data methodologies and reporting procedures for already available indicators. It will also offer an opportunity to develop harmonised standards for building new indicators (e.g. future indicators on local deployment of renewables and self-consumption). Standards and calculation methodologies could be included directly in secondary legislation (e.g. in relevant Articles or binding templates), and further guidance documents could be developed to assist Member States in reporting on indicators (e.g. via Eurostat procedures).

3. **Adding or deleting key and auxiliary indicators.** The Commission could be empowered to amend the list of selected key and auxiliary indicators in the light of technological changes and of the availability of better indicators to address new sectoral priorities. Certain indicators cannot be used presently because of a lack of regional or harmonised data, or because of weaknesses in the conceptual approaches upon which they are based. Nevertheless, such indicators will be instrumental in tracking high level ambition once they become fully operational.

   For instance, regional and EU-wide indicators could be developed in the future to gather information on specific issues, such as market integration, wholesale price, interconnections, and overall resilience of electricity systems throughout Europe. The Commission has already acknowledged the coverage limitations of currently available indicators and identified areas where additional regional indicators could be developed.[57]

Alterations to the list of key and auxiliary indicators should be consistent with the agreed headline targets for 2030 and be made in accordance with relevant decisions adopted at EU or international level. As such, indicators reflecting key targets that have been endorsed by the

[56] Assumptions on underlying variables that are exogenous to Member States, such as energy and CO2 prices, tend to vary significantly across countries. See e.g. European Topic Centre on Air Pollution and Climate Change Mitigation (2013). Consistency of climate and energy projections for 2020: Case study for five Member States, ETC/AMC Technical paper 2013/19 (31 August 2013). In the same manner, the Commission has not yet established the complete guidelines for accounting of all elements of the renewable energy target aggregate (e.g. energy from heat pumps) http://documents.tips/documents/analysis-of-the-latest-data-on-energy-from-renewable-sources-2012.html. It has also acknowledged that there is a need to work on the comparability of available indicators across Member States (e.g. residential energy intensity), See also *supra* note 1 at p 19.
[57] European Commission, *supra* note 1 at p 19.

Council in October 2014 (i.e. the 2030 targets)[58] should only be reviewed if the level of ambition is changed (i.e. stepped up).

To ensure legitimacy of the process, the Commission should be required to inform external stakeholders of any adjustments well in advance, and explain its reasons for suggesting changes. The Commission should also demonstrate that the adaptations do not affect the validity and reliability of the indicators as well as the possibility of drawing meaningful comparisons and policy conclusions based on successive reporting on indicators.

Stakeholders should be allowed to provide their views on the Commission's plans to adjust indicators, associated benchmarks and methodologies. In particular, the Commission should cooperate closely with the European Parliament and the Council when adjusting the framework. The Commission could use the State of the Energy Union to make changes to key and auxiliary indicators - and the underlying methodology - public.

4.2 Reviewing the functioning and effectiveness of the indicator framework

Beyond the review of the list of indicators, the Governance Instrument should require the Commission to review the use of indicators every five years. This requirement would be particularly important if non-binding planning and reporting emerge as the foundation of the indicator framework. The Commission may indeed be forced to intervene at a later date to assess whether binding measures need to be put in place to ensure the delivery of the climate and energy targets.

In particular, the Commission should have an obligation to:

1. **Review the functioning of relevant rules** regulating Energy Union indicators, including their role in monitoring, assessing, and correcting individual Member State and collective performance, with a view to identifying implementation issues, lack of compliance, and malfunctioning.

2. **Evaluate the effectiveness** of Energy Union indicators in promoting target achievement within the governance system and ensuring that national and collective progress is sufficient to fulfil the Energy Union strategy, and in particular to achieve the 2030 climate and energy targets.

The Commission's review should feed into a report submitted to the European Parliament and to the Council. This report could include proposals to amend rules supporting the use of indicators, for instance through delegated acts to *avoid politicisation of the process*,[59] or to adopt further coordinated policies in case the regime does not deliver the expected results or overall ambition.

[58] European Council, *supra* note 46.
[59] The adoption of Implementing and Delegated Acts via Comitology was traditionally a technical – yet opaque – decision-making exercise. The Comitology process provided limited opportunities for organised interests to influence outcome of delegated and implementing rule-making. With the Lisbon Treaty, Delegated Acts became increasingly politicised, with the involvement of the European Parliament and Council in the scrutiny of delegated acts as a matter of routine. In particular, Article 290 TFEU stipulates that the legislators may grant extra delegated powers (to amend basic acts) to the Commission for the sake of speed and efficiency – but where they get extra control in return. Nevertheless, Delegated Acts still deal with technical issues that generally do not attract great political attention.

5 Institutional support in Energy Union Governance

Getting the indicator framework right does not only mean developing a new and coherent set of rules. It will also require having a robust institutional framework in place to support implementation at EU and national levels. ClientEarth has previously argued that independent and expert institutions are fundamental to ensure market and public confidence and to provide advice that leads to more credible and legitimate decisions.[60]

There is a strong case for enhancing the role of independent expert information within the new Energy Union governance to assist the Commission and the Member States in decision-making in relation to indicators and to the implementation of commitments set out in Member States' NECPs. This can be achieved in particular through: 1) the involvement of an EU climate and energy independent expert body (either new or existing), and 2) strengthening the mandates of sector-specific EU and regional institutional actors.

5.1 The role of an independent EU Climate and Energy expert body

The post-2020 integrated climate and energy governance framework should provide for the involvement of a truly independent, *EU Climate and Energy expert body* ('expert body') to offer advice and technical support to the Commission and Member States with the purpose of driving the climate and energy transition forward. Indicators would only represent one element of its remit, and the body would be required to undertake wider quantitative and qualitative assessments and to provide technical advice on a wider range of matters in Energy Union governance.

An independent expert body entrusted with such technical responsibilities would remove technical analysis from the political discussion, and ensure political debate in terms of what is in the EU's best interests.

Clear legal duties

The Governance Instrument should assign the expert body clear legal duties to assist the Commission and Member States in developing long-term climate and energy policy, and specifically to help develop and implement the indicators. The body should also be permitted to engage directly with Member States and the Commission as well as with national stakeholders, investors, and civil society organisations.

The focus of the expert body in relation to Energy Union indicators should be threefold:

1. **Duties at the planning stage:**

   - **Providing technical support to Member States in setting their national commitments and preparing their trajectories, projections** and in making use of the NECPs planning templates.

[60] See ClientEarth (2014), *Health Check of EU 2020 Climate & Energy Governance*.

2. Duties at the reporting and oversight stage:

- **Provide assistance to Member States when they report** on data relevant for the use of key and auxiliary indicators (including when using the reporting template);
- **Help the Commission collect and compile data reported by Member States** on key and auxiliary indicators **and reviewing** the quality, transparency, accuracy, consistency, comparability, completeness, and timeliness of reported data;
- **Assist the Commission in critically examining** Member States progress and producing the annual State of the Energy Union report;
- **Carry out independent assessments** at Member States and EU-level. In particular, the expert body could prepare an annual report to the European Parliament and the Council on Member States and EU-level progress made in reaching overall climate and energy ambitions, in particular the 2030 headline targets. The report could outline the links between the monitoring of indicators and the data reported biennially by Member States on the implementation of policies and measures.

3. Duties at the decision-making stage:

- **Provide advice on possible policy responses**, in particular the Commission could be required to seek the expert body's advice before adopting corrective measures;
- **Assist the Commission in monitoring course correction actions** where Member States deviate from common objectives (e.g. in monitoring of the implementation of corrective action plans with the Commission).

It is imperative that the expert body's analyses and advice are clear, transparent, and considered objective and free from undue political interference. In the same manner, the expert body should be adequately resourced and staffed in order to perform its duties with full autonomy and independence. Independent advice is indeed crucial for stating the politically sensitive and clearly outlining Member States' underperformance, which is needed to drive the policy debate forward.

The Governance Instrument should require a high level of transparency and understandability for all statements, reports, and analyses of the expert body. Furthermore, the statements, reports, and analyses of the expert body should be published on a user-friendly online Transparency Platform in order to be easily accessible and understandable to the public.

Additionally, the Commission should be required to formally respond to the official expert body's advice and criticism, and publish its response on the Transparency Platform by a certain date. In the same vein, the Commission should provide public explanation of any decision to deviate from its advice on the appropriate policy response and use of corrective measures.

A new body vs extending the remit of an existing EU institution

In practical terms, the Commission could envisage the creation of an entirely new EU body, such as the *'European Energy and Climate Risk Observatory'* proposed under the 2030 governance

discussions.[61] However, the task of designing and adding a new layer to the current EU institutional landscape might be too burdensome and politically unacceptable for Member States.

Alternatively, the Commission could reinforce the legal duties of already existing EU institutions, such as the EEA, or the Joint Research Centre (JRC). The latter is the Commission's in-house science service, which also provides assistance to other EU institutions (such as to the European Parliament and the Council). The JRC has several scientific institutes, including the Institute for Energy and Transport ('IET'), which already provides scientific and technical support to EU policies related to energy and sustainable and safe energy production. However, because of its status as an 'in-house' scientific institute for the Commission, the JRC is not best placed to deliver independent scientific-technical advice to the Commission.

In contrast, the EEA s a better candidate as it is independent from the Commission and provides more substantial technical support to the Commission as regards monitoring and reporting work in climate and environment matters (e.g. as per Article 24 of the MMR). However, in its current form the EEA would need to be further empowered to play the role of a truly independent expert body.

If it were to embody the role of an expert body, the EEA could be strengthened in a number of ways. *First*, its independence should be clearly reinforced, with clear terms of appointments. *Secondly*, if the EEA is to provide independent advice and strong recommendations to Member States and the Commission, its legal duties should be expanded to reflect this new role. *Thirdly*, the EEA should be adequately resourced and its budget should be large enough to ensure that it can carry out the required work. *Fourthly*, the transparency and accuracy of the EEA's online database should be improved. Without prejudice to these recommended improvements, further analysis is needed to assess whether the EEA is best suited to play an enhanced role or whether those duties would be better delivered by another body.

5.2 Strengthen the role of technical EU and regional institutional actors

Currently, much of the data needed to populate the indicators proposed by the Commission are collected and processed not only by the Commission (e.g. its statistical wing "Eurostat") but also by a wide array of sector-specific EU institutions, such as the EEA, ENTSO-E, and ACER, in accordance with their respective remits under EU sectoral legislation.[62]

For instance, the EEA assists the Commission in processing data reported by Member States on climate-related indicators set out in Annex III of the MMR. ACER also develops and uses a wide range of key competition indicators to track progress in removing remaining barriers to the functioning of the IEM,[63] including: "*Market concentration index-wholesale gas supply*", "*Annual switching rates - electricity retail markets*", and "*Annual switching rates - gas retail markets*".[64]

As such, the Commission is already able to feed monitoring by these EU institutions into its annual reporting on indicators through the State of the Energy Union. However, these

[61] See E3G (2015), *Market Design for the Energy Union: the institutional structure for a flexible and integrated energy market*. Briefing Note.
[62] ACER's expertise lies in the harmonisation and integration of the EU energy markets and energy framework, while ENTSO-E's remit relates to the cooperation between its 41 European Transmission System Operators and developing a Pan-European electricity transmission network.
[63] These indicators are presented in ACER's annual Market Monitoring Reports.
[64] These indicators have been selected by the Commission in its Staff Working Document.

institutional actors could play a more important role in the Energy Union governance system, including through technical monitoring assistance.

Together, provisions in the Governance Instrument and revisions to existing legislation establishing ACER,[65] ENTSO-E,[66] and the EEA,[67] could empower them to:

1. **provide technical assistance to the Commission** in the collection of data reported by Member States and their compilation into indicators;

2. **develop additional indicators and harmonized methodologies** for future indicators;[68]

3. **develop regional or EU-wide indicators,** in particularly where the Commission has identified the need for harmonised indicators (e.g. on security of electricity supply across EU Member States and on intra-EU market coupling and energy trade flows);[69] and,

4. **provide advice to the Commission during the assessment of individual Member States and collective progress** on the basis of the monitoring of key indicators, in accordance with their areas of expertise. They could also be allowed to provide comments on the preparation of CSRs and other corrective measures.

Regional Security Coordinators ('RSCs') could be a further, innovative way to provide technical support to the Commission in the development and monitoring of new indicators on regional integration and operational coordination in the IEM (e.g. indicators on market coupling).[70] RSCs are increasingly charged with coordination between regional Transmission System Operators to ensure operational security. If empowered to act independently, they would be helpful in improving investor confidence and market integrity in the Energy Union.

It is worth noting that enabling institutional actors to provide technical support to the Commission will require a high level of independence and transparency, which is currently lacking, particularly with ENTSO-E and RSCs. More generally, expanding the remit of EU institutions to allow them to play a greater role within the Energy Union governance legal framework is likely to raise political and legal issues. Though it is beyond the scope of this briefing, the Commission needs to begin considering such issues and how these institutional actors will contribute to Energy Union governance.

[65] Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.
[66] Regulation (EC) 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity.
[67] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network.
[68] For instance, ENSTO-E has developed harmonised indicators for adequacy assessments in its "Target Methodology for Adequacy Assessment", which will include flexibility assessments, common definitions of indicators and common methodologies. See https://www.entsoe.eu/Documents/SDC%20documents/SOAF/ENTSO-E_Target_Methodology_for_Adequacy_Assessment.pdf.
[69] European Commission, *supra* note 1 at p 19.
[70] Tomas Wyns et. al. (2016), *An Effective Governance Approach for the Energy Transition in the Power Sector*.

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