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How Binding are the EU's 'Binding' Renewables Targets?

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Abstract
The EU's current renewable energy legislation sets a binding EU target for renewables as a share of overall energy consumption, allied with binding national targets for renewables as well. Yet the precise implications of having imposed such 'mandatory' binding targets have received little attention to date. This contribution examines the history and evolution of such targets, the context within which they must be pursued and applied, and some of the problems in and prospects for their enforcement and effectiveness. Comparisons are drawn with other areas of EU law where appropriate and some tentative lessons learned, as well as challenges still to be faced, are offered by way of conclusion.

Keywords: EU law, energy, environment, renewable energy, binding targets

I. INTRODUCTION

The EU has legislated to require that the EU as a whole mandatorily achieves a certain level of renewable energy as a percentage of total energy consumption by 2020, and under that EU target that each Member State also achieves specific binding targets as to national renewable energy shares of consumption.[1] Why should we be interested in 'binding' targets? The use of such targets is an increasingly common technique, trying to encourage governments to act, while also providing

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[1] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16, Arts 1 and 3.

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short-, medium- and long-term signals and incentives for private investment and actors in the relevant sectors, to develop technology and support deployment on a large-scale, commercial basis over time.[2]

The adoption of such targets, the investment of significant political capital in their pursuit and achievement, and their implications for the operation of markets and regulation in the sectors to which they apply are all important reasons for trying to understand these targets. Their setting, operation and enforcement will have real consequences for those who are required, or encouraged, to meet them, and for all of us who are affected by the economic sectors where such targets apply. Given that the focus of the present contribution is the supply and consumption of energy in general, and renewable energy in particular, the far-reaching potential implications of such targets are clear for businesses, consumers and the wider political and economic situation.

One problem with a final binding target is that if enforcement can occur only once the time period has ended and the target has not been reached (especially where that overall time period is lengthy), then this stage is too late to achieve that target. It is thus worth considering how such various measures might be taken during the period for the achievement of such targets, to encourage and ultimately ensure that such targets are reached. This difficulty is underlined when we consider the importance of early action to develop and deploy renewables technologies. Such prompt measures can lead to significant cost savings, efficiency and design improvements, and thus make the future achievement of renewable energy goals easier, more efficacious and cost-effective in the medium to long term.[3]

Thus, whether such 'binding' targets are in practice susceptible of (legal) enforcement has become one important element in assessing the impact and effectiveness of EU renewable energy law and policy, ever since the adoption of 'binding' renewables targets in EU legislation in 2009. This is reflected in the most recent European Commission documentation on renewables, which aims to establish a binding EU renewables target while not retaining the current binding national targets.[4]

II. LEGAL ENFORCEMENT PERSPECTIVES

The focus here is on targets set at EU level for the proportion of overall EU energy consumption which should be taken from renewable energy sources. In particular,

[2] As Rec 14 to the Second Renewables Directive (ibid) puts it: '[t]he main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources …'. It is the movement towards the final achievement of the (binding) target over a significant period of time that renders this approach different from rules requiring the achievement of a minimum standard. Of course, it is possible to tighten such standards over time, which would bring the two approaches closer together, rendering a minimum standards approach akin to a series of binding interim trajectory targets, in the sense discussed in Part III, below.

[3] See eg COM (2007) 1, *An Energy Policy for Europe*, White Paper.

[4] COM (2014) 15, *A policy framework for climate and energy in the period from 2020 to 2030*, sections 2.2 and 4.4; and COM (2015) 80, *Energy Union Package*, p 15.

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great emphasis has been placed upon the shift – from the first to the second (and current) generation of EU renewable energy legislation – from indicative to legally binding targets for renewable energy. Yet in many ways, from a practical, pragmatic perspective, a measure is only as 'binding' as the availability of effective techniques for its enforcement. Such EU rules are made at a level above (or beyond, depending upon your preference) the State, yet the EU's law-making process preserves a strong role for the representatives of its Member States – in the Council – in shaping and approving any EU legislation, and for the national legal order in ensuring its application and enforcement.

One of the great contributions of the EU's *sui generis* legal order has been to improve the enforcement of such non-national law rules via enlisting national legal systems (and actors therein, both institutions and private parties) to secure the application and enforcement of EU law. At the EU level, such enforcement would be pursued by the Commission, bringing an 'enforcement action' against Member State(s) in the EU courts under Article 258 TFEU (see Part IV, below). At the national level, enforcement might be achieved through Quasi-'Executive' bodies (regulators/agencies, etc), but also by private parties against government or each other (in national courts). Clearly, in such situations we would typically turn to EU law doctrines like direct effect, the supremacy of EU law, indirect effect, the case law on the national legal environment,[5] and possible State liability for sufficiently serious breach of EU law.[6] With regard to State liability, tricky questions will arise in this area with regard to the standard which a potential claimant must satisfy in proving the quality/extent of a State's breach of EU law, as well as concerning the establishment of any relevant damage suffered and a causal link between such breach and such damage.

The traditional focus in EU law has very much been upon the national-level aspects of legal enforcement. This is especially effective where EU-level rules require the grant of rights to, and/or the imposition of obligations upon, private parties. This gives them a direct interest in the application and enforcement of EU law at national level (whether against each other and/or against their own State). Yet here, such targets do not generate any obvious rights in the hands of private parties;[7] thus, such classical EU law doctrines are likely to be less effectual when seeking to enforce such targets against Member States.[8]

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[5] Often referred to as the principle of 'national procedural autonomy'.

[6] Under the line of cases which started with *Francovich and Bonifaci v Italy*, C-6 and 9/90, EU:C:1991:428, and developed by *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport* ex p *Factortame (No. 3)*, C-46/93 and C-48/93, EU:C:1996:79.

[7] Although see the point about judicial review below (Part VI), especially with regard to consultation and procedure.

[8] At best, they may: generate obligations upon decision-makers to take into account their obligation to achieve such targets (see, by parity of reasoning, the obligation of endeavour or effort of the UK's Climate Change Act 2008 in *R (Friends of the Earth) v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 810); and/or establish EU Law protection (eg by EU fundamental rights or general principles of law) through bringing a national situation within EU Law's scope (eg *Carpenter*, C-60/00, EU:C:2002:434 (on the fundamental rights issue raised by Art 8 ECHR)).

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III. 'BINDING' TARGETS AND THE GENESIS OF THE 2001 RENEWABLE ELECTRICITY DIRECTIVE

This section traces the genesis of the use of renewables targets by looking at the development of renewable energy policy in Europe. Whilst targets were used from an early stage to encourage the development of renewable energy sources, the Commission, the Member States and the European Parliament generally disagreed on the desirable extent of EU involvement in national renewables support. The back-and-forth between them has characterised the recent history of EU legislative negotiations on renewable energy, with each institution focusing upon particular issues of concern, as will emerge in the following discussion.

During the 1980s, there was a growing interest in energy from renewable sources in the then European Community of 12 (EU-12).[9] An EU financial support programme to promote renewables was set up in September 1993 (the ALTENER programme), in the wake of the Rio Conference, alongside the indicative objective to increase the EU-12's share of renewables so that it would cover 8% of the total EU energy demand by 2005.[10]

Recognition of the need to promote the development of renewable energy sources gained momentum in the years leading up to the Kyoto Conference, given that the EU had (initially) adopted a negotiating position of a 15% reduction in greenhouse gas emissions by 2010, in relation to 1990.[11] In its 1996 Green Paper, a discussion-type document which formed the first major step towards establishing an EU strategy for renewable energy, the Commission acknowledged the benefits of using targets as a guideline for action to promote energy from renewable sources.[12] Most Member States had, of their own accord, already decided to set national quantifiable targets for the contribution from renewable energy sources, albeit with varying levels of commitment.[13] Whilst the Green Paper raised the question of following up on the 2005 target with a more ambitious target for 2010, for the Community as a whole, it was careful to emphasise that this did not mean 'that each and every Member State should reach a certain percentage market share of renewable sources of energy'.[14] Indeed, the target would not be legally enforceable.[15] The suggestion that targets should be indicative and that their role would be to provide useful guidance was repeated in the subsequent

[9] Council Resolution of 16 September 1986 [1986] OJ C241/1; Council Recommendation of 9 June 1988 [1988] OJ L160/46. This interest had been generated by questions of energy supply security in the wake of the 1970s oil shocks, as well as in response to the 1986 advent of specific EEC environmental competence and concerns about carbon emissions.

[10] Council Decision 93/500/EEC of 13 September 1993 [1993] OJ L235/41; see Annex I.

[11] See the Council Decision of 3 March 1997 (at the 1990th Council Meeting). The target was eventually fixed at 8%.

[12] COM (96) 576, *Renewable Energy*, Green Paper.

[13] See, generally, D Fouquet and C Jones (eds), *EU Energy Law, Volume III, Book Two: Renewable Energy in the Member States of the European Union – Parts 1 and 2* (Claeys & Casteels, 2010).

[14] Ibid p 29.

[15] Ibid p 32.

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Council Resolution of 27 June 1997,[16] which invited the Commission to develop a comprehensive strategy for the promotion of renewable sources of energy. Among other things, the new strategy was to be based on the objectives outlined in the Green Paper, including that of doubling the share of renewables by 2010.

The European Parliament responded in the form of a Resolution and proposed not only a higher objective for 2010 (namely 15%), but furthermore suggested setting national objectives, which were to be broken down by sectors of renewable energy sources.[17] The Resolution was framed in rather 'soft' terms, using vocabulary such as 'gearing' both EU and Member State policy towards an increased share of renewables and setting 'objectives' for each Member States. However, it also hinted at the need for a clearly structured framework so as to ensure Member States' progress. The European Parliament therefore proposed to develop, in cooperation with the Member States, a 'concept ... concerning which renewable energy sources' should 'be used when and where in which Member State in order to facilitate cross-border regional planning and co-operation'.[18] The aim of this would be to facilitate cross-border planning and cooperation. Moreover, it also suggested developing the principles of a model for an EU-wide supply scheme obliging electricity supply companies operating grids to take electricity generated from renewable energy sources (RES-E). The Parliament's stance on the latter would remain essentially unchanged throughout the discussions on a harmonised support scheme for RES-E.

Building on positive feedback from the European Parliament, the Member States and stakeholders, the Commission published its White Paper for a Community Strategy and Action Plan.[19] While the Commission reiterated its proposal to double the share of gross inland energy consumption from renewables by 2010, it only suggested a 12% indicative target. This lowered the bar from the 15% proposed by the European Parliament, whose calculations had clearly taken into account the planned enlargement from an EU-12 to an EU-15. The Commission did not refine the target any further, and emphasised again that it was to be the overall objective and not a legally binding tool.

The White Paper offered a somewhat mixed picture. On the one hand, the Commission acknowledged that a lack of concentrated and coordinated effort to develop Europe's renewables potential could result in a missed opportunity to foster indigenous sources of energy supply and increase their competitiveness. Member States' existing national plans to develop renewable energy sources in the medium and long term were clearly deemed insufficient to achieve this goal. On the other hand, the language used to frame the Action Plan's objectives continued to be vague, favouring flexibility and the opportunity to update the Action Plan in light of international developments and experience gained.[20] While Member States were

[16] Council Resolution of 27 June 1997 on renewable sources of energy [1997] OJ C210/1.

[17] European Parliament Resolution on Renewable sources of energy COM (96) 576 [1997] OJ C 167/160.

[18] Ibid.

[19] COM (97) 599 final.

[20] Ibid p 14; in itself, of course, a laudably reflexive technique. The question was whether it would also offer sufficiently strong incentives for renewable energy development and deployment.

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expected to encourage the development of renewables, they remained free to propose their own contribution to the overall target and adopt whichever measures they preferred. EU action was thought to be able to provide added value in terms of 'sharing' and transferring 'successful' technological and market experiences,[21] but legislative action would only be taken at EU level if national measures were 'insufficient' or 'inappropriate', and when harmonisation was 'required'.[22] Coordinating Member States' action by means of knowledge sharing, the main policy tool which emerged from the White Paper, was clearly set against the backdrop of the threat of harmonisation – yet it remained to be seen at what stage (or indeed to what extent) the Commission would consider legislative action at EU level to be 'appropriate'. With regard to electricity from renewable energy sources specifically, however, the Commission already foresaw the need for a more centralised approach. It therefore indicated its plans to propose a harmonised framework Directive to ensure that renewables would make up a sufficient contribution to the overall electricity supply.

The European Parliament's Resolution on the White Paper reiterated the need for a 15% target for renewables by 2010, as well as a specific target for the amount of electricity to be produced from renewables, 'by expecting Member States to give binding undertakings on national targets for each type of energy'. Sticking to its previous suggestions in response to the Green Paper, the Parliament continued to appear in favour of: a tighter level of control in the form of binding obligations at Member State level to achieve national targets;[23] a revision by the Commission of national plans to achieve the EU objective, at the latest by the end of 1998; and, if necessary, the introduction (by the Commission) of additional activities geared towards a minimum national increase in renewables of 7%.

The general thrust of the White Paper was endorsed by the Council which, contrary to the Parliament, considered the 12% indicative target for the EU as a whole by 2010 to 'provide useful guidance for increased efforts at [EU] level as well in Member States, bearing in mind the need to reflect differing national circumstances'.[24] This confirmed that Member States retained a great level of flexibility in developing renewables and that, in light of the subsidiarity principle, the EU's role remained complementary to those national measures. While the EU renewables agenda was clearly on track, heading for a quantified increase in the share of energy from renewables, this objective was not meant to be mandatory in nature and the planned trajectory was to be one of policy co-ordination, rather than top-down EU regulation.

The tug of war between the Parliament, the Council and the Commission over a higher level of EU control over national renewables targets came to the fore in the discussion on the Commission's subsequent formal Proposal for a Directive on the promotion of electricity from renewable energy sources in the internal electricity

[21] Ibid p 10.

[22] Ibid p 14.

[23] European Parliament Resolution on COM (97) 599 final [1998] OJ C 210/215.

[24] Council Resolution of 8 June 1998 on renewable sources of energy [1998] OJ C198/1.

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market (RES-E Directive).[25] As mentioned above, the White Paper on a Community Strategy and Action Plan already indicated the need for a harmonised framework to ensure a sufficient level of electricity from renewables. In order to achieve the 12% target, it was decided that 22.1% of electricity consumed should come from renewable energy sources by 2010. The Commission therefore proposed that Member States should set and meet national indicative targets consistent with both the 22.1% target and their national commitments under the Kyoto Protocol.[26]

The idea of coexisting sector-specific RES-E targets at EU level, translated into national targets, in combination with national commitments under the EU 'umbrella' concerning the greenhouse gas emissions required by the Kyoto Protocol, fell short of the Economic and Social Committee's (ECOSOC) approval. ECOSOC even went so far as to suggest that this might conflict with subsidiarity *vis-à-vis* the targets of the Kyoto Protocol burden sharing, as well as each Member State's sovereignty over the choice of its energy mix.[27] Interestingly, the concern was raised that the Commission's approach, despite its wording, appeared in practice to lead to binding targets rather than indicative ones – something which ECOSOC considered impossible to do on the basis of Article 95 EC (now Article 114 TFEU).[28] The ECOSOC put its finger on the fact that the legal character of 'indicative targets' remained shrouded in ambiguity, and demanded that this, as well as the question of possible sanctions for non-compliance, be clarified.[29]

The European Parliament, in response to the Proposal, recommended a higher EU target than that put forward by the Commission and insisted on mandatory national minimum targets, drawn up in participation with the Commission and subject to detailed monitoring and reporting by the Commission.[30] The Council, on the other hand, continued to propose indicative national targets.[31] The amended proposal then issued by the Commission struck a balance, suggesting that the Commission could propose individual mandatory targets where it became clear that a Member State's indicative target was inconsistent with the objective of a 22.1% total share of electricity from renewables and with national commitments under the

[25] COM (2000) 279 [2000] OJ C311 E/320.

[26] See the subsequent Council Decision 2002/358/EC concerning the approval, on behalf of the EC, of the Kyoto Protocol to the UNFCC and the joint fulfilment of commitments thereunder [2002] OJ L130/1.

[27] Opinion of the Economic and Social Committee on the Proposal for a RES-E Directive [2000] OJ C367/5, p 6.

[28] One might wonder whether this was correct, or more of a shot fired in the politics of the subsidiarity game. Such political and diplomatic sparring may become even more important in light of the wording of Art 194(2) TFEU and its possible limits upon EU energy competence. See, further, A Johnston and E van der Marel, '*Ad Lucem*? Interpreting the New EU Energy Provision, and in Particular the Meaning of Article 194(2) TFEU' (2013) 22(5) *European Energy and Environmental Law Review* 181.

[29] See note 27 above, p 7.

[30] European Parliament, Legislative Resolution on the proposal for a European Parliament and Council directive on the promotion of electricity from renewable energy sources in the internal electricity market (COM (2000) 279 – C5-0281/2000 – 2000/0116(COD)), 16 November 2000.

[31] 2318th Energy Council Meeting.

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Kyoto Protocol.[32] In its second reading of the (by then amended) Proposal, the European Parliament relented and agreed to the setting of indicative national targets. In return, it proposed a new provision which would give the Commission the possibility to strengthen the indicative targets.[33] Under the proposed provision, if the Commission concluded that the national indicative targets were likely to be inconsistent (for reasons that were unjustified and/or unrelated to new scientific evidence) with the global indicative target, the Commission would be able to address these targets and possibly propose mandatory targets. This would tie in national, European and global targets, and limit the Member States' room for manoeuvre to the realm of 'new scientific evidence'. It should be remembered that the Court of Justice of the EU has consistently taken a strict approach in interpreting the scope of 'new scientific evidence' in the context of Article 114(5) TFEU.[34] The proposed provision would therefore allow either ample or no opportunities for Member States to set targets inconsistent with the overall goal.

Those final amendments were accepted by the Commission and the Council. The First RES-E Directive was therefore set up around indicative targets which could be made mandatory in limited circumstances – subject, of course, to such a future proposal obtaining a positive vote in the Council.

IV. THE FIRST GENERATION OF EU-LEVEL RENEWABLES LEGISLATION

It should be noted that the first EU legislation in this field focused only upon the promotion of electricity from renewable sources it was, thus, inherently a sectorally-focused measure. The same is true of the 2003 Biofuels Directive.

The 2001 Renewable Electricity Directive established an EU-wide goal of securing 22.1% of electricity from renewable sources by 2010 (as part of an overall EU target of 12% of EU energy needs from renewables by the same date).

As far as the national level was concerned, Article 3 of the First Renewables Directive required Member States to adopt 'national *indicative* targets' for electricity generated from renewable sources. Member States were required to take 'appropriate steps' to encourage greater proportion of consumption of electricity which came from renewable sources (Article 3(1)). Each State had to publish a report setting 'national indicative targets', outlining measures taken or planned, and then a national report had to be published every 2 years, indicating that State's success (or not!) in meeting those targets (Article 3(2) and (3)).

[32] Commission, *An Amended Proposal for a RES-E Directive*, COM (2000) 884. It is unclear from the wording of the provision whether the Commission proposed that a mere inconsistency with a national climate change commitment could actually trigger a proposal for a mandatory target even if that target were consistent with the EU's target for electricity from renewables.

[33] European Parliament, Resolution on the Council common position for adopting a European Parliament and Council directive on the promotion of electricity produced from renewable energy sources in the internal electricity market (5583/1/2001 – C5-0133/2001 – 2000/0116(COD)), 4 July 2001.

[34] Eg Joined Cases *Land Oberösterreich and Austria v Commission*, C-439/05 P and 454/05 P, EU:C:2007:510.

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The Commission's role was to assess Member State progress towards national targets and the consistency of national efforts with the relevant EU targets. The Commission was required to report every two years, and the Directive specifically envisaged the possibility for the Commission, in the future, to propose mandatory targets for adoption in EU legislation by the European Parliament and the Council, after reporting on the experience gained from the operation of the Directive and Member States' actions in endeavouring to meet the EU's indicative target (Article 3(4)).

One outcome of this system could thus have been that Member States were led to take action 'in the shadow' of possible future EU legislative proposals and, eventually, legislation, which might move to stronger and less flexible renewables promotion measures at EU level if national efforts proved insufficient.

The Biofuels Directive contained targets for the minimum proportion of biofuels, and included EU-level reference values. [35] It required Member States to set national indicative targets taking those reference values into account (see Article 3). Yet nothing in the text of the Directive required Member States actually to achieve these targets, nor did anything in the measure specify the consequences of such failure. Of course, where Member States failed to act at all in setting targets, the Commission was willing and able to pursue enforcement actions against them under what is now Article 258 TFEU. Further, there has been 'some' target-related Commission enforcement activity, where the Italian government failed to provide any reasons for setting its biofuels target significantly below the relevant reference value.[36]

This brief survey of the first generation of EU renewables legislation suggests that it was possible for the Commission to take EU-level enforcement action where Member States: (a) had set their national targets too low (eg significantly below reference figures without explanation); and (b) had failed to take 'appropriate steps' (eg they had set no targets at all, or their proposed measures were clearly not capable of achieving targets). But there would be no breach of the Directive where a Member State simply failed to attain the indicative national target set.

This state of affairs raised a number of queries. In particular – given that the goals of such target-setting were to encourage national governments to take action, and to provide signals for private investors to develop and deploy renewable energy technology and installations – one might question how reliable, consistent and firm such national (or indeed EU) targets were. Would they really offer adequate reassurance to those actors (energy companies, new market entrants, entrepreneurs, banks and other investors, energy users/consumers) who might have wished to reply

[35] Directive 2003/30/EC [2003] OJ L123/42; now repealed, and replaced (and developed) by the relevant provisions of the Second Renewables Directive (see note 1, above), especially Arts 1–5 and 17–21. The EU's biofuels law and policy has since been reconsidered; see the Commission's proposal to reform Directives 98/70/EC and 2009/28/EC, COM (2012) 595, and the new rules amending both the Second Renewables Directive and the Fuel Quality Directive 98/70/EC [1998] OJ L350/58, embodied in Directive 2015/1513, [2015] OJ L239/1. Since these provisions largely concern indirect land use change, they will not be addressed in what follows here (although an indicative 0.5% target for advanced biofuels has been added; see the new Art 3(4)(e) Second Renewables Directive).

[36] IP/06/862 (28 June 2006).

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upon them to guide or inform their behaviour? The uncertainty generated was underlined by Commission findings that a number of Member States had made poor progress towards achieving renewables development and deployment (both in electricity and biofuels), meaning that the EU was unlikely to achieve its overall 2010 targets.[37]

These developments, and shortcomings, set the stage for the negotiations which led to the adoption of the Second Renewables Directive in 2009.

V. THE SECOND RENEWABLES DIRECTIVE 2009

Between the adoption of the First Renewables Directive and the start of negotiations for its successor, various factors had become more prominent in the EU's energy policy landscape.[38] Oil prices rose significantly (from as low as USD 23/barrel in 2001 to as high as USD 126/barrel in mid-2008); the EU's energy important dependence (particularly in oil and gas) was growing, and potential volatility in such imports generated fears of significant economic and even supply security threats; and Member State governments (and arguably their citizens/electorates) had become more convinced of the need to pursue aggressive policies to combat harmful emissions and thus address climate change. These new priorities were emphasised in the European Council[39] and the European Parliament,[40] and came to underpin the Commission's broader energy policy proposals (foreshadowed in its 2006 Green Paper),[41] adopted in its First Strategic EU Energy Review and published in the White Paper 'An Energy Policy for Europe'. Its major focus concerned the EU's fledgling emissions trading system, but it also emphasised energy efficiency policy and, crucially for our purposes here, the need for longer-term renewable energy targets at the core of a 'coherent and effective policy framework throughout the EU' in this area. A need was identified to acknowledge and monitor the changing cost levels for energy in general, to ensure that any renewables support measures were well designed;[42] further, it was highlighted that investment was needed in the present, if economies of scale were to be able to contribute to renewables cost reductions in

[37] Commission, *The Renewable Energy Progress Report*, COM (2009) 192, referring in particular to Cyprus, Finland, Latvia, Malta, Romania and Slovenia in this regard.

[38] P Hodson et al (eds), *EU Energy Law, Volume III, Book One: Renewable Energy Law and Policy in the European Union* (Claeys & Casteels, 2010), paras 1.10–1.13.

[39] With regard to renewables, see (eg) the Conclusions of the European Council meeting of 23–24 March 2006, Council Document 7775/1/06 REV10 (18 May 2006; http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/89013.pdf).

[40] European Parliament Resolution on a strategy for biomass and biofuels of 14 December 2006, calling for a 25% overall renewables target [2006] OJ C317E/890.

[41] COM (2006) 105, accompanied by a Staff Working Paper, SEC (2006) 1500.

[42] An important and ongoing theme in EU energy law and policy; see the revised State aid rules and guidelines on renewables in the General Block Exemption Regulation 651/2014/EU [2014] OJ L187/1 (especially Arts 41–43 GBER, and the Commission's Energy and Environmental Aid Guidelines 2014 [2014] OJ C200/1, sec 3.3). Many elements of these were foreshadowed in the Commission's Staff Working Document, 'Guidance for the design of renewables support schemes', SWD (2013) 439 (5 November 2013).

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future; and the potential contribution of greater renewables deployment to both enhanced energy supply security and reduced greenhouse gas emissions were also emphasised.[43]

A. A move to 'binding' targets

Alongside its White Paper, the Commission also published its 'Renewable Energy Roadmap'[44]; in both documents – in spite of indications of Member State views opposing such binding targets[45] – it called upon the Council to endorse the idea of binding targets for a 20% share of renewable energy in overall EU energy consumption by 2020, including a 10% minimum target for biofuels. This was part of the Commission's flagship '20:20:20 by 2020' proposal (concerning renewables share, energy efficiency improvements and greenhouse gas emissions reductions). At its March meeting, the European Council formally endorsed this strategy, and called for formal legislative proposals to put the plan into action.[46] In particular, the Member States accepted the idea of binding targets, both for renewables as a 20% share of overall EU energy consumption and for 10% biofuels in overall EU transport petrol and diesel consumption, both by 2020. At the same time, national governments preferred to retain flexibility at national level for each specific renewables sector. Nevertheless, this marked a significant softening of Member States' attitudes towards EU-level binding renewables targets, and was due in no small part to the inclusion of proposals for burden-sharing among the Member States for the achievement of the overall EU targets;[47] this left space for further negotiation about differentiated national targets, which together would achieve the overall EU 20% goal.[48] For its part, in the European Parliament's Report on the 'Roadmap', MEPs came out strongly in favour of EU legislation containing binding targets,[49] and this attitude would persist throughout the negotiations which led to the Second Renewables Directive.

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[43] COM (2007) 1, para 3.5.

[44] COM (2006) 848, *Renewable Energy Roadmap: Renewable energies in the 21st century: building a more sustainable future*; see also the accompanying Staff Working Paper, SEC (2006) 1719.

[45] Eg at the high-level Energy Working Group organized by the Finnish Presidency of the Council in November 2006; see van Steen in Hodson et al (eds), see note 38, above, para. 3.8.

[46] Presidency Conclusions, 2 May 2007, Doc 7724/1/07 Rev 1; Concl 1.

[47] Drawing upon lessons learned from setting up the EU's Emissions Trading System and its differential responsibilities for each Member State in contributing to an overall EU target of emissions reductions; see eg SE Weishaar, *Emissions Trading Design: A Critical Overview* (Edward Elgar, 2014), pp 67–72.

[48] For discussion of the methods investigated, and ultimately used, see Hodson et al (eds), note 38 above, paras 3.37–3.47 (van Steen). Because the approach adopted (focusing on a flat-rate increase in the renewables share of a Member State's overall energy consumption, weighted according to GDP) might come at higher cost than an approach based upon a Member State's renewables potential, measures were also included in the proposal to allow for virtual transfers between Member States; see, now, the statistical transfers regime under Art 6 of the Second Renewables Directive (discussed in A Johnston and G Block, *EU Energy Law* (Oxford University Press, 2012), 12.47–12.52).

[49] Report A6-0287/2007 (25 September 2007).

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The Commission's proposal for a new Renewables Directive arrived in early 2008[50] and, as far as the binding nature of renewables targets was concerned, the content of the proposal has survived largely unchanged in the final text of the Directive.[51] A '20% by 2020' overall EU-level target was adopted for renewable energy's share of final energy consumption, including a 10% biofuels target[52] in petrol and diesel in EU transport overall consumption, to be achieved by the same date.

B. Binding targets under the 2009 Directive

Article 3(2) of the Second Renewables Directive provides that:

> Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in Part B of Annex I.

This requirement is also clearly linked in its operation to various other provisions of the Directive. So, first, it is possible for a Member State to meet its targets using the so-called 'flexibility mechanisms' laid down elsewhere in the Directive, which include statistical transfers from one Member State to another (Article 6); joint projects between Member States (Articles 7 and 8); joint projects between one or more Member States and a third country (Articles 9 and 10); and joint support schemes covering more than one Member State (Article 11).[53]

Second, the Directive contains various provisions which focus upon specific issues that might inhibit or encourage the development and penetration of renewable energy. Article 13 requires Member States to address numerous administrative procedures, regulations and codes which might affect renewable energy installations, specifications, planning procedures (etc);[54] Article 14 focuses on obligations to provide information and/or training for all relevant actors (including consumers, builders, architects, surveyors, public authorities);[55] and Article 16 focuses specifically upon access to and the operation of transmission and distribution grids in the electricity system, to allow safe and secure operation while being able to accommodate a growing share of electricity from renewable sources. These measures include: priority or guaranteed grid access; priority dispatching of renewable installations; transparent and public rules concerning grid connection and adaptation costs; ensuring that transmission and distribution tariffs

[50] COM (2008) 19 *Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources*.

[51] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

[52] For further details on the transport and biofuels provisions, see P Hodson in Hodson *et al* (eds), note 38 above, ch 7.

[53] To date, the only quasi-example of this last technique involves an International Treaty (29 June 2011) between Sweden and Norway on a joint certificate scheme for renewables support (from 2012, due to end in 2035).

[54] See E Kottasz in Hodson et al (eds), note 38 above, ch 5, for discussion.

[55] Ibid.

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do not discriminate against renewables; and assessing in the 'National Renewable Energy Action Plan' (or 'NREAP', as required to be drawn up by Article 4)[56] whether new district heating and cooling infrastructure will be required.

Third, and centrally, the detailed content of each Member State's NREAP will be crucial to understanding how a Member State intends to reach, and is progressing towards, its national binding target. In particular, Part B of Annex I to the Directive provides an 'indicative trajectory', divided into two-year periods: Member States must have closed the gap between their current share of renewable energy and their target by 20%, then 30%, then 45%, then 65%, before finally hitting the target in the fifth two-year period. Furthermore, the Commission adopted its 'template Decision' in mid-2009,[57] which covers the minimum requirements of any NREAP as specified in Annex VI to the Directive and in effect provides a binding format to be used by the Member States in submitting their NREAP. Member States must set out the gross final energy consumption, taking account of energy efficiency measures; they must also adopt national sectoral targets and estimated renewables shares in electricity, heating and cooling, and transport; and they are required to provide a detailed coverage of measures adopted for achieving the targets (including specifics concerning support schemes in various sectors, measures for implementing Articles 13, 14 and 16, and planned use of (and potential for) flexibility mechanisms in meeting the national targets).

The level of detail involved in these minimum requirements to be addressed by any NREAP – allied with the specific provisions addressing particular topics like grid access, administrative rules and procedures, and the obligations on Member States to report every two years on progress and measures taken, in detailed fashion (Article 22) – will obviously be of relevance and importance for compliance and enforcement purposes. This will be true of the Commission's role of assessing NREAPs and Member States' performance under the Directive (see Article 23 for its monitoring and reporting functions and obligations). But it will also feed into the role of national regulatory authorities (NRAs) insofar as the EU's internal energy market legislation entrusts NRAs with specific functions in this area and/or the Member States themselves designate NRAs (or indeed some other body or agency) with an oversight or enforcement role. Some of these provisions impose specific obligations upon Member States, and failure to comply with them could clearly lead to rebukes and even formal enforcement action by the Commission under Article 258 TFEU or by private parties in national courts. We will return to these enforcement questions shortly (Part VI, below).

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[56] See, in particular, the text of Art 4(1): 'national renewable energy action plans shall set out Member States' national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020, taking into account the effects of other policy measures relating to energy efficiency on final consumption of energy, and adequate measures to be taken to achieve those national overall targets, including co-operation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses, and the measures to be taken to fulfil the requirements of Art 13 to 19'.

[57] [2009] OJ L182/33.

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But what about the enforcement of the specific provision concerning the vaunted new 'binding' targets? One problem with a final binding target is that if enforcement can occur only once the time period has ended and the target has not been reached, then it is too late to achieve that target: it would be preferable, or so the Commission thinks, for it to be able to take action against laggard Member States earlier, to get them back on track to meet their targets.[58] So, does the Directive offer wording which might assist in this regard?

C. Details concerning binding targets under the 2009 Directive

1. 'Effectively designed measures'

First, Article 3(2) refers to the requirement that Member States shall employ 'effectively designed measures' (EDMs) to 'ensure' that the renewables target is met. Yet no definition is provided in the Directive of what these might be. No doubt, this is a reflection of subsidiarity and proportionality issues relied upon by Member States during the negotiation process, to preserve that national flexibility which we mentioned above. Similarly, Article 4(1) and Annex VI of the Second Renewables Directive require Member States to specify the measures used to implement the requirements of Articles 13 to 19. So, to some degree, elements of national EDMs are in fact specified by the terms of the Directive. Given the contents of Annex VI and the template Decision, allied with various recitals to the Directive,[59] it is clear that EDMs will have to include support schemes in one form or another.

For the Commission to decide properly whether or not a national measure is 'effectively designed' and therefore implements the Directive is clearly no straightforward task. The Commission faces similar problems in other policy areas, especially where these concern environmental protection. The Court has (for these or other reasons) proven to be willing to set more or less objective standards against which the appropriateness of Member States' national implementing measures can be assessed. A good example of this is the Court's interpretation of Council Directive 79/209/EEC, the so-called Birds Directive.[60] Under the Birds Directive, Member States are required to designate 'the most suitable territories' for the conservation of certain bird species and to take 'special conservation measures' to ensure their survival and distribution (Article 4(1) and (2)). Similarly to the obligation to adopt 'effectively designed' measures under the Second Renewables Directive, the Birds Directive gives no indication of which criteria must be fulfilled for a territory to be deemed 'the most suitable', or what 'special conservation measures' should entail. In *Santoña Marshes*,[61] the Court resolved the first of these issues by stipulating that 'ornithological' criteria should form the basis of Member States' suitability

[58] Hodson et al (eds), note 38 above, paras 3.54–3.55.

[59] Rec 22, 25 and 27, in particular, make direct reference to the need for public support and national support schemes to ensure renewables development and deployment.

[60] Now amended and codified as Directive 2009/147/EC.

[61] *Commission v Spain*, C-355/90, EU:C:1993:331.

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assessment of special protection areas (SPAs).[62] This judgment significantly limits Member States' discretion to the extent that other (eg economic and social) interests may not influence their choice of SPA. The Commission can henceforth pursue a Member State for omitting to classify a territory as an SPA on the basis of relatively objective criteria – something which it succeeded in doing in *Santoña Marshes* itself. The Court moreover held that Spain had failed to take the 'appropriate steps' to avoid pollution or deterioration of the habitats in the area, an obligation listed in Article 4 (4) with regard to SPAs, despite the area never having been classified as an SPA in the first place. The principle thus established was confirmed in subsequent case-law, including the famous judgment in *Basses Corbières*.[63]

Furthermore, in *Santoña Marshes*, Spain argued that the Birds Directive only set out an obligation to achieve a result (namely the conservation of wild birds), rather than to take specific measures such as preserving, maintaining and re-establishing specific habitats.[64] The Court held that, on the contrary, these obligations existed before any reduction in the number of birds or any risk of a protected species becoming extinct needed to have materialised. It based this argument *inter alia* on the ecological value inherent in such habitats and the fact that the Directive's Preamble maintained that a sufficient diversity and area of habitats was in fact 'essential' to achieve the result of conserving wild birds.

Considering all of the above, the Court clearly saw fit to restrict the discretion which, from a narrow reading of the Birds Directive, Member States seemingly retained with regard to the conservation of wild birds.[65] Whether or not the Court engaged in 'environmental activism', it strengthened judicial control over national

[62] Eg the presence of species of birds listed in Annex I; and the presence of a 'wetland', especially one of 'international importance' (Art 4(2)). In practice the Court has often relied on conclusions presented by 'objective' associations and institutions to assert its findings. For example, the Inventory of Important Bird Areas in the European Community (IBA), whilst not legally binding, was held to contain the 'scientific evidence making it possible to assess whether a Member State has complied with its obligation to classify as SPAs the most suitable territories in number and size for conservation of the protected species' (*Commission v Netherlands*, C-3/96, EU:C:1998:238, [69] and [70]).

[63] *Commission v France*, C-374/98, EU:C:2000:670. The case is of particular interest because the ECJ held that an unclassified SPA which should have been so classified remains subject to the conservation obligations set out in Art 4(4) of the Birds Directive. This is in spite of the more relaxed conservation regime of classified sites which had been introduced after the judgment in *Santoña Marshes* by Article 6 of Habitats Directive. Contrary to Art 4(4) of the Birds Directive, the 'new' regime allows a plan or project which has an adverse effect on an SPA or SAC to be permitted for reasons of 'overriding public interest'. The Court's reasoning in *Basses Corbières* thus prevents a defaulting Member State from using the leeway introduced by the Habitats Directive and as such circumvent the conservation obligations with regard to an 'unclassified SPA'. In other words, *Basses Corbières* has created an 'extra' incentive for Member States to designate a habitat as an SPA where, on the basis of ornithological criteria, there is sufficient reason to do so.

[64] See note 61 above, para 14.

[65] Something which was apparently much needed, given the slow implementation of the Directive after its adoption. At the time *Santoña Marshes* was decided, the Commission had reported that, in its opinion, twice as many habitats should have been designated by the Member States as areas of special protection (Commission, *Eighth Report on monitoring application of Community law* [1991] OJ C338/1, p 220; L Krämer, *EU Environmental Law*, 7th ed (Sweet and Maxwell, 2012), pp 5–11.

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implementing measures. In a similar fashion, EDMs appear to be specific measures required by the Second Renewables Directive to achieve the overall result of a renewables target, and are therefore a binding obligation subject to judicial enforcement. Arguing along the lines of the Court's interpretation of the Birds Directive, one could establish certain objective criteria, derived from the Second Renewables Directive itself, to help assess whether EDMs have been taken and whether they are indeed 'effective'. Some of these are clearly identified in the Directive itself, such as the provisions concerning support schemes in recitals 22, 25 and 27 and the measures listed in Articles 13 to 19. The subsequent evolution of the Commission's 2014 Energy and Environmental Aid Guidelines (EEAG) might yet offer further criteria in this regard, although to date they have been relevant only to State aid decision-making.[66]

Failing any objective criteria against which the Commission could assess the 'effectiveness' of measures to meet the national renewables target, the reference to EDMs may therefore perhaps best be viewed as making an overall point of emphasis. It is possible that EDMs in fact foreshadow the emergence of best practices gleaned from the experience of other Member States and reported to the Commission over the life of the Directive and its indicative trajectory. However, given the early stage of development of a number of the technologies involved, and indeed the support and incentive schemes used to promote them and the difficulties of their interaction with security of supply and market/competition concerns, it may be hard to generate much in the way of hard-edged standards against which to test a Member State's measures and their design, beyond those details developed under the EEAG for State aid – rather than EDM – purposes.

A parallel can perhaps be drawn here with Directive 2010/75/EU on industrial emissions (the 'IED'), which replaces, among other things, Directive 2008/1/EC concerning integrated pollution prevention and control (the 'IPPC Directive').[67] Best available techniques (BATs) play a crucial role in pollution prevention and control. The legal definition of BATs under both the IPPC Directive and the IED is loosely formulated, leaving considerable discretion to decision-makers to judge 'which' techniques should be deemed 'best'. As a result, questions on the role of BATs focus on how they are determined, and the extent to which they must be (or are being!) relied upon.

Member States, stakeholders and NGOs exchange information on BATs, which results in the drafting of BAT reference documents (BREFs). Despite the collaborative nature of this process, participation in the information exchange appears rather unevenly distributed, as a result of which BATs contain a mix of 'political' and 'technical' elements.[68] This so-called 'Sevilla process', which was

[66] See note 42, above.

[67] Which remained in force until 6 January 2014.

[68] Art 13(1) IED does not indicate the distribution of the actors involved in the exchange process. Information on participation in the information exchange process is no longer routinely made available by the European IPPC Bureau because of database protection rules. Existing data shows that Member States, the Commission and industry dominate – with only a marginal presence of environmental

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named after the location of the European IPPC Bureau's headquarters, is potentially rife with private interest bargaining. The IED formalises the procedure of the information exchange by way of Article 13(1) and considerably changes the weight given to BREFs, and especially the 'BAT conclusions', which are contained in the BREFs (see further below).[69] Importantly, those BAT conclusions are drafted by the Commission and adopted by way of a comitology procedure, made up of Member State representatives (and not the industry) (Article 75(2)). This strengthens the legitimacy of BAT conclusions, which under the older IPPC Directive were simply published by the Commission.

Under the IPPC Directive, BATs were not to be understood as 'hard standards'. Emission limit values (ELVs), for example, were based upon BATs 'without prescribing specific technique or technology, but taking into account: the technical characteristics of the installation; its geographical location; and local environmental conditions' (Article 9(4)). Under the IED, BAT conclusions must be 'the' reference for setting permit conditions, allowing only a limited possibility to set conditions on the basis of BATs not described in those conclusions (Article 14(3)–(6)). More significantly, ELVs must be set so that, under normal operating conditions, emissions do not exceed levels associated with BATs as laid down in the BAT conclusions (Article 15(3)). Whilst Article 15(4) of the IED allows for certain derogations, these are heavily qualified and in practice may make it difficult for competent authorities to set ELVs at a lower standard.[70]

Despite their non-legally binding character, practice suggests that even under the IPPC Directive some Member States (and especially those with fewer resources to spare on environmental regulation, such as newly acceded Member States) tended to rely heavily upon BREFs in setting their own national rules on standards and techniques. This is hardly surprising, given that the Commission had indicated the need for adequate justifications to set permit conditions less stringent than the benchmarks set out in BREFs – something which it was willing to enforce before the Court (apparently despite the non-legally binding nature of BREFs).[71] The move from seemingly 'soft' to 'hard' standards under the IED is therefore, in practice, less significant than appears at first sight. Moreover, the 'mandatory' nature of BAT conclusions under the IED remains subject to various derogations – although their scope appears limited. This – in combination with the fact that reading across from

(F'note continued)
interest groups and research institutes (M Lee, *The Industrial Emissions Directive* (16 November 2012) doi: 10.2139/ssrn.2176720, pp 9–10); for further analysis of the composition of Technical Working Groups, see B Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press, 2008).

[69] Lee, ibid.

[70] B Lange, 'The EU Directive on industrial emissions: squaring the circle of integrated, harmonised and ambitious technology standards?' (2011) 13 *Environmental Law Review* 199; M Lee, 'The Ambiguity of Multi-Level Governance and (De-)harmonisation in EU Environmental Law', (2013) 15 *Cambridge Yearbook of European Legal Studies* 357.

[71] N Emmot et al, 'Policy Review: IPPC and the Sevilla Process' (2000) 10 *European Environment* 204, p 205; Lee, note 68 above, p 13.

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BAT conclusions to actual permit conditions leaves a level of policy discretion – has led to some scepticism regarding the actual distribution of authority under the new IED.[72]

All of this suggests that: first, it may still take some time for EDMs to emerge under the Second Renewables Directive, and the process for their collection at EU level and EU-wide dissemination may take some development; second, that where such EDMs are under development, they will in any case leave significant discretion to Member States in how they develop and design their own domestic regimes for renewables; and, third, that EDMs could be developed under the Second Renewables Directive via the comitology process (see Article 25 of the Directive) and, ultimately, Commission guidelines and even decisions, once sufficient information and experience has been gathered and tested. Still, while this offers greater guidance and some potential levers for the Commission in scrutinising national-level rules and policies, such renewables EDMs seem destined only slowly, if at all, to offer any real enforcement bite in terms of target trajectories and final goals. Unless, of course, that bite can be imported from the State aid field via the EEAG and the GBER;[73] relying upon the direct effect of the State aid rules, the development of quite significant detail in renewables support mechanism design can offer harder-edged enforcement tools. However, it should be remembered that the focus of the State aid rules concerns justifying the impact of State subsidies that might otherwise distort the competitive process on (here) the energy market. Yet the energy-environmental goal achievement in the sense of renewables targets has a rather different focus, concentrating on the deployment and operation of renewable electricity generation; indeed, it might be argued that until other mechanisms (like the EU ETS) for addressing explicit and implicit subsidies to other generation sources (like fossil fuels) are themselves 'effectively designed', there will remain a need to distort that energy market if renewables are to make the contribution to environmental sustainability envisaged by the Second Renewables Directive.

2. *The 'indicative trajectory'*

As outlined above, while the final targets (listed in Part A of Annex I) are binding upon Member States, the trajectory specified by the Directive in Part B of Annex I is indicative in nature. The Commission's original proposal did, however, include an extra incentive to comply with the trajectory, since Guarantees of Origin (GOs) submitted for cancellation in one Member State could only be sold to another Member State subject to the selling Member State having at least met the targets of its indicative trajectory (Article 9(1)).[74] This calculation would have been based on

[72] As pointed out by Lee, above at note 68, who also concludes that 'national regulators still have a crucial and difficult evaluative role under the IED, and monitoring and enforcement is still likely to be challenging. The likelihood is that this hard law revision will only have the intended effect if further collaborative and learning techniques are used alongside it' (p 14).

[73] See note 42, above.

[74] A Johnston et al, 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects' (2008) 17 (3) *European Energy and Environmental Law Review* 128.

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the 'immediately preceding two year period' (which would most likely have been the period immediately preceding the transfer, although that remains open to discussion). However, the complexity of a system of trade based solely upon GOs was not to the liking of the European Parliament. Claude Turmes MEP, and Rapporteur for the Parliament's Industry, Research and Energy (ITRE) Committee, feared that such a system would lead to legal uncertainty and windfall profits.[75] A number of Member States, too, had misgivings about the Commission's proposal concerning possible GO trading.[76] The final text of the Second Renewables Directive indeed downplays the role of GOs and retains the various new flexibility mechanisms which were furthermore proposed by the European Parliament in its Resolution of 17 December 2008.[77] The final Directive does not carry over the extra incentive for Member States to comply with their interim trajectory so as to be able to transfer GOs to other Member States. Transfers of GOs are still possible, but have 'the sole function of providing proof to a final customer that a given share or quantity of energy was produced from renewable sources',[78] but plays no role in a Member State's compliance with Article 3 of the Directive (which lays down the obligation on Member States to reach their mandatory national overall targets). Neither does the final text include an equivalent mechanism which would make joint projects and statistical transfers subject to compliance with the indicative trajectory.

The indicative, rather than binding, nature of the trajectory was opposed by the European Parliament, which was concerned that there would not be sufficient means to keep Member States on track to meet the EU targets and so wanted to include binding interim targets as well. Indeed, the European Parliament would also have included a direct penalty mechanism which would have seen Member States pay up for not reaching their final and/or even their mandatory interim targets. The finances thus raised would have contributed to a specific fund to be used to boost the development of renewable energy in Europe. It appears that the idea stemmed from the EU's long-standing practice of using production quotas and levies in the regulation of the internal market,[79] tools which the Committee felt it was time to use in the area of renewable energy sources, given that quotas had already become an

[75] ITRE Report on the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, 26 September 2008.

[76] Specifically, Germany, the UK and Poland, which presented their alternative: 'Non-paper: Proposal by Germany, Poland and the UK on an Alternative Renewable Flexibility Mechanism' (June 2008) (https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDQQFjAA&url=http%3A%2F%2Fwww.endsreport.com%2Fdocs%2F20080723a.doc&ei=vEwzUomcLtPs0gWyz4DoDQ&usg=AFQjCNG1yfuufUbpWGknRi8TZYaG5Xf1MQ&sig2=8Rfdohv11ElzI9aRnk9_rA) discussed in A Johnston and G Block, *EU Energy Law* (Oxford University Press, 2012), para 12.40ff.

[77] European Parliament Legislative Resolution of 17 December 2008 on the 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' (COM (2008) 19 – C6-46/3008-2008/16(COD)) [2010] C45E/132. An earlier version of the flexibility mechanisms can be found in the joint proposal by Germany, Poland and the UK (ibid).

[78] Art 2(j), and see Rec 52.

[79] Especially in the Common Agricultural Policy; see the discussion in Johnston et al (note 74 above), pp 144–145.

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instrument of environmental policy.[80] With regard to renewable energy, the European Parliament's ENVI Committee was of the opinion that EUR 90 per missed MWh of renewable energy would be an appropriate penalty basis.[81] However, the final text of the Directive retained the indicative character of the trajectory, and indeed even lowered the renewables share to be achieved by Member States thereunder for the first two two-year phases (from 25 to 20% and from 35 to 30%, respectively).[82]

So, mere failure to follow that trajectory will not amount to a breach of a Member State's obligations under the Directive. The traction which the trajectory does provide only operates in conjunction with the way in which a Member State's NREAP must contain effectively designed measures to address the range of sectoral and other issues listed in Article 4 and Annex VI. This is underlined by Article 4(4) of the Directive, which provides that:

> A Member State whose share of energy from renewable sources fell below the indicative trajectory in the immediately preceding two-year period set out in part B of Annex I, shall submit an amended national renewable energy action plan to the Commission by 30 June of the following year, setting out adequate and proportionate measures to rejoin, within a reasonable timetable, the indicative trajectory in part B of Annex I.

As a result, falling behind the schedule of the indicative trajectory triggers an obligation on a Member State to amend and re-submit its NREAP to the Commission; yet no formal 'final' decision-making powers are granted to the Commission as a result of any such departure from the trajectory. Presumably, failure to submit an amended NREAP could trigger an enforcement action by the Commission, but beyond that there is explicit no power in the Commission's hands to adopt a 'better' NREAP for the recalcitrant Member State.

This mirrors some of the provisions found in other parts of the EU's energy and environment *acquis*,[83] where the Commission's final decision-making role was kept either limited or rather un(der)specified. For example, in the first incarnation of the EU's emissions trading system (EU ETS) Directive,[84] the Commission's attempts[85] to reject the final allocation of allowances made under National Allocation Plans for

[80] ITRE Report, note 75 above, p 48, Amendments 22, 80, 102 and 131.

[81] Note 75 above, p 49, Justification for Amendments 22 and 53.

[82] In itself, this is not surprising, given expectations of time-lag in starting up a push towards renewables deployment and the associated challenges of planning clearance, investment, construction, etc), provided that such moves are underway so that an exponential (rather than linear) improvement in overall renewables share could be expected as 2020 approached.

[83] And, indeed, elsewhere in EU law: see, eg, the discussion concerning air traffic control and the Common Fisheries Policy in Part III.D, below.

[84] Directive 2003/87/EC [2003] OJ L275/32 (as subsequently amended by Directive 2009/29/EC [2009] OJ L140/63).

[85] Commission Decisions C(2007) 1295, Poland – NAP, of 26 March 2007 and Estonia – NAP, of 4 May 2007.

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phase II of the EU ETS were ultimately overturned by the Court of First Instance,[86] which ruled that the Commission's mandate extended only to checking whether the process and criteria used by the Member State were compatible with the Directive. By contrast, the final decision on allowance allocation was reserved to the Member States under the EU ETS Directive.[87] Similarly, under the Third Internal Energy Market legislative package, in some areas the relationship between national government and/or NRA decision-making powers and those of the Commission – when receiving notification of national-level decisions or querying their compatibility with the EU rules – is left unclear. A nice illustration is provided by the position under the Gas Security of Supply Regulation,[88] with regard to national decisions on making gas pipelines compatible with bi-directional flows: under Article 7(5), the Commission may 'require that the [national] authority concerned amend its decision' within four weeks, yet there is nothing to confirm that this extends to dictating the substance of that amended decision.[89] If such uncertainties can only be addressed by legal proceedings and a judicial decision (as in the EU ETS judgments),[90] this runs the risk of undermining confidence in the reliability of such systems for guiding the behaviour of private actors, whose contributions – in the fields of emissions reduction, energy market trading and development, and of course renewables development and deployment – are crucial to the success of EU and national policies in the energy-environmental sphere.

Thus, as an interim conclusion, it can be stated that the Commission has many more tools at its disposal under the Second Renewables Directive to monitor, encourage, pressure and cajole the Member States to make progress towards the binding EU targets. Some of these could generate the real prospect of harder-edged enforcement, but their likely reach is relatively limited, especially in the crucial situation where a Member State has made efforts as required by the Directive, but is still falling short of its interim trajectory and risks missing its final, binding targets.

Before moving on to consider how this survey of the provisions of the Second Renewables Directive relates to various possible EU law enforcement techniques in more detail, it is worth asking ourselves whether the notion of binding targets has

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[86] *Poland v Commission*, T-183/07, EU:T:2009:350 and *Estonia v Commission*, T-263/07, EU:T:2009:351. The Court rejected the Commission's appeals against these judgments in *Commission v Poland*, C504/09, EU:C:2012:178 and *Commission v Estonia*, C-505/09, EU:C:2012:179 (29 March 2012).

[87] Ibid, 82–133. See, now, the amended EU ETS after Directive 2009/29/EC ([2009] OJ L140/63), which provides for an EU-level setting of the number of allowances available, plus stronger Commission scrutiny and control over national actions in this area: the Court, in its judgments of 29 March 2012 (ibid), specifically referred to the need for this new legislation to bolster its decision to reject the Commission's appeals.

[88] Regulation 994/2010/EU [2010] OJ L295/1.

[89] See Johnston and Block, note 48 above, 10.66.

[90] See note 86 above. Investors and markets reacted rather strongly to the uncertainty created by the CFI and CJEU judgments for overall allowance amounts in circulation, with a carbon price drop of between EUR 3 and EUR 5 per tonne being experienced.

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been used elsewhere in EU law, and whether anything can be learned from their design and operation there.

D. Binding targets in other areas of EU law: drawing a parallel?

1. Binding targets in the European airspace

It should be noted at the outset that pickings are fairly slim in the search for the use of binding targets at EU level in other sectors. But EU legislation on air navigation services does also make use of 'binding targets', following a somewhat more detailed pattern similar to that under the Second Renewables Directive. Considering that EU law should be interpreted in a consistent manner,[91] endeavouring to draw a parallel may help us to shed some light upon the meaning and role of binding targets. We will consider Regulation 691/2010/EU,[92] which sets out binding performance targets concerning air traffic control, pursuant to Article 11 of the European Sky Regulation.

Regulation 691/2010/EU makes use of mandatory (binding) targets: although the targets themselves are set at national level, they still form part of a national action plan which is to be established in line with EU-wide strategy (in this context, fixed EU targets for set performance indicators in set performance areas). It should first be noted that the nature of such targets is to set performance levels to be met, and below which national standards and performance should not drop: thus, such standard-setting mirrors a type of minimum harmonisation, by contrast with the use of targets to provide a pre-set trajectory towards achieving a goal of improving performance levels year-on-year to reach a final binding target. In this sense, the precise function and operation of such binding targets under Regulation 691/2010/EU is thus subtly different from those applicable under the Second Renewables Directive.

Whilst these targets under Regulation 691/2010/EU are 'binding', the definition of this term is rather soft. 'Binding targets' are defined as 'a performance target adopted by Member States as part of a national or functional airspace block performance plan and subject to an incentive scheme providing for rewards, disincentives and/or corrective action plans' (Article 2(f)). The emphasis remains on incentives and disincentives, rather than legal enforcement.

'Bindingness' under Regulation 691/2010/EU seems to apply along a sliding scale. A certain level of non-compliance with national targets may trigger a 'request' from the Commission to take corrective measures. This is the case where a 'significant and persistent drop in performance' is observed, which affects other Member States and/or the entire European airspace.[93] Considering that the Regulation takes a strict approach to assessing the quality of national performance targets, it would be logical if a similar approach were taken with regard to laggard Member states. National performance targets which fall short of being consistent with, and adequately contributing to, EU targets, will eventually[94] trigger a

[91] *Matra SA v Commission*, C-225/91, EU:C:1993:239, para 42.

[92] [2010] OJ L201/1.

[93] Art 14(2).

[94] After a Commission recommendation that changes be made; Art 13.

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Commission decision, which will require the Member State to take corrective measures.[95] However, it still seems that the final decision on the nature of those correctives will lie with the Member State, which wording forms a nice parallel with the comments made above (in Part V.C of this paper) concerning the EU ETS, the Gas Security of Supply Regulation and, of course, the Second Renewables Directive; although 'nice' only in the sense of being consistent in its somewhat vague formulation of these decision-making powers and procedures.

One step further down the sliding scale, Regulation 691/2010/EU introduces 'alert thresholds'.[96] Beyond these thresholds, which are set at EU level and are logically below the EU target levels, it is to be expected that 'bindingness' will really start to bite. In another example of a degree of definitional vagueness, the Regulation only provides information on what happens where alert thresholds are reached due to circumstances unforeseeable at the beginning of the period and which are at the same time insurmountable and outside the control of Member States and the entities subject to the performance targets (ie a *force majeure* justification may be available to such a Member State). Where this is the case, the EU and/or national targets may simply be revised.[97] If alert thresholds are reached due to other circumstances, it is unclear what the consequences should be and whether the Commission would start enforcement proceedings, although one would expect that at least to be possible (although whether it would be effective quickly to address the problem is perhaps more difficult). Such lack of performance is also likely to amount to a 'significant and persistent drop in performance' and could therefore trigger the measures described above.

In any event, it is clear that even under Regulation 691/2010/EU, where targets are explicitly defined as 'binding', a degree of uncertainty remains. At best, 'binding' targets will trigger legal enforcement where non-compliance is significant, persistent and has an external effect (beyond the borders of the recalcitrant Member State). Nevertheless, a lack of performance remains justifiable in certain limited circumstances of *force majeure*.

2. *Targets and conservation measures in European fisheries*

A second and more recent example is to be found in the process of reform of the Common Fisheries Policy (CFP). Whilst the final text of Regulation 1380/2013/EU[98] is of course a compromise, the discussions which preceded that compromise and the initial Commission proposal provide some insight into a different approach to target-setting and enforcement. Moreover, the reforms reflect a move towards the 'regionalisation' of the CFP, which sits somewhere between a top-down control mechanism and national decision-making.

[95] Art 14.

[96] Arts 9(3) and 18.

[97] Art 18.

[98] [2013] OJ L345/22.

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The initial Proposal for a Regulation on the CFP[99] aimed to introduce a system in which conservation measures, such as multiannual plans, were adopted at EU level, with the aim of restoring and maintaining fish stocks above levels capable of producing Maximum Sustainable Yield (MSY) (the 'ultimate' target, as it were). A multiannual plan was to establish the basis for fixing fishing opportunities and 'quantifiable targets' for the sustainable exploitation of stocks and marine ecosystems, defining clear timeframes and establishing safeguard mechanisms for unforeseen developments (Article 11). Quantifiable targets were to be expressed in terms of fishing mortality rates, and/or spawning stock biomass, and stability of catches.

National conservation measures could be adopted in accordance with such a plan, but the wording of the proposed provision was subtle:

> In a multiannual plan … Member States *may* be authorised to adopt measures in accordance with that multiannual plan, which specify the conservation measures applicable to vessels flying their flag in relation to stocks in Union waters for which they have been allocated fishing opportunities.[100]

On the one hand, the Commission thus proposed a decentralised approach, allowing Member States to adopt the conservation and technical measures necessary to achieve the quantifiable targets set for certain fish stocks at EU level. On the other hand, the Commission also suggested a significant level of centralised control over those decentralised measures: there would be a 'fall-back mechanism' for the Commission to adopt delegated acts specifying the conservation measures for fisheries covered by a plan (Article 20). This was to kick in where: (a) Member State conservation measures were deemed incompatible with the objectives of a multiannual plan; (b) Member State measures were deemed not to meet the objectives and quantifiable targets set out in multiannual plans effectively; (c) Member States which could take conservation measures did not do so within 3 months; or (d) certain safeguards were triggered. Moreover, it seemed from the wording of the proposed Article 17(1) that there existed also an alternative option, where the multiannual plan did not allow Member States to adopt any such measures: *quaere* what the exact role of the Commission would have been in such a case.

Quantifiable indicators for periodic monitoring were to be provided to help in assessing progress in achieving the quantifiable targets – and presumably guide the Commission in its assessment of the compatibility and effectiveness of national conservation measures, which it could do 'at any time' (Article 19). Moreover, the Commission proposed to maintain the emergency response mechanism already existing under the current CFP.

The Commission thus approached the 'target debate' from a different angle, by avoiding the terminology of mandatory targets and instead focusing on what should

[99] COM (2011) 425 final, *Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy*.

[100] Art 17(1), emphasis added.

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happen if the targets were not reached. Given that targets are only as binding as they can be effectively enforced, the quantifiable targets as proposed by the Commission were effectively mandatory in nature.

The European Parliament, in its first reading, kept many of the provisions proposed by the Commission, including an amended version of the fall-back mechanism.[101] It proposed to give Member States a 3-month period to modify their measures after having been notified by the Commission that their measures were incompatible with, or did not meet the objectives and quantifiable targets of, the multiannual plan in question. Failing that, the Parliament suggested that the Commission should then be able to adopt conservation measures by way of a delegated act, but only after consulting the relevant Advisory Councils and ICES[102] and/or STECF.[103]

Unfortunately, the fall-back mechanism did not survive its journey through the Council, or at least not in its original form.[104] The compromise text upon which the Council and the European Parliament agreed[105] remains similar to that of the Commission insofar as conservation measures are taken at EU level, 'in particular' in the form of multiannual plans. Multiannual plans shall include quantifiable targets, such as fishing mortality rates and/or spawning stock biomass, as well as clear timeframes to reach those targets. Conversely, the Council deviated from the original proposal by limiting the Commission's delegated power to supersede Member State conservation measures with its own, and by channelling this possibility through the ordinary legislative process instead.

Following the Council's proposal, the Commission 'should only adopt conservation measures through implementing acts or delegated acts where all Member States concerned in a region agree on a joint recommendation' (Recital 39). The actual provision on what is now called 'regionalisation' paints a slightly different picture, however, even in its amended form. Where the Commission is allowed to adopt delegated or implementing acts,[106] Member States whose management interests are affected are first given the opportunity to submit joint

[101] European Parliament legislative resolution of 6 February 2013 on the proposal for a regulation of the European Parliament and of the Council on the Common Fisheries Policy (COM (2011)0425) (A7-0008/2013) [2016] OJ C24/134.

[102] International Council for the Exploration of the Sea.

[103] Scientific, Technical and Ecological Committee for Fisheries (for details, see http://ec.europa.eu/fisheries/partners/stecf/index_en.htm).

[104] Council agreement on a general approach on the basic provisions of the CFP, 26 February 2013 (http://register.consilium.europa.eu/pdf/en/12/st11/st11322-re01.en12.pdf).

[105] Though this remains subject to a second reading by the EP and, naturally, its subsequent adoption.

[106] When exactly will this power will apply? Rec 67: '[t]he power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of the adoption of conservation measures accompanying certain environmental obligations by Member States [etc]'; and Rec 68: '[i]n order to ensure uniform conditions for the implementation of the provisions of this Regulation in respect of temporary measures to alleviate a serious threat to the conservation of marine biological resources, of the entry-exit scheme in fleet management and transmission of data for the Union fishing fleet register, implementing powers should be conferred on the Commission'.

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recommendations – and the Commission must wait until the deadline for them to do so, the period for which will be set out in the conservation measure, has passed (Article 18). But whilst the Commission 'may adopt' these measures, by way of delegated or implementing acts, there seems to be no obligation on the Commission actually to do so.[107] The extent to which the Commission can deviate from the recommendations will of course be subject to the respective scrutiny procedures for delegated and implementing acts.[108] If no agreement is reached, or where the joint recommendations on conservation measures are deemed not to be compatible with the objectives and quantifiable targets of the conservation measures in question, the Commission can then submit a proposal following the ordinary legislative procedure, or under Article 43(3) TFEU if the proposal concerns levies or taxes. This obviously gives the Member States (through their seat in the Council) more input into the final wording of the conservation measure than if the measures were adopted by way of a delegated act (which can be vetoed by the Council, but only by qualified majority).

Additionally, where Member States are given the direct power to adopt measures implementing an EU conservation measure (eg a multiannual plan), they may only do so if all Member States concerned have reached an agreement on those measures. While the Commission shall be 'associated' with such decisions and its comments 'taken into account', the only enforcement mechanism is for the Commission to 'request' a Member State to amend or repeal a measure where that measure does not comply with the EU conservation measure (eg the multiannual plan) (Article 18(8)). This provides another example of the uncertainty surrounding the Commission's decision-making power and role in such situations; presumably, the Member State(s) concerned may simply decline so to amend or repeal that measure, even in the face of a Commission request.

At first glance, the 'penalty' of having a fall-back mechanism for EU (Commission) action has clearly lost some of its bite in the Regulation as adopted. The Commission can no longer adopt delegated acts (or even propose them through the ordinary legislative procedure) to specify conservation measures where Member State measures are 'deemed not to meet the objectives and quantifiable targets effectively'. However, the Regulation also adds something new, which is that multiannual plans shall include 'safeguards to ensure that the quantifiable targets are met, and/or remedial action' (Article 10(1)(g)). This new provision raises two key questions: first, will such 'remedial action' end up as part of the Commission's delegated or implementing powers; and, second, what will be the likely timing of such safeguard or remedial measures? Either way, this formulation may prove to be sufficiently flexible to include a penalty mechanism in the multiannual plan itself.

[107] And the nature of that power can be either delegated or implementing: Art 18(3).

[108] In accordance with Regulation 182/2011/EU [2011] OJ L55/13 (28 February 2011), which makes the Commission subject to scrutiny from the Parliament and the Council which, in the case of delegated acts, will have a set period of time during which they can veto the Commission's proposal by a majority and a qualified majority, respectively (Art 290 TFEU). In the case of implementing acts, which follow a procedure much like the old comitology procedure, control will mainly lie with Member State representatives (rather than the Member States in the institutionalised form: ie the Council).

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To summarise, the saga of the latest CFP legislative negotiations teaches us some interesting lessons. First, agreement was reached among the Commission, European Parliament and Council on the need for strong(er) EU-level definition of targets, which are to be treated as binding upon Member States and of a mandatory character. Second, there was an acknowledgement (again across all three institutions) of the need to address the issue of gaps and failings (etc) which come to light during the process of implementing and enforcing a multiannual plan. Third, on the basis of that acknowledgment, agreement was reached on the need to introduce some safeguards and/or remedies to get any given Member State (and thus the EU as a whole) back on track in meeting the goals of that multiannual plan. These developments show that the EU institutions, and crucially the Member States in the form of the Council, are capable of assessing the need for structured goals, monitoring and timely enforcement mechanisms while progress towards final binding targets is still being pursued, with the clear purpose of trying to keep such progress in line with the planned trajectories required. These are three important lessons for the design of future EU-level renewables targets and their enforcement in practice. But it also underlines that building policy consensus in terms of the achievement of the relevant defined goals is crucial to providing the climate within which more fruitful inter-institutional dialogue can be pursued, and clearer, more effective legislative provisions agreed.

E. Missed opportunities under the Second Renewables Directive?

1. Penalties

In spite of the use of the word 'binding' and the views of the European Parliament, there is no direct penalty mechanism in the Directive for Member State failure to achieve those targets. Moreover, there does not appear to be a penalty for their failure to follow the trajectory closely enough. The proposed mechanism for GOs, mentioned above, was not reinstated in the final text with regard to participating in statistical transfers between Member States (see Article 6 of the Directive). The proposed mechanism for GOs only allowed for the selling of GOs to another Member State if the selling Member State had met the targets of its indicative trajectory, based on the two year period preceding the transfer (Article 9(1) of the Directive).[109] The absence of such a mechanism has implications for the credibility of binding targets, both along the indicative trajectory during the process leading up to 2020 and in ensuring that the 2020 target for the EU overall is actually achieved. These concerns have been highlighted in discussion surrounding the next EU-level renewables legislation, which is covered in the concluding comments below (Part VI).

2. Portfolios and related issues

It should also be noted that the Directive does not demand or even encourage the development of a 'portfolio' of renewables technologies. Rather, Member States are

[109] Johnston *et al*, note 74, above.

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given the discretion to determine their own energy mix in their implementation of the Directive. This respect for the principle of subsidiarity is also reflected in the wording of Article 194(2) TFEU, the 'newly'-adopted energy provision which will most likely form the basis for any future version of the EU's Renewables Directive. Article 194(2) TFEU explicitly states that an EU measure adopted on the basis of that provision should not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) TFEU. However, the extent to which this caveat curtails the scope for the EU to adopt secondary legislation on the basis of Article 194 TFEU is far from clear. It is possible (if not likely) that an EU measure could still affect (eg) a Member State's choice in determining its energy mix without falling foul of Article 194(2) TFEU, but only up to a certain threshold.[110] Portfolio targeting is therefore not necessarily excluded from the scope for future EU action.

To a certain extent, the Second Renewables Directive stimulates Member States at least to consider and think about the future development of each and every type of renewable energy technology. According to Article 4(1) of the Directive, Member States are required to set targets, as well as trajectories, for the contribution of renewable energy in the heating and cooling, electricity and transport sectors. These targets and the trajectories for 2010 to 2020 are estimations only. Decision 2009/548/EC establishes an obligatory template to be followed by Member States when drawing up their NREAP. This includes a table, in which Member States must fill out the total contribution (installed capacity, gross electricity generation) which they expect, for each year between 2010 and 2020, from each renewable energy technology to contribute to meeting their binding targets and the indicative interim trajectory. These tables form part of each Member State's NREAP, and estimations have to be made for each of the above sectors. For example, Member States have to estimate, for each year between 2010 and 2020, how much wind power will contribute in the heating and cooling sector; the electricity sector; and the transport sector (see Tables 10 to 12 of Decision 2009/548/EC). In practice, this exercise amounts to setting a trajectory for the contribution of each renewable energy technology to the overall renewable energy target. Whilst it remains a fact that there is no legal obligation to stick to these predicted numbers, the resulting information is publicly available and provides a useful oversight of which types of technologies are expected to be developed, where and when.

Six months before communicating their initial NREAPs, Member States also had to notify the Commission of the estimated production of renewable energy compared to their indicative trajectory which could be transferred to other Member States, as well as their estimated potential for joint projects, until 2020 (Article 4(3) of the Directive). This reporting obligation on estimated excess production and demand from non-national sources continues every two years until 2020, as part of the

[110] Which one might conceive of as a measure of the 'significance' of any such impact (or perhaps as a form of *de minimis* test); for a more in-depth discussion, see Johnston and van der Marel, note 28 above, especially sec 2.3.1.

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general reporting obligations on the Member States by virtue of Article 22 of the Directive. Despite this, the Directive provides little to shed light on the (future) geographical distribution of renewable energy sources in Europe. Whereas Member States must update their NRAEP if their share of renewable energy falls below the indicative trajectory in the immediately preceding two-year period, no such obligation exists where the estimated contribution from a particular renewable technology is not achieved. Even a very large discrepancy between what a Member State planned and what it achieved in each sector would not necessarily trigger a review of the data, unless this would have an impact upon the total share of renewable energy compared to the indicative trajectory. Whilst Member States must submit a biennial report to the Commission, this does not include an obligation to update the estimations made for the contributions from different renewables technologies, with the exceptions of biomass and wastes, residues, non-food cellulosic material and ligno-cellulosic material (although this may be implicit from the report).

In this context, it should be noted that there is much significance in the ability to predict and plan for the geographical distribution of RES-E generation in the future.[111] The location of such generation capacity has implications for: inter-Member State co-operation (between governments in planning, licensing, possible statistical transfers; and between regulators in the co-ordination of their activities, especially concerning the rules applicable to infrastructure: connections, capacity and congestion management, etc); and relations between transmission system operators on both a day-to-day management and a longer-term planning and investment basis. Indeed, the grid investment, strengthening and management required to accommodate significant growth in the connection of RES-E to that grid will raise similar co-ordination questions, and will pose questions concerning the ability of grids and States to raise and/or provide finance for such investment and development.

These considerations are thus somewhat double-edged in nature: on the one hand, they militate in favour of greater cross-border trade to seek the most economically efficient location for new RES-E generation capacity (and the concomitant grid investments required); on the other hand, the need for a degree of predictability to facilitate planning of new construction and investment might encourage some governments, regulators and undertakings to seek to limit cross-border trade in the interests of stability (and the raising of finance required to fund such new investments). Assessing the costs and benefits of these sometimes competing interests and goals is no easy matter, and it may be that fear of the unknown in terms of the possible impacts of increased trade may be valued more highly than the

[111] See C Battle et al, *Review report on interactions between RES-E support instruments and electricity markets* (Report D5.1 of the 'beyond2020' project, October 2012) http://www.res-policy-beyond2020.eu/pdffinal/Interactions%20between%20RES-E%20support%20and%20electricity%20markets%20(beyond2020%20-%20D5-1).pd); and P Frias et al, *Assessment Report on the impacts of RES policy design options on future electricity markets* (Report D5.2 of the 'beyond2020' project, October 2013) http://www.res-policy-beyond2020.eu/pdffinal/Assessment%20report%20on%20the%20impacts%20on%20future%20electricity%20markets%20(beyond2020%20-%20D5-2).pdf.

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possible benefits of comparative advantage which may flow from increased cross-border trade (both physical trade in electricity and what one might term 'virtual' trade in the form of certificates; the latter, of course, currently being essentially excluded[112] by virtue of the wording of Articles 2(k) and 3(3) of the Second Renewables Directive).

On the other hand, the European Parliament's ITRE Committee believes that the EU's mandatory renewables target has undermined investment in carbon capture and storage (CCS), a climate mitigation technology which is crucial to secure a reduction in CO_2 emissions in the near future. The impetus for CCS seems to have waned since Directive 2009/31/EC (the 'CCS Directive')[113] was passed with so much enthusiasm. The failure of any CCS project to secure funding under the first round of NER300, which had aimed to fund eight CCS projects,[114] and the continuing low price of carbon emissions have, in combination with the economic crisis in Europe and a general lack of public understanding and support for CCS, undermined efforts to ensure a successful commercial-scale demonstration of CCS in Europe. While a low-carbon transition can be reached with more energy efficiency, renewable energy and carbon-free energy sources, CCS is crucial in the case of continued or increasing use of fossil fuels. Around 60% of global primary energy at present comes from stationary use of fossil fuels, and in any event Europe will remain dependent upon fossil fuels until renewable energy sources can be deployed on a larger scale. In light of the EU's aim to reduce overall greenhouse gas emissions by at least 80% by 2050, investment in both CCS and renewables deployment are both deemed of importance to keep global temperature rise under two degrees Celsius.

With this important objective in mind, the ITRE Committee has therefore called for a 'technology neutral' approach to the EU's 2030 energy goals, which it believes would create a level playing field and ensure effective competition amongst varying low-carbon technologies.[115] Interestingly, the ITRE Committee considers such an approach to be in line with Article 194(2) TFEU. Despite our earlier remarks

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[112] This seems to have been confirmed by the outcome of the recent Court judgments in *Ålands Vindkraft*, C-573/12, EU:C:2014:2037 and Joined Cases *Essent Belgium v VREG*, C-204-208/12, EU:C:2014:2192. See A Steinbach and R Brückmann, 'Renewable Energy and the Free Movement of Goods' (2015) 27 *JEL* 1 and D Fouquet and JV Nysten, 'Renewable Energy Support and Free Movement of Goods: The European Court of Justice Continues its Line' (2015) 4 (4) *European Energy Journal* 34, for helpful discussion.

[113] [2009] OJ L140/114; for a summary, see Johnston and Block, note 48 above, paras 13.12–13.58. For detailed discussion, see: IPCC, *Carbon Capture and Storage* (Cambridge University Press, 2005); I Havercroft et al, *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* (Hart Publishing, 2011); MM Roggenkamp and M Woerman (eds), *Legal Design of Carbon Capture and Storage: Developments in the Netherlands from an International and EU Perspective* (Intersentia, 2009); and M Holwerda, *EU Regulation of Cross-Border Carbon Capture and Storage: Legal issues under the Directive on the Geological Storage of CO_2* (Intersentia, 2014).

[114] See http://ec.europa.eu/clima/policies/lowcarbon/ner300/index_en.htm for details.

[115] Draft Opinion of the Committee on Industry, Research and Energy for the Committee on the Environment, Public Health and Food Safety on 'Implementation Report 2013: Developing and applying CCS technology in Europe', 18 July 2013, 2013/2079 (INI). NB the default position of the EEAG 2014 (note 42, above) is also one of technology-neutrality for RES-E support, unless the

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regarding the scope of Article 194(2) TFEU, it may be that – in the ITRE Committee's opinion – EU-wide portfolio targeting of renewable energy technologies would be too intrusive a measure.

VI. ENFORCEMENT MECHANISMS

A. EU level

The task of ensuring the application of EU law has been bestowed upon the Commission, as guardian of the Treaties (Article 17(1) TEU). Where a Member State fails to fulfil an obligation under the Treaties, the Commission has the discretion to initiate the so-called 'infringement procedure' set out in Article 258 TFEU. Subject to various procedural constraints and only after having gone through the necessary steps of the pre-judicial stage, the Commission may eventually bring the matter before the Court. This 'threat' of legal action is all the more significant in light of the fact that non-compliance with the Court's ruling can, since the amendments of the Maastricht Treaty, trigger significant financial penalties (Article 260 TFEU). It should be noted that non-compliance with the Treaties does not necessarily result in legal action. It is up to the Commission (or another Member State, see below) to 'consider' that there is a breach in the first place, and subsequently whether or not to refer the matter to the Court. Above all, Article 258 TFEU's predecessor was in fact meant to be a forum for negotiation and international diplomacy; referrals to the Court were mostly avoided.[116]

When the Commission 'considers' that a Member State has failed to fulfil an obligation under the Treaties, it shall issue the defaulting Member State with a 'reasoned opinion' which is accompanied by a formal letter of notice. These official documents set out the substance of the case against the Member State and provide it with a timeframe in which it should remedy the violation. These stages are a precondition for the admissibility of the case before the Court, and allow the Member State to avoid legal action if it meets the Commission's deadline. The Commission 'may' subsequently bring the matter before the Court. It is well settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion.[117] If a Member State can achieve its targets in the time frame set by the Commission in the reasoned opinion, an implausible but not impossible scenario, this will be the end of the Commission's intervention. Interestingly, the description in Article 258 TFEU of the kind of breaches which may be brought before the Court is very generic: it suffices that the Commission considers that a Member State has failed to fulfil 'an obligation under the Treaties'.[118]

(F'note continued)
Member State proposing technology targeting can justify the need to do so for the relevant technology or technologies involved.

[116] M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU*, (Routledge, 2010), pp 86–87.

[117] See, *inter alia*, *Commission v France*, C-166/97, EU:C:1999:149, para 18.

[118] For a more detailed discussion on the types of breach by Member States of EU law which have been brought before the Court see PP Craig and G de Búrca, *EU Law: Text, Cases and Materials*, 6th ed (Oxford University Press, 2015), p 444ff.

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As of March 2013, the Commission had launched several infringement cases for non-transposition of the Second Renewables Directive. Reasoned opinions were sent to Austria, Bulgaria, Cyprus, the Czech Republic, Finland, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Poland and Slovenia.[119] But there was no mention of this issue in the more recent Renewable Energy Progress Report from 2015.[120]

It has been argued that the 'threat' of legal action is less than a serious one. In practice, and especially in areas related to the environment, the enforcement mechanism lacks the teeth necessary to function as an effective deterrent.[121] This is partly due to the great diversity among the Member States in legal and regulatory approaches to various environmental matters. The cause of this diversity is inherent to EU environmental law, an area in which the scene is set by minimum requirements rather than extensive harmonisation. Member States may take different approaches to implementing the provisions of Directives, something which does not ease the Commission's task of assessing whether EU law compliance is indeed being achieved. For example, the Commission was incapable of reporting on the application of the IPPC Directive, because Member States all used 'different ways' of expressing their (pollution) limits.[122]

The enforcement of the Second Renewables Directive faces similar problems. Member States may take different approaches to implementing the openly-worded provisions of the Directive, such as the requirement to adopt 'effectively designed measures'.[123] When carrying out their reporting obligations, each Member State thus provides the Commission with a unique set of data. This complicates the Commission's overall task of assessing which parts of the Directive have, or have not, been implemented properly.[124] Arguably, with the introduction of a transparent 'end result', namely mandatory targets for the contribution of energy from renewable sources, the Second Renewables Directive solves at least part of this problem. Disregarding the other obligations of the Directive (such as the requirement to adopt EDMs), assessing whether or not targets are complied with is, if anything, a straightforward task.

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[119] COM (2013) 175, *Renewable energy progress report*, p 13.

[120] COM (2015) 293, *Renewable energy progress report*.

[121] P Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007), p 252.

[122] Ibid, p 253, note 14.

[123] In reference to our previous discussion on the Birds Directive, with regard to which the Court established 'objective' (ornithological) criteria on which the Commission could rely to assess compliance with Art 4, it is obvious that such 'objective' criteria would here too significantly lighten the Commission's load.

[124] Experiences in other energy-related areas bear out similar difficulties; the evolution of national allocation plans and their criteria under the EU ETS provides one example of a steady shift of definitions, details and decision-making to the EU level, while the evolution of the specific legislation on gas supply security offers another (on which see Johnston and Block, note 48 above, paras 10.29–10.66, and see COM (2016) 52, *Proposal for Regulation of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010*).

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Member States, too, may take enforcement action against a recalcitrant Member State (Article 259 TFEU).[125] The matter must first be brought before the Commission which, after hearing the States concerned, has three months within which to give a reasoned opinion. It should be pointed out that, with regard to environmental matters, no Member State has ever made use of this possibility. For obvious diplomatic reasons, resorting to legal action against a fellow Member State is tactically unwise.

Finally,[126] it should be pointed out that, on the basis of the 700 environmental cases decided in the period between 1976 and 2011, the average time-span between pre-judicial procedures and a Court decision is almost four years.[127] With regard to the need for rapid development of renewable energy sources, it would make the official enforcement of non-compliance with targets after the target date hardly worth the Commission's time and (limited) resources. Here, the timeliness of enforcement for the purposes of meeting the renewables targets becomes a very difficult problem to overcome. By the time any conclusive judgment is reached, let alone the possible imposition of periodic penalties to encourage compliance, the EU will be far into the next phase of its renewables policy: one might thus wonder what real difference pursuing such a case for missing targets would really make in practice.

On the topic of defences, it should be highlighted that the Court has rarely been receptive to Member States' arguments.[128] It can be expected that Member States would plead that they had no intention not to achieve their targets, or that there was a case of *force majeure.* The Court has repeatedly held that all that matters is an objective finding of non-compliance with EU law; the lack of intentional wrong-doing is irrelevant.[129] The defence of *force majeure*, whilst admissible, has been narrowly construed. It is a well-known fact that Member States 'may not plead provisions, practices or circumstances existing in (their) internal legal system in order to justify a failure to comply with obligations and time limits laid down in (EU) Directives'.[130] Anything short of insurmountable difficulties[131] is unlikely to hold strong as a defence of *force majeure.*

Ultimately, therefore, it is possible that a robust 'naming and shaming' approach by the Commission in publishing press releases and reasoned opinion details may prove a more effective tool in practice than the ultimate sanction of proceedings

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[125] Eg *France v UK*, 141/78, EU:C:1979:225, on unilateral fisheries conservation measures; *Spain v UK*, C-145/04, EU:C:2006:543, on UK rules on European elections in Gibraltar.

[126] Note that Art 122(1) TFEU concerning severe supply difficulties in, notably, the sphere of energy and Arts 346–348 TFEU might also be relied upon by a Member State attempting to justify measures in exceptional situations of public security, but it seems highly unlikely that these provisions would be significant for enforcement of mandatory renewables targets.

[127] Krämer, note 65 above, pp 12–34.

[128] Craig and de Búrca, note 118 above, p 450ff.

[129] *Commission v Belgium*, 301/81, EU:C:1983:51, para 8.

[130] *Commission v Italy*, 280/83, EU:C:1984:211, para 4, and subsequent case-law.

[131] See *Commission v Italy*, 33/69, EU:C:1970:14, para 16, in which even a bomb attack had not created a situation which made is so excessively difficult that non-compliance could be justified.

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before, and a judgment by, the Court. Furthermore, armed with such information, it may be possible for other Member States in Council to put pressure on recalcitrant Member States during negotiations on similar, cognate or even unrelated legislative dossiers. No doubt the European Parliament may take advantage of such information in a similar fashion when interacting with such Member States in various fora. After all, the prospect of significant fines for past failures to meet targets and/or periodic penalty payments for ongoing failure to do so would seem potentially to counter-productive: forcing the Member State to defend such an action and then pay fines to the EU for its failures would risk being seen as removing time and resources that could better be spent on actually achieving the renewables targets.

B. National level

1. Oversight/advisory/regulatory functions

First of all, the relevant Member State government (which could be national or regional, and on some environmental issues even local) could choose to delegate various key functions in the renewables sphere to independent agencies or bodies. Many national schemes, data gathering and accounting are run through the energy national regulatory authorities (NRAs); all of these activities are crucial to building up the picture at national level of how national support schemes are working, and are used to provide detail for the regular Member State reports required on progress with their NREAPs. And insofar as such NRAs have specific functions concerning such issues as whether an installation qualifies for support under a national renewables scheme, there are genuine enforcement roles to be played by the NRAs which have a direct bearing upon pursuit and achievement of the national binding targets.

But it has not, to our knowledge, been the case that such NRAs (or indeed other independent agencies) have been given a stronger role in holding the government to account with regard to such targets, let alone the power to require the government to do things to reach those targets. Perhaps the closest example is the role of the UK's Climate Change Committee, which is an independent body created to offer 'a structured, highly visible input of independent expertise into climate decision-making'.[132] It provides strong advice to the government on setting the carbon budget, including the required trajectories and an assessment of actual causes of reductions in emissions. But even this Committee's advice need not necessarily be followed by government when setting carbon budgets, designing policies and mapping them on to trajectories. So, in the specific context of holding a given Member State to its binding target, such bodies are unlikely to offer a strong enforcement route.

[132] M Stallworthy, 'Prospects for the UK's national approach to climate law-making', in M Peeters et al (eds), *Climate Law in EU Member States: Towards National Legislation for Climate Protection* (Edward Elgar, 2012), ch 6, p 124.

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2. *Attempts by private individuals to hold national governments to their obligations and policy targets*

That being the case, it seems likelier that individuals (including companies, pressure groups, etc) who rely upon or are affected by the government's renewables policies may prove a more likely source of enforcement attempts in the realm of binding targets. However, again, such litigation seems more likely to involve specific implementing measures and schemes,[133] and will use the existence of the binding targets as a context to establish the applicability of government duties to consider their achievement and incorporate that into the design of policy, as well as to establish that such measures may fall within the scope of EU law (where that might offer further arguments on grounds of, for example, fundamental rights or general principles of law).

Thus, the UK has seen some recent litigation in the wake of a government proposal retrospectively to change the levels of support to be provided for small-scale renewable electricity generators. In *Secretary of State for Energy and Climate Change v Friends of the Earth* such proposed changes were held to be *ultra vires* the scope of the power conferred upon the Secretary of State by section 41 of the Energy Act 2008. This led to subsequent claims for damages against the government on the basis of Article 1 of the First Protocol to the ECHR, which were successful where the contracts that had been signed but later cancelled were sufficiently completed and certain to amount to possessions under that provision.[134] Of course, such court-led or influenced governance brings its own risks too: such case law will inevitably create shocks when a new ruling is handed down, and may appear *ad hoc* where the focus has to be on a particular set of facts before the court. Markets, investors and businesses may react badly to such shocks, as they try to process the implications of a given judgment, and this can be exacerbated where a case involves a trip to Luxembourg along the way, via Article 267 TFEU.

Ultimately, however, these devices cannot require specific policies to be adopted or abandoned by a given Member State, although it is arguable that they can require something to be done, otherwise the relevant policy gap would not respect the duties imposed upon that Member State by the Directive and (typically also) national implementing law. Similarly, simple failure to meet the binding target at the end of the reference period seems unlikely to generate useful practical arguments under the

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[133] Note also the trend towards the use of the Energy Charter Treaty and bilateral investment treaties by investors in an attempt to hold Member States to their announced support schemes, even in the face of national (often constitutional) law that has been held to allow changes in policies and law. This is a huge topic and beyond the scope of the present contribution, but its practical significance should be noted in the enforcement context as offering another potential (and potentially highly controversial) avenue for claimants.

[134] See, eg, *Breyer v Department for Energy and Climate Change* [2014] EWHC 2257 (QB), upheld on almost all points in *Department for Energy and Climate Change v Breyer* [2015] EWCA Civ 408, [2015] 1 WLR 4559. For discussion of the litigation in this area up to, but not including, the most recent *Breyer* judgment, see A Johnston, 'Recent Renewables Litigation in the UK: Some Interesting Cases' (2015) 13 (3) *Oil, Gas & Energy Law Intelligence*.

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heading of Member State liability for sufficiently serious breach of EU law. Naturally, whether a failure to meet the target would even be 'sufficiently serious' is already a difficult question of assessment within this area, although one supposes that the obligation to reach the target could be construed as one involving no discretion (like the need to implement a directive that was at issue in *Francovich* itself).

But even if this hurdle were overcome, private parties will still struggle to show any specific loss or damage which was causally connected to the Member State's breach. Rather, they will have a broad expectation that, had something more or better been done by the Member State on renewables, then they – as undertakings in the field – would have stood to benefit. But such expectations are too vague and general to amount to legitimate expectations of substance or any genuine possession or other legal interest. So this route, too, seems to offer little in the way of genuine target enforcement prospects.

VII. CONCLUSIONS

The Second Renewables Directive combines a level of 'top-down regulation' with various 'other' forms of governance, such as use of flexibility mechanisms and joint projects, allied with transparency and reporting requirements. On the one hand, the Directive increases the plethora of tools available to the Commission to encourage Member State action, as discussed in Part V above. These options for centralised 'control' sit alongside increased EU-level legislative detail concerning procedural requirements, such as various administrative procedures and minimum requirements for the building industry (Article 13), the establishment of certification schemes for certain heating sources (Article 14), the previously-mentioned creation of GOs, alongside the related obligation to establish mechanisms and bodies in charge of issuing, cancelling and verifying them (Article 15), and the development of a grid infrastructure and the necessary planning procedures to accommodate an increase in renewable energy (Article 16). On the other hand, the Directive leaves wide discretion to the Member States when it comes to the exact measures which have to be taken, for example, by employing vague vocabulary such as 'effectively designed measures'. Moreover, interim targets are explicitly of an indicative nature only. The preceding discussion has even confirmed that the nature of the 'binding' final targets is far from certain.

The resulting picture offers a dual image. From one perspective, the Directive consists of a mix of more or less unenforceable obligations, hiding behind a façade of mandatory compliance. From another vantage point, the Directive takes an innovative approach to combining new and old forms of governance within one single instrument, creating a flexible notion of 'bindingness' which not only remains open to future interpretation, but potentially gives the concept of 'bindingness' a new meaning altogether. The focus is on strong targets to push Member States into making significant efforts to change the *status quo* in a given area; here, the proportion of total energy consumption supplied by renewable energy. Targets are framed in legally mandatory language to reinforce the message sent that effecting such change is vitally important, and that undertakings, investors and developers can

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rely upon States to take action in the field. Other areas of EU law suggest that renewables policy forms a part of a gently growing trend to rely upon forms of target-based governance across longer time periods, along with the complex of information provision, reporting, expertise development and generally reflexive evolution of rules and policies in the relevant sphere. Yet detailed and practical, command-and-control-style enforcement mechanisms are mostly lacking from such target-based governance regimes, often allowing the danger of regular national shifts in policy, upsetting expectations of a predictable policy climate (as discussed in Part V.B.2, above). Political pressure, 'naming and shaming' and scrutiny of national measures taken in pursuit of these targets are the order of the day, backed up by information sharing and experience building in a developing area of law and policy.

Especially problematic is the Commission's lack of control throughout the process. Even if a Member State could be held accountable before the Court for not reaching its final target, the damage would already have been done. It is some degree of interim monitoring and control that matters most; at the very least, interim control seems likely to play a key role. It has become clear that the Commission is increasingly aware of this issue. The Commission's 2013 Progress Report on RES indicated that, whilst the Second Renewables Directive initially triggered a promising start in RES growth, the economic crisis, lack of investment and continuing administrative barriers make it unlikely that most Member States will reach their final targets.[135]

In 2013, 15 Member States had failed to meet their indicative 2010 targets for the share of renewables in the electricity mix,[136] and 22 Member States did not meet the indicative target of 5.75% in the area of transport.[137] By 2015's Progress Report, however, a combination of lower energy demand due to the economic stagnation (and perhaps also improving energy efficiency), allied with progress in deploying renewables, meant that only France and the Netherlands failed to meet their interim targets (and then only by less than 1% each), although renewables use in transport has continued to see more laggards. Indeed, a number of Member States have already met their 2020 targets However, the Commission also noted that the trajectory for later years becomes steeper, and that overall the 'majority of Member States are … expected to meet or exceed their 2020 renewable energy targets', which of course implies that a significant proportion may well not do so.[138]

Despite the lack of possibility for EU action in the face of non-compliance with interim targets, it may however be possible for the Commission to increase its level of interim control by breaking down the causes of Member States' failures and

[135] See note 119, above.

[136] As agreed under Directive 2001/77/EC. These Member States were: Austria, Cyprus, Czech Republic, Greece, Finland, France, Italy, Luxembourg, Malta, Poland, Romania, Sweden, Slovenia, Slovakia, and the UK.

[137] As agreed under Directive 2003/30/EC. These Member States were: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Spain, Finland, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Portugal, Romania, Slovenia, and the UK.

[138] See note 120, above.

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addressing them separately. The 2013 Progress Report, for example, stated that Member States' progress reports showed slow progress in removing administrative barriers, for example, and that many Member States had not addressed the reforms 'specifically listed in Article 22(3) of the Directive'.[139] This bleak statement was enthusiastically followed by the promise that the Commission will continue to investigate this issue, and launch infringement proceedings where Member States fail to act. This raises the question whether the Commission plans to launch infringement proceedings where Member States fail to make, or at least fail to intend to make, the reforms listed in Article 22(3) of the Directive. The provision in question stipulates that Member States, in their first report, 'shall outline whether (they) intend to …': establish a single administrative body to deal with permit applications for RES installations; provide for the automatic approval of planning applications; or list suitable geographical locations for developing RES. It is unclear whether the Commission interpreted this as an obligation on Member States to intend to adopt at least one of those three types of administrative reforms (given that Article 22(3) lists alternative options), or whether Member States only have to notify whether they intend to make any of the listed reforms at all. Following the latter interpretation, the obligation would be fulfilled if a Member State duly reported its intent, even if its intent were to do nothing at all. The 2013 Progress Report suggested that the Commission has adopted the former interpretation of Member States' obligations under the Directive.

Enforcing these administrative requirements would put flesh on the bones of Article 13 of the Directive, which leaves a lot of discretion to the Member States in ensuring that various principles of procedural good governance are met, such as ensuring that administrative costs are transparent, authorisation procedures are simplified, and permits and spatial planning are better coordinated. More importantly, this effectively would allow for some measure of enforcement at the trajectory stage, if not for a lack of reaching interim targets then at least for not intending to make the administrative reforms necessary to reach the final targets. The evidence from the 2015 Progress Report suggests that Member States have been making advances in this regard in various areas (establishing 'one-stop-shops' for renewables project approval and simplifying or shortening various administrative procedures), but also that more work remains to be done. No emphasis is placed upon taking enforcement action against Member States where progress has been less impressive, suggesting that in practice the Commission continues to pursue a consultative and co-ordinating approach to these requirements, rather than a confrontational and litigious one.

The Commission is in the midst of developing a response to its recent consultation on a new renewable energy directive for the period after 2020.[140] As presently conceived, this measure would have a binding overall EU target of at least a 27%

[139] See note 119, above, p 8.

[140] Commission, *Consultation Questionnaire (Web-Based): Preparation of a new renewable energy directive for the period after 2020* (18 November 2015) https://ec.europa.eu/energy/sites/ener/files/documents/RED%20II%20Public%20Consultation_0.pdf.

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share of renewables by 2030, allied with a return to indicative Member State targets thereunder. Instead of worrying about binding national targets, the Commission stresses the need to: 'address uncertainties with regard to national policies, governance and regional cooperation'; empower consumers; decarbonise the heating and cooling sector; adapt market design and remove barriers to renewables; and enhance the use of renewables in the transport sector (in particular with a view to developing electric transport). A number of EU measures are suggested, and crucially the Commission asks 'under what circumstances [could] EU … measures be used or activated, how [should we] share potential costs in a fair and equitable way and how [can we] ensure participation by all Member States[?]' Responses and a summary of results are now available on the Commission's website.[141] For our purposes here, the key element identified by respondents was the need for a robust legal framework: many considered the binding national targets to have been crucial to achieving the 2020 targets, and wanted the EU to require strategic renewables planning at national level, including consultation on renewables strategies, but complemented by strong Commission guidance (especially on best practices learned from experience to date). In particular, the majority of respondents favoured the provision of preventive measures in any new directive to avoid gaps in target achievement and also called for corrective actions if such gaps were to arise.[142]

No doubt, when any Commission proposal for the next renewables directive is forthcoming and reaches the Member States in Council, different views as to the desirability of such harder-edged preventive and corrective EU-level measures may be voiced. But for present purposes, the important point is that the debates concerning credible renewables commitments and the setting of targets as a key governance tool remain alive and well, and promise to generate significant debate and, it is submitted, action at both EU and national level in the years to come. Binding targets, therefore, remain a subject of interest, difficulty and also much promise in the renewables field, but – as we hope this contribution has made clear – they cannot stand alone. They must be embedded in a carefully thought-out and robustly-developed broader regime, if those targets are to have the desired impact in practice. In particular, attention should be paid to Member State progress along their trajectories, and the possibility for providing harder-edged enforcement mechanisms for the Commission where Member State efforts prove clearly inadequate, in the face of established practices for designing national measures more effectively. Most respondents to the recent Commission consultation would appear to agree that greater clarity and predictability in these regards would provide a better research, development, investment and deployment environment for renewable energy in future.

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[141] See *Preparation of a new Renewable Energy Directive for the period after 2020* https://ec.europa.eu/energy/en/consultations/preparation-new-renewable-energy-directive-period-after-2020.

[142] See *Public consultation on the Renewable Energy Directive for the period after 2020: Analysis of stakeholder views* https://ec.europa.eu/energy/sites/ener/files/documents/Summary%20RED%20II%20Consultation.pdf.

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