

A Governance Instrument fit for purpose: is the MMR up to the task?

In late 2016, the Commission will come forward with a **legislative proposal for streamlined planning and reporting** ('P&R') for the Energy Union governance. This new legislative instrument (the 'Governance Instrument') will be vital in contributing towards the delivery of National Climate and Energy Plans ('NECPs') and the Energy Union - and in particular 2030 - objectives. As such, **the legislative proposal will need to contain robust and credible rules and mechanisms to ensure accountability, transparency and investor certainty.**

The Monitoring Mechanism Regulation (the 'MMR')¹ already provides legislative arrangements for streamlined P&R on climate policies and measures under the 2020 framework. It streamlines P&R requirements under the Effort Sharing Decision (the 'ESD')² along with P&R for other EU policies (e.g. the Emissions Trading Scheme) and the UN Framework Convention on Climate Change ('UNFCCC'). The MMR thus provides an inspirational basis for streamlining P&R under the Energy Union and is even seen as a possible foundation for the Governance Instrument.

Below, **we highlight important key elements that the new Governance Instrument needs to encompass** - whether these are contained in the MMR or a new legal instrument. Regardless of whether the MMR serves as the vehicle for the Governance Instrument, several key reforms will be required to ensure that it supports effective achievement of Energy Union objectives. Most fundamentally, the Governance Instrument will need to:

- Contain mechanisms to hold Member States & the EU accountable for their progress - or lack thereof - towards meeting the Energy Union objectives;
- Provide detailed and consistent rules for developing NECPs by Member States and improve methodologies for the development of projections and planned policies and measures;
- Serve as more than just a technical rule book for P&R, but instead facilitate transparency, understanding, and opportunity for public engagement in the Energy Union.

¹ 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 L 165, 18.6.2013 p 13

² 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.

1 The Governance Instrument must hold Member States & the EU accountable

The Governance Instrument will need to contain credible mechanisms for holding Member States and the EU to account for their progress towards meeting their 2030 targets and wider Energy Union objectives.

In this context, **the MMR already provides a strong basis for Member States reporting on the achievement of their binding greenhouse gas (GHG) emissions reduction targets.** In particular, the MMR elaborates on core reporting requirements that can be found in the ESD and requires Member States to report to the Commission on, *inter alia*, national GHG inventories, policies and measures and projections.³ The MMR also entails **rules for monitoring and reporting by the Commission** on Member States and EU-wide progress under the ESD.⁴

However, **the MMR does not contain compliance or corrective provisions** in case progress reported by Member States is insufficient for them to fulfil their ESD obligations. Traditional non-compliance procedures are instead contained in the ESD, which lists specific 'corrective actions', should a Member State exceed its annual emission allocation.⁵

Key recommendation: The Governance Instrument should either contain compliance and corrective provisions, or link them directly through sector-specific legislation. Alternative accountability mechanisms, including the use of soft regulatory tools such as the adoption of recommendations, should also be embedded or cross-referenced in the Governance Instrument in order to mobilise peer pressure and address non-compliance through a transparent process.

2 NECPs need to support investor certainty

Member States' NECPs must build upon a detailed and transparent planning framework that supports the achievement of Energy Union objectives and that provides certainty for investors regarding the Member States' medium and long-term climate and energy strategies.

The MMR is - by and large - not a planning instrument. The MMR contains semi-planning requirements, but these provisions are hard to consider 'planning' provisions per se, and are unlikely to push Member States to develop a convincing narrative on how they will meet their GHG targets.⁶ For instance, the requirement for Member States to provide information on policies and measures is more about reporting as it asks Member States to provide information on what they are already doing.⁷

The rules governing the methodology that Member States use in developing policies and measures is also weak. Even though the Commission provides recommendations to Member States while they prepare their projections, there is little concrete guidance on which EU policies

³ Articles 7, 13, and 14, respectively, of the MMR in conjunction with Article 6 of the MMR ESD.

⁴ Article 21 of the MMR in conjunction with Article 6 of the ESD.

⁵ Article 7, ESD.

⁶ Articles 13 and 14, MMR. See also ClientEarth (2016). "Pursuing good climate and energy governance through reform of the Effort Sharing Decision."

⁷ Article 13, MMR.

and measures Member States must include in their projections. A recent EEA report assessing practice of monitoring, reporting and interpreting projections over the last decade concluded that "information concerning the manner and degree to which national and EU-wide policies and measures are incorporated into the national projections is generally poor, with detailed information on the timing and expected implementation rates of different policies generally not reported."⁸

To the extent that Member States are required to **detail future planned policies and measures and to report on** projections, they retain **wide discretion regarding the implementation of specific policies and measures contained in projections.**⁹ This has resulted in the links between (planned) policies and measures and projections not being well explained by Member States.¹⁰

The Low-Carbon Development Strategy (LCDS) are the only real planning tool under the MMR. However, the MMR's provisions on LCDSs are not prescriptive and most information is qualitative.

Key recommendation: The Governance Instrument will need to incorporate detailed and prescriptive planning provisions that require Member States to produce robust and credible NECPs, including requirements for Member States to:

1. Develop consistent methodologies for the development of projections and their (planned) policies and measures, to provide a strong analytical basis for the NECPs;
2. Provide detailed information on EU policies and measures in their NECPs (with links to more detailed planning requirements in sector-specific Directives where necessary).

3 The Governance Instrument needs to be more than just a technical instrument for planning and reporting

In addition to ensuring that the Commission and stakeholders have access to information from Member States detailing their progress in achieving agreed objectives, the Governance Instrument will need to facilitate high level political buy-in from all stakeholders across the EU.

The MMR does not provide for sufficient public visibility. Aside from having a mundane and technical-sounding title, P&R under the MMR largely amounts to a technical box-ticking exercise. Although Member States must make any relevant information on their national GHG inventories and the implementation of policies and measures public and electronically available, there is no requirement to help make them understood by national stakeholders.

⁸ EEA (2015). "Projections in Hindsight: An assessment of past emission projections reported by Member States under EU air pollution and GHG legislation," *EEA Technical Report No 4/2015*, p 5.

⁹ Article 13(1)(d), MMR.

¹⁰ EEA (2015), *supra* note 8 at p 5.

Furthermore, accessing information submitted by Member States on the database managed by the EEA is very difficult, with numerous Member States' reports remaining under restricted access.

In addition to the above, the **use of implementing and delegated acts** to elaborate more detailed planning, reporting and monitoring rules under the MMR is highly technocratic, opaque, and therefore non-transparent.¹¹

Key recommendation: The Governance Instrument will need to provide a basis for high level visibility and political buy-in from stakeholders. Specifically, the Governance Instrument should:

1. Ensure that P&R does not amount only to a technical box-ticking exercise between the Member States and the Commission, but also provides transparency and understanding for outside stakeholders;
2. Provide for a structured process for stakeholder participation and outside scrutiny around Member States' NECPs, as well as their progress and compliance with achieving their climate and energy objectives;
3. Make the adoption of implementing and delegated acts more visible and open to stakeholder scrutiny (e.g. allowing stakeholders to express their views on the drafts of such acts);¹²
4. Ensure that an independent expert body such as the EEA can assist the Commission in planning, monitoring, and course correction processes.¹³

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¹¹ See in particular 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; and Commission Delegated Regulation No 666/2014 of 12 March 2014 establishing substantive requirements for a Union inventory system and taking into account changes in the global warming potentials and internationally agreed inventory guidelines pursuant to Regulation No 525/2013 of the European Parliament and of the Council Text with EEA relevance, OJ L 179, 19.6.2014, p 26.

¹² See ClientEarth (2015), "Making 'Better Regulation' better - ClientEarth's recommendations."

¹³ See ClientEarth (forthcoming). "Legal options for designing an indicator framework to support a credible Energy Union Governance System."