

LEGAL OPINION

**LEGAL ASSESSMENT OF THE EUROPEAN COMMISSION'S
PROPOSAL FOR RENEWABLE ENERGY POLICY BEYOND 2020**

On behalf of

Europäisches Parlament, Rue Wiertz 60, ASP 08 G112, 1040 Brüssel

The Greens/European Free Alliance

created by

Dr. Dörte Fouquet

Jana V. Nysten, LL.M.

from

BBH
Becker Büttner Held

Rechtsanwälte · Wirtschaftsprüfer · Steuerberater

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Part 1 Introduction

On January 22, 2014, the European Commission (in the following also referred to as “Commission”) presented their **proposal for a climate and energy package for 2030** (in the following also referred to as “Commission proposal”),¹ which aims at the establishment of a “*competitive, secure and sustainable energy system*”. The core feature of the proposal is a binding target of at least 40% greenhouse gas emission reductions until 2030. It also contains a renewable energy target, according to which the European Union (in the following also referred to as “EU”) would have to **reach at least 27% renewable energy in the Union’s overall energy consumption by 2030**. However, unlike under the current Renewable Energy Directive 2009/28/EC, there would **not be any national targets** for the Member States, but only this one overall target for all Member States together to reach.

Without national targets, questions have arisen as to how the European Commission is going to ensure that the binding EU-level target of at least 27% renewable is in fact reached, e.g. as the European Union has no territory of its own on which to build renewable energy power plants, or what can be done if it is not reached.

The Commission to this end proposes a new “**governance**” approach which should allow reaching the target, but the proposal is rather mystical in this regard and there are open questions as to how the Commission intends this system to work. Further, one may ask whether the Commission can actually use such a “governance” system which is understood as being something different than legislation adopted in the course of a legislative procedure. The questions in this regard mainly relate to lack of participation rights of the Council and the European Parliament.

Finally, the Commission writes, one has chosen not to propose national targets for the European Member States in order to “*give Member States flexibility to transform the energy system in a way that is adapted to their national preferences and circumstances*”. However, there are serious doubts as to whether this approach is indeed efficient to reach the target, as it leaves the **Member States in the legislative seat**. From the Member States’ perspective, one may ask whether lack of specific EU legislation may in fact be less helpful, as they would be bound by EU primary law when exercising their legislative powers.

In the following, the Commission’s proposal will thus be assessed with regard to those three topics. This study will close with summary conclusions.

¹ Communication from the Commission of 22.1.2014 “A policy framework for climate and energy in the period from 2020 to 2030” COM (2014) 15 final.

**Part 2 A binding EU level target of at least 27% renewables
without binding national targets****A. Nature of a binding EU level target**

A legally binding target would have to be understood as a **target which has to be reached**. However, while it may create an obligation to be met, the **value of any obligation** – including thus an obligation to reach such a target – is largely **determined by the means to meet or enforce it**. Those could be incentives on the one hand, or sanctions on the other hand.

An example to illustrate: A and B have entered into a contract, according to which B shall give A 1000 EUR, in return for B building A's garage. Normally B would of course only take on this obligation if he himself has the means to do so or has someone whom he can use to do it. Then, if B builds the garage, A would have to pay B. This creates an incentive for B to do so. The more A pays, the more may B be interested in living up to his obligations and build the garage. If B does not, A would not have to pay him and could possibly even request his money back. Further, most national laws would allow A not to – fully - pay B, already if B makes clear that he will not build the garage, does not do it within an agreed timeframe, or builds it in a faulty manner. Thus A can take recourse to both incentives and sanctions.

Still, the nature of a binding EU level target would be different in the sense that it would be an obligation **undertaken by the EU itself**, without any counterparty to incentivize or sanction the obligation. The EU would thus – out of own (potentially) legislative initiative – get active to reach the target.

In the following, it will be looked at which measures would be available for the EU to take in order to reach a binding EU level target without any national targets for the Member States, and how and by whom such a target can be enforced. As the Commission proposal as it currently stands does not include any – binding or not – national targets for the Member States to be introduced by legislation, those will be briefly discussed but not be considered as feasible options.

B. Measures to reach the target**I. The EU cannot meet its target without the involvement of the Member States**

Based on the **principle of conferral of powers** as expressed in Article 4 of the Treaty on the European Union (TEU), the Union only has the powers which the Member States have given to it. Over the years, a lot of competences have been granted to the EU legislator, but the sovereignty of the Member States as regards their State territory and State budget has been untouched.

The EU, historically consisting of a group of sovereign Member States, itself **notably does not possess own territory** and can – based on the principle of conferral - neither just decide to use the territory of the Member States for any purpose without their agreement.

Under Article 311 of the Treaty on the Functioning of the European Union (TFEU), “(t) he Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources”. In particular, **no recourse can be made to the Member States’ finances**. The available EU budget is decided in a legislative procedure with involvement of the Member States according to the Articles 312ff TFEU.

Applied to the question of how the EU could reach a binding EU level renewable energy target, one may conclude that the **EU depends on the Member States** when it comes to reaching that target: itself, the EU **lacks both the territory and the finances** to reach its target independent of the Member States’ cooperation.

A binding EU level target would **thus be of little value – as it simply could not be reached - if the EU were to meet it by its own**. Whether there is value to it at all therefore depends entirely on whether and if so how the EU can “use” the Member States to reach its own target.

II. The EU has to “use” the Member States to reach its target

The solution – as the EU does not seem to have any other means to reach its target without the Member States - would be **legislation** adopted with involvement of the Member States and imposing certain obligations on them. This again poses the question whether and if so how the obligations created can be met and enforced. As for the Member States no constraints as regards power of disposal over territory or budget seem to exist, this is mainly a question of design of the obligations. Three different options are currently being used:

First, the Renewable Energy Directive 2009/28/EC (in the following also referred to as “RE Directive”) contains a binding national target which the Member States have to reach. However, the current Commission proposal does not foresee national binding targets and the Member States seem to oppose it.

Without a binding national target, one may think of certain measures the EU legislator could impose on the Member States, such as National Action Plans as under the Energy Efficiency Directive 2012/27/EC (in the following also referred to as “EE Directive”). Another option would be that the EU legislator would impose concrete measures, such as under the RE Directive and the EE Directive, or in the context of the European emission trading system.

1. Binding Targets

As the Commission proposal actually excludes the option of a binding national target, for the time being, the discussion of this instrument can be kept brief:

Binding national targets constitute an obligation as to the result. So, if the result is not achieved - i.e. the **target is not reached - the Member States can be called to responsibility**. At least at that point of time, the Commission, as guardian of the Treaties and in charge of enforcing the provisions of EU law under Article 17(1) TEU, could start infringement procedures.²

2. National Action Plans

A good example for an area in which the EU has committed to a target but not set binding national targets for Member States would be the area of energy efficiency.

However, for energy efficiency, notably, there is no binding EU level target, but the EU has only a “*headline*” target, which has been broken down into the objective to achieve “*energy consumption of no more than 1474 Mtoe of primary energy and/or no more than 1078 Mtoe of final energy in 2020*” (See Article 1(1) and Article 3(2) d EE Directive respectively). Accordingly, the action so far taken has been rather “soft”. Article 3 EE Directive requires the Member States to set themselves a target, thereby taking into account the EU level target. The Directive does however not require the Member States to show any kind of ambition: The Member States are not supposed to set their targets so that the EU level target is reached, but shall only take it “*into account*”. Rather the European Commission is going to **sum up the different targets and assess whether they suffice**. In case they do not add up to the EU level target, it appears, there is **nothing the European Commission can do**.

According to Article 24 EE Directive, the Member States shall report their progress towards their targets. From April 2014 onwards, the Member States shall further submit National Action plans every three years. Those “*shall cover significant energy efficiency improvement measures and expected and/ or achieved energy savings, including those in the supply, transmission and distribution of energy as well as energy end-use, in view of achieving the national energy efficiency targets referred to in Article 3(1). The National Energy Efficiency Action Plans shall be complemented with updated estimates of expected overall primary energy consumption in 2020, as well as estimated levels of primary energy consumption in the sectors indicated in Part 1 of Annex XIV.*”

² Whether and to what extent this is possible already before is subject to debate. The Commission at least does not seem to – normally – see any infringement action being started prior to 2020 when the target obligation becomes due.

However, despite the obligation to submit and update the plan, there are no sanctions foreseen. The Commission will evaluate the progress reports and the National Action Plans, but again despite making an assessment and sending it to the European Parliament and the Council, the **only thing the Commission can – but is not obliged to – do is issue recommendations to the Member States** (See Article 3(3) EE Directive).

As the **obligation to the result** would – according to the wording of the Directive – be only **the submission of a target and a National Action Plan** in line with Articles 3 and 24 EE Directive but not actually meeting the targets, it appears that no possibilities to start infringement proceedings for failure to meet the target are foreseen. The reporting obligation even seems to indicate that the Member States can and have to update their National Action Plans – which may or may not include updating the target.

Similar conclusions may be drawn from Article 4(4) RE Directive, in which it is said that a *“Member state whose share of energy from renewable sources fell below the indicative trajectory (...) shall submit an amended renewable energy action plan...”*. Thus while the RE Directive also installs a system to monitor that the Member States reach their (in the end binding) target, this system does not provide for any means to sanction deviations from the path the Member States have described they want to take. **Departure from the National Action Plans does thus – at least so far – not seem to be sanctioned by EU law.**

A somewhat more progressive approach may be found in other areas of EU law, e.g. in the Air Traffic Control Directive 691/2010/EC (in the following also referred to as “ATC Directive”), which however does not relate to meeting an EU level target, but imposes on the Member States the obligation to set targets in the sense of performance levels, thus certain thresholds below which national standards and performance -relating in this case to air traffic control – may not drop and thus provides some form of minimum harmonization in this area. In such a context it does not seem so unusual that the ATC Directive in a way installs an “alarm” mechanism, by setting “alert thresholds” in Article 9(3). However, again there is no clarity what happens when those “alert thresholds” are surpassed by a Member State – Article 18 ATC Directive only says that there might be a justification for the Member State in question in case the drop was due to circumstances beyond its control. A contrario, one may argue that infringement action would be possible if the Member State does not have such justification, but without an authoritative judgment by the European Court of Justice one cannot be entirely sure about this.

Experience with such a system of reliance on National Action Plans and thus the Member States, i.e. the Old Renewable Energy Directive 2001/77/EC (in the following also referred to as “ORE Directive”), has shown reliance on National Action Plans can easily result in the EU

not meeting its EU level target, due to lack of political will by the Member States and in the absence of any binding and enforceable obligation on them.³

To conclude on National Action Plans, it **depends on the provision in secondary EU law what exact obligation is being imposed on the Member States**, i.e. which result they have to achieve. If this result is **only setting some kind of target and the submission of a plan**, then this is a **very weak** instrument for the EU to achieve its binding EU level target.

3. Measures

Imposing concrete measures, e.g. an energy savings obligation scheme as done in Article 7 of the EE Directive, or priority access for renewable energy as done in Article 16 of the RE Directive, on the Member States is another option. The Member States are in any event obliged **“adopt all measures of national law necessary to implement legally binding Union acts”**, according to Article 291 TFEU, and normally have to do so by a certain date. Thus, as this is an obligation to reach a concrete result, the **failure to do so can give rise to enforcement action**.

Thus, most of the infringement actions against the Member States relate to implementation mistakes or simply lack of implementation within the timeframe set for doing so.⁴

The European emission trading system, as a harmonized system to achieve the EU level target of at least 20% greenhouse gas emission reduction, may be seen as a concrete measure in this sense as well – since the Member States are obliged to implement the Directive in its entirety.

However, while those concrete measures may be easier – and earlier, i.e. when the deadline for implementation has passed – to enforce, they may be difficult to negotiate, as the example of the above mentioned energy savings obligation in Article 7 EE Directive may show.

Further, one would need to make sure – as one cannot or at least should not rely on the Member States’ individual ambitions – that **the measures result in the achievement of the binding EU level target**. This creates **two problems**: First, and from a practical side, it must be **difficult to calculate exactly** what is needed, as there are several uncertainties. Second, and from a political side, Member States not willing to commit to a binding national target are

³ Compare e.g. European Commission – Evaluation Report in Accordance with Article 3 of Directive 2001/77/EC COM (2004) 366 final, where it was stated on p. 33 that *“(t)he trends set out in the Commission Staff Working Document lead to the conclusion that, although progress towards meeting the targets has begun, the 2010 target will not be achieved under current policies and measures. There is a strong need for more political will to invest in the EU into renewables.”*

⁴ For general information on this and for an overview over pending and closed infringement procedures relating to all EU legislation, see http://ec.europa.eu/eu_law/infringements/infringements_en.htm.

unlikely to accept such measures, which in order to be effective would need to be rather far-reaching, it seems. Thus, while such measures may be a solution for reaching the binding EU level target without binding national targets, it does not appear to be an “easy” one.

C. Legal enforcement

I. Against the Member States

The standard procedures for failure to act against the Member States are the so-called **infringement proceedings** according to Article 258 TFEU. After an extensive pre-litigation phase, during which the Commission communicates its views to the Member State on the alleged non-compliance and the Member State in question gets the opportunity to defend itself, the Commission may take the Member State to Court.⁵ In a second referral, if the Member State did not comply with the European Court of Justice’s ruling, the Commission asks a penalty to be imposed on the Member State.⁶

However, this **requires a clear breach of an obligation by the Member State**. While for binding national targets, this may be easily established once the target is not achieved, and for concrete measures to be taken by a certain date a breach may be constituted rather easily as well (compare above Part 2B.II.3), it seems **more difficult the vaguer the obligation** is. In any event, as mentioned above, when Member States have no obligation but e.g. to submit a plan, then submission of the plan should suffice and no infringement proceedings can be started.

Further, one needs to note that the decision whether to start infringement proceedings or not lies **at the discretion of the European Commission**. Failure to do so can in principle not be challenged.⁷ However, one may argue that **the more blatant the breach** by the Member State, the more the Commission should watch over its (correct) implementation. This again **speaks for concrete and well-formulated measures in EU secondary legislation**, it seems, the more if the binding EU level target shall be met without any binding national targets.

II. Against the European Union

A binding EU level target may only be binding on the EU legislator itself, and should logically only be enforceable against the EU institutions.

⁵ For general information on this and for an overview over pending and closed infringement procedures relating to all EU legislation, see http://ec.europa.eu/eu_law/infringements/infringements_en.htm.

⁶ For an overview of Commission policy in this regard, see http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm.

⁷ See e.g. ECJ, Case 247/87, *Star Fruit*, ECR 1989, 291. See also below Part 2C.II.

The Commission, being – normally – the institution in charge for proposing and executing legislation according to Article 17(1) TEU, would thus have to take care that the EU target is reached. If not, proceedings of failure to act may be started. However, if the Commission would take action, e.g. through submitting a proposal for legislation, but such would be blocked through failure to act by other institutions, i.e. the European Parliament or the Council, then proceedings would have to be directed against the latter's inaction.⁸

Such **proceedings for failure to act** would be governed by Article 265 TFEU which allows the Member States, the institutions and in limited cases also private and legal persons⁹ to complain to the European Court of Justice of the failure to take a decision by one of the institutions.

However, the complaint is only admissible **if and so far the institution in question has been asked to act**. Discretion as regards the action excludes admissibility where the institution is not obliged to act, such as is the case with the Commission's decision as to whether or not open infringement proceedings against a Member State.¹⁰ This may cause **problems if the Commission does not – as it seems under the current Commission proposal – get a mandate to propose legislation** to reach the binding EU level target, or would only have a very limited mandate. In such a situation, proceedings for failure to act would have to be limited to the precise content of the concrete mandate to the Commission, excluding everything where the Commission enjoys discretion.

The fact that the institution needs to have been asked to act also has a procedural component: Before one can turn to the European Court of Justice, one has to send a **“warning”** to the institution in question, to which the latter may react within two months after the warning was received. Such a response can either be taking the action, of which the failure to take was criticized in the warning, or a justification why the action was and is not being taken.¹¹ However, even taking a different action than the one originally envisioned may make the complaint inadmissible,¹² though possibly the complainant could then try to initiate annulment procedures against the act “wrongly” adopted. Thus, theoretically, upon such a warning, the Commission could reply that due to the limited mandate and/or the discretion no action was taken. This way – in particular as it currently looks this justification would be well-founded in

⁸ Vgl. Schwarze, in Schwarze, EU-Kommentar, 3. Auflage, Nomos 2012, Art. 265, par. 9. Here however one has to distinguish inaction and rejection of course.

⁹ It has to be a binding act, which the institution failed to take, and most importantly, the person needs to be individually and directly concerned by the act not being taken. See e.g. ECJ, Case C-68/95, T. Port, ECR 1996 I-6065 (in which the Court stated that the same criteria for standing before the Court would need to apply as they do in the context of Art. 263 TFEU proceedings – i.e. annulment actions – to guarantee effective protection to individuals).

¹⁰ See e.g. ECJ, Case 247/87, Star Fruit, ECR 1989, 291.

¹¹ See e.g. ECJ, Case 48/65, Lütticke, ECR 1966, 27.

¹² See e.g. ECJ, Joined Cases 5/62 – 11/62 and 13/62 – 15/62, San Michele, ECR 1962, 917.

the wording of the Commission proposal – access to court and thus legal enforcement action would be barred.

Further, and maybe most importantly, proceedings can only be started against **failure to take binding action**.¹³ It is thus questionable whether a failure to act of the Commission under the Commission proposal could ever lead to such proceedings due to the **non-binding nature of the measures under the “new governance” structure the Commission proposes** (compare below Part 3).

All in all, thus, the possibilities to take legal enforcement action against the EU for failure to meet its binding EU level target seem **rather limited if the Commission proposal is maintained the way it is** and does not foresee for a stronger mandate for the Commission to act.

D. Conclusions

To conclude, the **nature of a target is mostly determined by the means to achieve and actually enforce it**. In this sense, it does not surprise that the Commission itself reflected in the past: *“Providing targets at the European level augments this stabilising impact: EU policy generally has longer time horizons and avoids the destabilising effects of short term domestic political changes. To be effective, targets have to be clearly defined, focussed and mandatory. The “12% renewables” target is a good political target, but has proven insufficient to develop the renewable energy sector.”¹⁴*

An binding EU level target for renewable energy would thus certainly require action to be taken by the EU and likely legislation to be adopted in order to “use” the Member States for reaching the target, as the EU does not itself has the means to do so.

However, with the option of binding national renewable energy targets being expressly excluded, the question arises what such legislation should look like. The above mentioned examples indicate that **merely asking the Member States to submit targets and National Action Plans to the European Commission and the latter to monitor the developments may not suffice to allow for the achievement of the binding EU level target**. This is at least the case when under the EU secondary legislation to be adopted adopted the obligation of the Member States is met once they submitted their targets and plans, as e.g. under the current EE Directive. In such a situation, it would not be ensured that the binding EU level target would be reached. While theoretically, proceedings against the European Commission for failure to act seem possible, considering the non-binding nature of the measures in the

¹³ See e.g. ECJ, Case 15/70, Chevalley, ECR 1970, 975.

¹⁴ European Commission, Communication from the Commission to the Council and the European Parliament - Renewable energy road map - Renewable energies in the 21st century: building a more sustainable future (COM(2006) 848 final) p. 4.

Commission proposal, for the moment this seems unlikely. Further, without a mandate to propose any concrete measures, the Commission would likely get away as not having been able to do anything. Similarly, if proposals were submitted but not adopted, due to lack of consent by the Member States, **there is little that can be done.**

However, different formulations and setting could be imagined, which may provide for a slightly stronger regime: For example, if EU secondary law to be adopted would provide that Member States had to take appropriate measures with a view to the achievement of the binding EU level target, then it would be hard to say what could be considered “appropriate”. This would in the end be up to the European Court of Justice to decide, in the course of proceedings which may take years. Certainly, it is not excluded that the Court would find a breach of the Member State’s obligation, but this is likely to be a case to case decision depending a lot on the facts. To safeguard a stable legislative framework for the development of renewable energy, this would likely not suffice.

If the secondary legislation describes concrete measures by the Member States to be taken, this could – despite practical and political problems to get to such legislation - prove an efficient instrument for the EU to meet its binding EU level target. The European Commission could start infringement actions against Member States failing to implement the measures, and if not, possibly, one could even proceed against the European Commission for failing to do so – at least if the EU level binding target is at stake. As seen above, not only the Member States would need to have obligations to take concrete measures in order to allow for legal enforcement procedures, the Commission would need **a clearer mandate to propose and then enforce such measures as well.** This is even more important as the Commission enjoys discretion as regards the opening of infringement proceedings against the Member States, and the decision not doing so cannot be challenged as a failure to act.

However, as the concrete measures would have to go through legislative proceedings, much would depend on the Member States. As a note of caution, when the Member States so heavily oppose binding national renewable energy targets, it does not seem as though they would welcome far reaching concrete measures, as e.g. also the history of the EE Directive seems to confirm.

Part 3 The concept of “new governance”

A. The Commission’s proposal

The European Commission seems to envision a **future renewable energy policy and legislative framework mainly in the hands of the Member States**. The system seems to entirely rely on National Action Plans. To get to those plans, it seems, a **three step approach** shall be followed.

In a first step, the Commission would define what should be within the National Action Plans which the Member States then would have to adopt. So far, the Commission proposal says that *“(i)n particular, the plans would describe how a Member State intends to deliver the necessary reductions in greenhouse gas emissions as well as indicating the amount of renewable energy and energy savings the Member State intends to attain in 2030 taking into account existing Union legislation and policies”*. From the wording, it appears that Member States would **have to describe measures they want to take and have to set themselves indicative targets for renewable energy and energy savings**. They would also have to indicate the **impact on the national energy mix**. It is assumed that for the obligation to submit such plans, the Commission would propose legislation, specifying the timing and setting out some requirements as regards the content, possibly even prescribing a certain template. With that, the National Action Plans under the Commission proposal would seem very similar to the National Action Plans under the current EE Directive. The conclusion that the targets are merely indicative is strengthened by the fact that the plans shall be regularly updated – at least once within the ten years between 2020 and 2030 – *“to take account of changing circumstances”*. Again, the **formulation seems to allow for Member States reducing their indicative targets and changing their National Action Plans accordingly**, and as was and is the case under similar EU secondary legislation (compare above Part 2B.II.2).

Step two then seems to be coordination between the Member States and it is unclear what the Commission’s role in that would be. However, considering that the third step would be only a review by the Commission and – *“(i)f the plan is deemed insufficient”* – *“a deeper iterative process (...) with the aim of enforcing its content”* it is unlikely that the Commission intends to interfere in the coordination among the Member States too much, i.e. through legislation.

In fact, the third step, though nothing is said about what the deeper iterative process should look like, does not seem to involve too many powers for the Commission anyways: it is described as a *“process led by the Commission to assess the Member States’ plans (...) and to make recommendations as appropriate”*. The term “recommendations” does not seem to

include anything with binding character, the more as Art. 288 TFEU explicitly states that recommendations are **non-binding**. Also, the Commission proposal explicitly states that this governance structure “*may need to be set in legislation at a later date if the envisaged cooperative approach is not effective*”.

Thus, to sum up, the Commission proposal suggests a system in which the Member States adopt their National Action Plans, the Commission assesses those plans and may make recommendations. Legislation seems to be intended only as regards the content of the National Action Plans, thus as regards the more or less formalistic requirements such plans have to meet, i.e. set a target, identify measures to reach the target, update at least once etc., **similar to the approach taken in the EE Directive**.

B. The Commission’s competences under new governance and participation rights

I. Role of the Commission

Apart from the potential legislation around the need to have a National Action Plan, the Commission seems to be the **only institution involved** in the new governance. Considering that this process is a non-legislative one, based on non-binding recommendations, the Council and the Parliament would not be involved.

II. Role of the Council

As said above, the role of the Council would likely be restricted to the adoption of the legislation setting the requirements around the National Action Plan. It would not interfere in the “*iterative process*” as the Commission calls it, which would instead be “*led by the Commission*”. The Member States would however possibly be able to get a say at step two, thus at the coordination stage, in which “*consultation with neighbouring countries should be a key element*”.

III. Role of the Parliament

Apart from the legislation which may be adopted on the requirements around the National Action Plan, there seems to be **no role for the Parliament**.

IV. Restrictions on the Commission’s competences under Article 194 TFEU

According to Article 194 TFEU, “*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve*” the following objectives:

“(a) *ensure the functioning of the energy market;*

- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.”

Such **legislative measures** shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

The provision does not speak about non-legislative acts, such as the ones the Commission seems to propose to take in the course of the iterative process, thus recommendations. In fact, **recommendations, as non-legislative acts**, do not even need a specific legal basis in the Treaties, but can be made irrespective of the EU competences.¹⁵ Therefore, nothing in the Treaties prevents the European Commission from making such recommendations, it appears.

V. Restrictions on the EU's competences under Article 194(2) TFEU

According to Article 194(2) TFEU, the measures taken by the EU legislator “*shall 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*”.

As regards the **non-binding recommendations** envisioned by the Commission proposal, there seems to be only a **limited threat** to the Member States' sovereignty, simply due to their non-binding nature. If the Member States do not want to follow them, they would not be bound to do so, so that their rights are not affected in principle.

However, it is not to be excluded that the recommendations would lead to **political pressure** on a Member State in question and that such Member State would thus see its sovereignty affected. Although Article 194(2) TFEU clearly states “*such measures*” and thus refers to the legislative measures adopted by Council and Parliament in accordance with the legislative procedure, one may try to argue that **what cannot be done by force through legislation cannot be done by force through political pressure either**. Absent an authoritative judgment of the European Court of Justice it is not entirely clear what is meant by the caveat in Article 194(2) TFEU, so that such an argument could at least be made, although it sits uncomfortably with the understanding that recommendations do not require a specific competence.

One may add that there is **considerable uncertainty around the right interpretation** of Art. 194(2) TFEU and accordingly the consequences for EU legislation in the field of (renew-

¹⁵ See e.g. Biervert, in Schwarze, EU-Kommentar, 3. Auflage, Nomos 2012, Art. 288, par. 36.

able) energy.¹⁶ Some argue that this provision would bar all legislation which may impact the Member States' sovereignty relating to their national energy mix, so that the EU could not adopt new binding national renewable energy targets. However, absent an authoritative judgment of the European Court of Justice such a restriction on the competences of the EU legislator cannot be confirmed. Rather, one could also interpret the provision differently, for example by implying a certain "threshold" as regards the impact a measure must have to trigger Art. 194(2) TFEU, similar to the threshold in Art. 192(2) AEUV, where a measure must "significantly" affect the Member States sovereignty, before the provision applies. One could also argue that if the Member States agree unanimously binding national renewable energy targets would be possible, again somehow parallel to Art. 192(2) AEUV, and in line with the more political argument that if the Member States agree to be bound, then they can be bound, may it be under Art. 194 TFEU or by changing the Treaties and explicitly conferring the competence to the EU. Thus, while those interpretations have not been confirmed by the European Court of Justice either, it seems **premature to conclude that Art. 194(2) AEUV can only be interpreted so as to bar EU legislation introducing binding national renewable energy targets.**

VI. Restrictions due to the non-binding nature of recommendations

Article 288 TFEU defines recommendations as being **non-binding**. The Member States can thus not be forced to do anything based on a recommendation. This significantly restricts the possibilities of the Commission in this regard. In a scenario in which a National Action Plan is "*deemed insufficient*", there may be discussions, **but no changes can be forced**. Neither can the Commission force the Member States to abide by their plans, or prohibit them to change them (compare above Part 2B.II.2).

C. Conclusions

As seen above, the Commission seems to propose a system similar to that under the EE Directive, thus relying mainly on the Member States. Legislation – other than probably to create an obligation to adopt National Action Plans and set targets – does not seem to be envisioned. The Commission would only act through non-binding recommendations.

That being the case, procedurally, there is no need for participation of the Council and the Parliament and there seem to be no restrictions to the Commission's competence which

¹⁶ For a detailed discussion, see e.g. Fouquet et. al. "Report on legal requirements and policy recommendations for the adoption and implementation of a potential harmonised RES support scheme" compiled within the European research project beyond2020, Grant Agreement no. IEE/10/437/SI2.589880, February 2014, available at: [http://www.res-policy-beyond2020.eu/pdf/Report%20on%20legal%20requirements%20and%20policy%20recommendations%20for%20the%20adoption%20and%20implementation%20of%20a%20potential%20harmonised%20RES%20support%20scheme%20\(beyond2020%20-%20D3-2\).pdf](http://www.res-policy-beyond2020.eu/pdf/Report%20on%20legal%20requirements%20and%20policy%20recommendations%20for%20the%20adoption%20and%20implementation%20of%20a%20potential%20harmonised%20RES%20support%20scheme%20(beyond2020%20-%20D3-2).pdf).

would make the proposed new governance impossible. So it appears **the Commission can do what it proposed to do.**

However, practically, this **does not make the new governance a very effective instrument** it seems. Experience from the past has shown that, e.g. under the ORE Directive or under the EE Directive, the **Member States lack ambition and EU level targets - without any EU legislation making sure that they are met - were not met.**

Part 4 The impact of the Commission proposal on Member State legislation without binding national targets and without concrete measures

A. The principle of shared competence

As mentioned above, Article 4 TEU sets out that the competences which have not been transferred to the EU by the Member States through the Treaties remain with the Member States. Article 4(2)i) TFEU defines that legislation in the field of **energy is a competence shared between the EU and the Member States**. This means, according to Article 2(2) TFEU that the **Member States may act where and in so far as the EU has not acted and where and so far as the EU has decided no longer to act**.

Applied to the Commission proposal, the latter half of the sentence becomes important. Under the EE Directive binding national targets and some rather concrete measures were imposed on the Member States. The room for the Member States to act was thus restricted in the sense that for example they could not adopt or maintain legislation in conflict with the concrete measures such as e.g. the priority grid access (compare above Part 2B.II.3).

The Commission proposal does not seem to foresee such legislation, neither as regards targets nor as regards concrete measures, but only the governance structure discussed above (compare above Part 3). Thus one may say that the **EU has stepped back** from exercising its legislative competence and the Member States have regained theirs.

B. A step back – consequences

As seen above, the Commission proposal would lead to the EU legislator withdrawing from exercising legislative competence in the field of renewables to a considerable extent.

For the achievement of the binding EU level target, this leads to **two problems**:

First, the **EU cannot make the Member States take any action**, where there is no competence for the EU legislator to act, i.e. where this has not resulted in EU legislation yet. Thus, if the EU legislator has e.g. chosen to go for an approach with National Action Plans but without any further concrete measures, then the EU hardly has any influence on what the Member States write in their National Action Plans (compare above Part 2B.II.2). Depending on the nature of the obligation to adopt such a plan and based on current examples, it looks like the EU would neither have any competence to enforce the National Action Plans when Member States deviate from it (compare above Part 2B.II.2). Thus, **less ambitious Member States may endanger the achievement of the binding EU level target**.

To illustrate this problem, one may again refer to the situation under the ORE Directive, under which there was no binding national target and the Commission found this to be insufficient to reach the EU level target, as Member States lacked political commitment. Similarly, under the EE Directive, the Member States' self-set targets do not add up to the EU level 20% "headline" target. In both cases, lacking an explicit mandate to act, **the Commission could not and cannot do anything, neither is there the possibility to take action against the EU for failure to act** (compare above Part 2C.II).

Second, the Member States have to **abide by existing EU law**. While special legislation may allow for derogation in certain aspects, without such special legislation the normal rules of EU primary and secondary law apply. Thus binding national targets may give some possibilities for justification and thus leeway to the Member States. Certainly, a binding EU level target may already do so to some extent, however, it may not suffice to create and justify dedicated national renewable energy policies and legislation – as by itself it does not create (sufficient of) an obligation of any kind on the Member States (compare above Part 2D). This may give rise to **problems in such Member States which do show some ambition with regards to renewable energy policy**.¹⁷

For example, recently the discussion has been brought up whether Member States could – even in a situation where there are binding national targets – maintain national support schemes which are restricted to renewable energy installations within their own territory. Without binding national targets it would be **much harder to justify such allegedly discriminatory treatment**, it seems. In particular, it is argued, that as the electricity market has evolved, earlier case-law of the European Court of Justice could no longer be invoked for such a justification.¹⁸

Similarly, the **State aid rules** may constrain Member States in designing and implementing a renewable energy policy, as Art. 107 TFEU generally prohibits "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods (...), in so far as it affects trade between Member States...*" The European Commission then has to

¹⁷ One may also note that the Directive 2009/28/EC has with the binding national target in combination with the system of cooperation mechanisms created a means for Member States to generate income. Ireland for example plans to develop renewable energy in order to "sell" it to the United Kingdom, so that the United Kingdom is able to reach its target and will not have to fear infringement proceedings and potential penalties. This possibility would fall away as well, without any binding national targets, of course.

¹⁸ See the Conclusions of the Advocate General Yves Bot of January 28th 2014 Advocate in Case C-573/12 *Alands Vindkraft*. HE seems to argue that given the progress of the internal electricity market, Member States can no longer justify support schemes limited to renewable energy installations within their own territory, and concludes that Art. 3(3) of the Directive 2009/28/EC which explicitly allows this is invalid as in conflict with primary EU law. The European Court of Justice's ruling in *PreussenElektra* (ECJ, Case C379/98, ECR 2001 I-2099) would no longer be applicable.

decide whether to approve a measure or not based on (among others) its contribution to an objective of common interest. In case there would no longer be a strong renewable energy policy framework in the EU and legislation allowing support measures to renewable energy, including State aid measures, **getting such approval may become more difficult for the Member States**. Some of them do offer financial support to renewable energy in the form of State aid as an integral part of their policy in this area, which might then be called into question. Similarly, it would become **more difficult for the Member States to justify reductions or preferable treatment as regards the costs to finance their renewable energy support policies**: If there is no obligation on the Member States to show any kind of ambitions, then there would not have to be costs passed on to the energy-intensive industry, for example, and thus no reductions to safeguard their competitiveness would be necessary, the Commission could argue when running through the State aid notification procedure. However, without such provisions and facing the threat of undertakings relocating outside their territory, loss of jobs and infrastructure, even the most ambitious Member States **may not be able to politically justify renewable energy support policies**. One may even add that – in a world without an obligation to deploy renewable energy – there would also be no need for special rules e.g. for capacity reserves or the like, as the Commission may again argue in the course of a State aid notification procedure that just deploying less renewable energy would be less distortive. For the Member States in question that may (have to) result in the **decision to stop their renewable energy ambitions**.

Thus, EU primary law may in some important aspects stand in the way of ambitious Member States helping the EU to reach the binding EU level target.

Further and from a more practical perspective, the EE Directive so far with the binding national target in combination with the system of cooperation mechanisms has created a **means for Member States to generate income**. Ireland for example plans to develop renewable energy in order to “sell” it to the United Kingdom, so that the United Kingdom is able to reach its target and will not have to fear infringement proceedings and potential penalties. This possibility would fall away as well, without any binding national targets, of course. The Member States **would be deprived of income they counted on**. Also, investments are currently being planned and already made to build the infrastructure for future cross-border trades in renewable electricity, for example in Spain and Portugal. However, without any binding national renewable energy targets for the Member States to be met there would be little incentive for them to engage in such trades and the **investments in infrastructure would go to waste**.

C. Conclusions

As seen above, the Commission proposal would lead to a **withdrawal of the EU legislator** from the area of renewable energy. This withdrawal would seem to **endanger the EU's ability to meet and enforce its binding EU level target** and thus question the value of the target altogether (compare above Part 2A). What is worse, the withdrawal **may even destroy the renewable energy policies of the Member States** by making it much more difficult to justify potential deviations from rules of EU primary law. With that, the **entire Commission proposal for a renewable energy policy beyond 2020 may be called into question**, as it would in fact lack not only binding national renewable energy targets but also an effectively binding EU level target.

Part 5 Summary conclusions

As becomes clear from the above assessment, the **Commission proposal is rather weak**. It does – likely – not involve any binding legislation other than – possibly – an obligation on the Member States to set themselves an indicative target and to submit a National Action Plan. Without concrete obligations on the Member States, the European Commission can do little to make them contribute to the achievement of the binding EU level target. As the EU lacks own territory and own financial means, the binding EU level target can not be reached that way and without “using” the Member States. Rather, **as it entirely depends on the ambitions of the Member States without any enforcement powers for the EU**, that target is unlikely to be reached. Thus the **binding EU level target does in fact seem to be of very little value and the entire Commission proposal seems to fail** in providing the framework for a “*competitive, secure and sustainable energy system*” which it was intended to do.

Having reached this conclusion, **one may ask why the current approach with binding national renewable energy targets**, which according to the Commission’s own statements seems to work and most of the Member States, since their adoption, faced significant growth,¹⁹ **is not maintained for the future after 2030**. This would not only give some force to the binding EU level, but it may also help offering some protection to the national renewable energy policies some ambitious Member States may pursue, and potentially protect some investments already made.

¹⁹ Compare e.g. European Commission, Report from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, Renewable energy progress report (COM(2013) 0175 final).