November 2014

EU Climate & Energy Governance Health Check

Looking back to 2020 and forward towards 2030

ClientEarth

Contents

Key climate and energy governance messages

Key Transparency Messages

*1. Currently the rules on access to documents from the EU institutions are more restrictive than those in the Aarhus Convention. 'Access to documents' legislation applicable to the EU institutions must be brought in line with the Aarhus Convention. Separately, the **2030 climate and energy framework** must ensure as a minimum that all climate related documents are free to access on the basis laid out in the Aarhus Convention.*

*2. The CJEU has found that there is a general presumption that the disclosure of any documents relating to an infringement procedure at the pre-litigation stage would undermine protection of the purpose of an investigation and therefore cannot be disclosed. The presumption against disclosure must be reconsidered by the CJEU, **especially with regard to climate relevant information in the 2030 context**, all the more as the EU institutions have a strong tendency to interpret the term 'investigation' very broadly.*

*3. In the specific context of **2030 climate & energy governance**, access to the National Action Plans and all related information will be vital considering the plans may replace the various reporting obligations currently enshrined in law under the 2020 package. The combination of a streamlined, informal reporting process with a lack of compliance with the Union's transparency obligations under the Aarhus Convention could lead to an unenforceable governance landscape. **In effect the 2030 governance proposals could enable the EU to increase its avoidance of disclosing climate and energy information to the public.***

*4. Given the seismic economic and social changes required to deliver the low carbon transition and the scale of public and private investment, **transparency is fundamental to guaranteeing the legitimacy and credibility of decision making**. Public buy-in to the EU decarbonisation project will not exist unless there is an open and transparent administration governing the low carbon transition.*

Key Effectiveness Messages

1. To be effective, climate governance must be embedded in the rule of law.

*2. The retreat in the **2030 climate and energy framework** from binding targets at the MS level is regrettable. Targets 'binding' on the EU are not binding in any meaningful sense - to be 'binding' EU targets must be translated into binding MS level targets.*

3. The Commission's increased determination to complete the IEM and utilise the State aid guidelines for decarbonisation purposes in the post-2020 landscape is to be welcomed. However, the Commission will come under intense political lobbying not to enforce and not to deploy its State aid jurisdiction to optimise low carbon and sustainable energy outcome thus the value of this commitment is far from certain.

Key Accountability Messages

1. The role of accountability in governance is to guarantee action and that the action will be taken in the manner that is agreed or expected.

2. In principle, the EU's legal system provides a very powerful framework for holding MS to account for delivery of their responsibilities for EU climate and energy governance, to the extent that those responsibilities are enshrined in legislation.

3. There are significant deficiencies in MS accountability for their obligations under the ***2020 climate and energy package*** *including a lack of reporting by MS, fragmented reporting across various policies, failure on the part of the Commission to enforce, consequent opportunities to game the system and difficulties for 3rd parties (e.g. NGOs) to enforce.*

4. There are also significant deficiencies in enforcement for the EU institutional contribution to achieving the decarbonisation objectives such as the complete discretion which the EU enjoys over the decision to enforce, the lack of a composite reporting requirement on the EU institutions and the lack of independent science underpinning climate policy.

5. While targets must be binding to fully satisfy the principle of accountability, indicative targets are not devoid of value, especially when broken down on a national level. Indicative targets stimulate MS effort to design strategy and allow the MS to retain flexibility to address national circumstances and future developments. However, to be credible targets must be embedded in binding legislation at MS level. For investors to believe the political sincerity of a radical low carbon transition, they need credible targets underpinned by a long-term legal commitment. Enforceability should not be seen as a negative thing to punish MS not meeting targets but about ensuring that the target is binding in a real sense.

Key Legitimacy Messages

1. Legitimacy contains two fundamental pillars: participation of those who will be affected by the decision and credible decision making on the basis of independent expert advice.

2. The UK Climate Change Committee is an example of the kind of innovative governance that needs to be developed at EU level to ensure legitimate, and thereby credible, decision making is standard for the ***2030 Framework and beyond****.*

Key Flexibility Messages

*1. There is little doubt that the principle of flexibility with regard to the national energy mix is now a central organising principle of **EU 2030 climate and energy governance**.*

2. However, whereas MS can undoubtedly lay strong claim to a right to flexibility over the national energy mix, this does not allow them to deviate from the EU's climate objectives, which are squarely based on Article 192. In effect, the EU has a strong mandate to act on greenhouse gas abatement and thus the power to adopt a robust regulatory pathway to delivering the 2050 decarbonisation objective.

*3. While flexibility will be a strong organising principle for **EU climate and energy governance for the post 2020 period**, it is not an absolute criterion. The key risk of allowing too much flexibility is that individual MS will make choices about their national energy mix which will pre-empt the carbon budget for the EU as a whole. **The 2030 governance regime** must ensure that an appropriate balance is struck between facilitating national flexibility over the energy mix on the one hand and achieving the EU's climate objectives on the other. In practical terms, this means that facilitating the flexibility principle may militate against the adoption of nationally binding renewables targets for 2030; however, provided no national binding 2030 targets for renewables are fixed by the EU, the pressure must be increased for greater delivery onto the EU's GHG instruments (ETS and ESD).*

*4. The 2030 Framework proposes the introduction of 'national plans for competitive, secure and sustainable energy.' It is not yet clear if these plans will have a legislative base, however, a core part of ClientEarth's analysis of the possibilities for reinvigorating the proposals for the **2030 governance framework** relates to a wider use of the Environment Chapter and greater utilisation of the ordinary legislative procedure - including for these national plans.*

Key Certainty Messages

1. Embedding the principle of certainty into an effective pathway for decarbonisation requires that the arrangements for decision making are defined by 4 central characteristics. Namely they reflect a credible commitment to effective action; take a long term perspective; facilitate forward planning; and create a framework for ensuring effective action in the face of uncertainty.

*2. **The 2020 package** created a governance regime that requires MS and EU institutions to substantially reaffirm their commitment to effective climate mitigation every 10 years. As a result, Europe's climate debate has not moved beyond a discussion of 'whether' to act rather than 'how' - wasting valuable political capital.*

*3. **The 2030 Framework** views 2030 as an end in itself rather than an interim landing point embedded in a stable long-term governance pathway to at least 2050. This must be rectified - investors require long-term certainty and the 2030 debate is an opportunity to promote that certainty.*

4. It is too early to tell whether the Commission's January 2014 proposals on reporting will improve reporting on climate and energy and whether the final indicators, which are used balance sustainability appropriately against energy security and competiveness, will be a really effective tool.

5. On the basis of partial MS reporting, the Commission simply decides to report on the macro decarbonisation picture when it is ready to do so. This is not reflective of a stable and transparent process that transcends politics. ClientEarth's analysis is that the Commission should be reporting to the Spring meeting of the European Council and a concurrent session of the European Parliament every year on the overall EU decarbonisation pathway - a state of decarbonisation in the Union report.

Key Policy Integration Messages

*1. A lack of policy integration and policy inconsistency, compounded by a fragmented Commission are regrettably hallmarks of the EU's **2020 climate and energy package** which are clearly having detrimental impacts on achieving the desired low carbon objectives.*

2. There should be a legally binding EU target for reducing GHG emissions by at least 80-95% by 2050. Such a target would stimulate greater policy integration and create investment confidence stretching out to mid-century.

Making the case for a more holistic 2030 governance debate

The Commission's 2030 Communication invited MS and stakeholders to focus on the question of governance as part of the 2030 debate. ClientEarth welcomes that shift in the EU's climate and energy debate. However, we would argue that as presently conceived, the 2030 governance discussion is too narrowly defined. The Commission's agenda is largely limited to a procedural streamlining of the climate and energy reporting process. This paper is designed to make the case for why the 2030 debate should be viewed as a key opportunity for undertaking a much more systemic review of the EU's climate and energy governance arrangements.

Good governance is absolutely essential to the delivery of the EU's climate and energy objectives and targets. A 2030 debate focused predominantly on targets is ultimately meaningless unless it is joined by an equivalent emphasis on the strength and thereby the credibility of the arrangements for delivering those outcomes.

In seeking to open the policy space for a broader discussion of EU climate and energy governance, we have identified what we consider to be the core principles and features of a good governance regime. This paper then tests the EU's present 2020 and proposed 2030 arrangements against those principles to establish the 'health' of EU climate and energy governance.

Our conclusions are captured in the following table:

Framework of relevant Governance Principles		***2020 package***	***2030 Framework***
Fundamental principles of good governance	Transparency	***Weak***	***Weak***
	Effectiveness	***Good***	***Weak***
	Accountability	***Bad***	***Bad***
	Legitimacy	***Weak***	***Bad***
Governance principles necessary for action in the **EU context**	Flexibility	***Good***	***Bad***
Governance principles necessary to deliver **climate and energy** outcomes	Certainty	***Bad***	***Bad***
	Policy Integration	***Bad***	***Bad***

The results of the analysis in this paper make clear that there is a strong case for the opening of the governance debate at EU level beyond the narrow parameters of streamlining reporting processes.

What does good climate and energy governance look like?

The concept of 'governance' essentially describes the arrangements for how power and responsibility for achieving outcomes is allocated. Use of the term 'governance', in the context of climate and energy policy, also describes the reality that power and responsibility for achieving policy outcomes are not allocated in a 'top down' manner but instead are shared by a wide range of stakeholders. In the climate and energy context, power and responsibility are shared first and foremost between the EU institutions and MS but they are also shared amongst regulated industries, investors, civil society, national parliaments and regional authorities.

There are three core sets of principles that shape good EU climate and energy governance:

- Governance principles universally accepted as **fundamental** to good governance in all contexts:
  - Transparency
  - Effectiveness
  - Accountability
  - Legitimacy

- A governance principle specific to governance in the **EU context**:
  - Flexibility

- Governance principles necessary to achieve the aims of **climate and energy** policy:
  - Certainty
  - Policy Integration

The European Commission has also considered which key principles make up 'good governance' in the 2001 White Paper on European Governance.[1] The Commission White Paper also sets out seven principles, however those principles are slightly different from the principles analysed here. 'Certainty' was not included in the Commission White Paper as that paper was a general one, not dealing with the specific climate and energy governance context. Similarly, the Commission White Paper included 'participation' as a standalone principle, whereas in the current paper we incorporate that principle under the broader term 'legitimacy'. Finally, the Commission White Paper also included 'proportionality and subsidiarity' as standalone principles. This paper incorporates consideration of those principles as part of a wider discussion of the principle of 'flexibility', which includes those concepts but also raises specific issues relevant to the climate and energy context.

This paper has been divided into three chapters to capture the division between 'fundamental', 'EU' and 'climate & energy' specific principles. Within each of the 3 chapters the individual principles will be analysed in the context of the 2020 package and the 2030 Framework.

[1] European Governance: A White Paper COM(2001)428

Chapter 1: Governance principles universally accepted as fundamental to good governance

1 Transparency

Transparency is considered to be a hallmark of good governance that applies universally, climate governance is no exception. Compliance with the principle of transparency requires as a minimum that the technical and expert evidence used by policy makers to frame the scope of the policy challenge, and the range of potential solutions, is made public. It also requires that evidence gathered by policy makers concerning progress (or the lack thereof) towards delivery of policy solutions or objectives is disseminated, including the data concerning the possible options for course correction.

Given the seismic economic and social risks posed by climate change, energy insecurity and escalating energy prices, the profound social change required to deliver the low carbon transition and the scale of the public and private investment needed to achieve this objective, transparency is fundamental to guaranteeing the legitimacy and credibility of decision making concerning the available policy options.

In short, the economic and social implications of the climate and energy challenge are so great, decision making cannot legitimately occur behind closed doors.

As a minimum, compliance with the principle of transparency requires public access to information held by bodies responsible for administering and overseeing climate and energy governance concerning the status of the delivery process. Access to this information will enable the public at large and the NGO community in particular, to:

- know whether that climate & energy policy and law is being fully complied with;
- understand the practical effect on emissions that legislation has and;
- challenge inappropriate action or inaction by the relevant authorities through advocacy or even litigation when necessary.

Creating an open and transparent process of climate and energy governance will increase public understanding of the need for the low carbon transition, which is critically lacking, but also engender public confidence that effective action is being taken.

1.1 Transparency in action

From the outset of United Nations climate negotiations, the European Union has strongly emphasised the importance of transparency to the architecture of a credible regime for international climate governance.[2] However, the EU's approach to embedding this principle within the Union's internal legal framework has been very problematic, with important implications for the quality of EU climate and energy governance.

On the one hand, the EU attaches sufficient importance to the principle of transparency to explicitly enshrine this concept as a foundational value within Article 1 of the Treaty on European Union, which commits the Union to making decisions ‘as openly as possible’. The constitutional nature of the EU’s commitment to transparent decision making is further elaborated and entrenched by Article 15 of the Treaty on the Functioning of the EU, which guarantees a right of access to information held by the Union and its institutions, bodies, offices and agencies and

[2] See for the emphasis of transparency in international climate agreements and climate finance: http://ec.europa.eu/clima/policies/international/negotiations/initiatives/index_en.htm and http://ec.europa.eu/clima/policies/finance/international/transparency/index_en.htm

also that those entities will function in a transparent manner.[3] In addition, Article 42 of the EU Charter of Fundamental Rights frames transparency as a common value of the Union and so elevates it to the status of a right for Union citizens to enjoy rather than simply a duty upon the EU institutions and MS.

In addition to these constitutional commitments to transparency, the EU has been particularly proactive in pioneering the application of this principle to the sphere of environmental policy, which should, in theory, significantly contribute towards the creation of a highly transparent process of EU climate and energy governance. Since the early 1990s the EU has prioritised the principle of transparency as a key principle of EU environmental governance, notably with the Environmental Impact Assessment process and early access to environmental information measures. More latterly the EU was a key champion in the negotiation of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which guarantees extensive participative rights in the field of the environment, principally rights of access to information, rights to participate in decision making and rights of access to justice to challenge decisions.

However, despite the EU's constitutional commitment to transparency and its political willingness to champion the Aarhus Convention, much of these efforts have concentrated on ensuring transparency at MS level. In contrast, the EU's approach to imposing equivalent disclosure duties on the EU institutions themselves has regrettably reflected a marked double standard between the relatively strong EU obligations imposed on MS to be transparent and the much more lax obligations imposed by EU law on the EU institutions themselves.

This double standard has important implications for the quality of climate and energy governance. Whereas the EU has been assiduous in its effort to ensure transparent environmental decision making at national level, and in particular ensuring Member State compliance with Aarhus Convention disclosure standards, its own approach to disclosure has revealed a very strong bias towards confidentiality. Indeed, Professor Ludwig Kramer, a leading commentator on this issue, has stated that:

"In practice it is frightening to see how much expert opinion, research results, studies, data and facts are withheld from the interested public in EU environmental matters"4 [and the climate and energy context is no exception.]

The nature and reality of this double standard is well documented. Prior to the coming into force of the Aarhus Convention the EU had already introduced legal obligations for both MS and the EU itself in setting down specific disclosure duties for each tier of governance. In order to ensure compliance with the more demanding Aarhus Convention disclosure standards, the EU introduced Directive 2003/4/EC which strengthened Member State disclosure obligations. In contrast, the EU adopted a more limited approach to applying the Convention to itself. The primary legal vehicle used by the EU to apply the Convention to the EU institutions is Regulation (EC) 1049/2001 (which pre-dates the conclusion of the Aarhus Convention by the EU) as amended by Regulation (EC) 1367/2006. In effect, the EU's disclosure obligation is subject to

[3] Also see a further Treaty Articles on transparency: Article 9(3) TEU: "Decisions shall be taken as openly and as closely as possible to the citizen"; Article 11(2) TEU: The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society"; and Article 298 TFEU: "In carrying out their mission, the institutions shall have the support of an open, efficient and independent European administration".
[4] Ludwig Krämer, The EU, access to environmental information and the open society; Environmental Law Network International 2013, 38-43; available at: http://www.clientearth.org/reports/131210-the-eu-access-to-environmental-information-and-the-open-society.pdf

significant exceptions, which go beyond those permitted by the Aarhus Convention and have significant consequences for transparency of climate and energy policy.

At present, Article 4 of Regulation 1049/2001 governs when the EU institutions can (and indeed must) refuse disclosure as follows (emphasis added):

*"1. The institutions **shall refuse access** to a document where disclosure would undermine the protection of:*

(a) the public interest as regards:

— public security,

*— defence and **military** matters,*

— international relations,

*— the **financial, monetary or economic policy** of the Community or a Member State;*

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

*2. The institutions **shall refuse access** to a document where disclosure would undermine the protection of:*

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

*— **the purpose of inspections, investigations and audits**,*

unless there is an overriding public interest in disclosure."

Regulation (EC) 1367/2006 later narrowed the scope of these exceptions by requiring them to be interpreted restrictively. However, despite this narrowing of the exceptions, the EU institutions are (unlawfully[5]) exempt from the rules in the Aarhus Convention in two ways that have important implications for climate and energy governance. [6]

1. **Automatic versus Relative Exemptions**: The EU transparency obligations set out above provide for "automatic" grounds for refusal i.e. "the institutions ***shall*** refuse access...", whereas the Aarhus Convention states that "a request for environmental information ***may*** be refused if..." The detrimental impact on climate and energy governance is immediately apparent as EU officials will understand that they *must refuse access* to documents rather than at least *consider* the possibility of disclosure. It could also be argued that this encourages a wide application of the exemptions which is directly inconsistent with the more recent amendment (via Regulation (EC) 1367/2006) narrowing the exemptions.

2. **Additional Exemptions**: the list of exceptions in Regulation (EC) 1049/2001 contains three exemptions not allowed for in this form, or at all - in the Aarhus Convention; namely the protection of:

    a. military matters;

[5] See ClientEarth's publication 'The Aarhus Convention: Implementation and Compliance in EU Law' for a full discussion of the lack of conformity between the Convention and EU access to justice rules, available at: http://www.clientearth.org/reports/20141028-the-aarhus-convention-implementation-and-compliance-in-EU-law.pdf

[6] It is important to note that these deviations from the Aarhus Convention apply only in relation to access to information requests addressed to the EU institutions. The rules applicable to the MS are in compliance with the Aarhus Convention in relation to both these exemptions.

b. financial, monetary and economic policy of the Community or a Member State; and

c. the purpose of inspections, investigations and audits.

While limiting access to documents to protect military matters should not impact climate and energy governance to a great extent, the second and third 'additional' (and unlawful) exemptions could potentially have a very detrimental impact on transparent climate governance.

The second exemption from disclosure, "the protection of the financial, monetary and economic policy of the Community or a Member State", could result in extreme transparency restrictions. This exemption could be used to refuse access to all State aid and other financial decisions related to energy. However, one could also argue that all of energy policy, but also climate policy more generally, are fundamental elements of economic policy and thus fall as a whole within this exception. To ClientEarth's knowledge such a broad interpretation of the exemption has not yet been claimed but ***the 2030 climate and energy framework must ensure, at a minimum, that all climate related documents (whether held at national or EU level) are publicly accessible as required by the rules set out in the Aarhus Convention, and not restricted by unlawful broader exemptions set by the EU itself.***

The third 'additional' exemption does appear in the Aarhus Convention but in a much more limited formulation. The Aarhus Convention refers only to an exemption to protect enquiries of a 'criminal or disciplinary' nature.[7] Compared to the Aarhus formulation, the EU's unlawful expansion of the exemption to include 'all inspections, investigations and audits' is clearly much broader. This wide exemption is at least limited somewhat by the requirement that where there is an overriding public interest in disclosure, then the documents should be released. Regulation (EC) 1367/2006 further limits the use of this exemption as it deems an overriding public interest in disclosure to automatically exist in relation to emissions into the environment where the request concerns an inspection or audit. However, this automatic existence of an overriding public interest in disclosure where emissions into the environment are concerned does not apply in the case of investigations. These rules have been considered by the Court of Justice of the European Union (CJEU) which ruled that there is a general presumption that the disclosure of any documents by the EU relating to an infringement procedure at the pre-litigation stage would undermine protection of the purpose of an investigation.[8] In effect, the CJEU has essentially held that there is no right of access to EU inspections and investigations concerning MS compliance with EU climate and energy law, and this includes access to inspections and investigations concerning GHG emissions.

1.2 Relevance to quality of EU climate and energy governance

The EU's unwillingness to comply with the Aarhus Convention rules on transparency not only calls into question the credibility of the Union's commitment to the principle of transparency per se, but more specifically it undermines confidence in the quality of EU climate and energy governance. The following sets out some, but by no means all, of the existing examples of the EU bias towards confidentiality and how it affects climate and energy governance:

[7] The exact wording in the Aarhus Convention allows the refusal of disclosure to protect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature"
[8] Joined cases C-514/11P and 605/11P, Liga para a Protecçao da Natureza and Finland v Commission, 14 November 2013

1.2.1 Non-Disclosure of PRIMES modelling

An important example of the EU's bias towards confidentiality arises in the context of the Commission's non-disclosure of the data and technical assumptions underlying the 'PRIMES' modelling process.[9] The PRIMES data is used to inform the EU's entire climate and energy policy framework. The PRIMES modelling system is developed on the basis of models derived from various universities; however, those underlying university models are not disclosed, nor are the assumptions made as part of the modelling process. The Commission refuses access to the data on the basis that the Universities own the data and algorithms used. Indeed, it is not clear to what extent even the Commission have full access to all information. The refusal to disclose has been the subject of widespread concern amongst MS and NGOs. In particular NGOs have argued that the PRIMES model does not properly reflect the increasing cost effectiveness of energy efficiency technology. Without disclosure of the underlying data and assumptions it is impossible for NGOs and MS to scrutinise the precise basis on which EU energy efficiency policy is designed. A challenge could be brought against this lack of disclosure on the basis of the Aarhus Convention and associated Regulations. There are arguments against why such a case could succeed such as the intellectual property rights of the universities but in opposition there are very strong arguments as to why such a request for disclosure should succeed: the model has been developed with public money; the use by the Commission of the method to come to regulatory decisions and more generally, it is not acceptable to base regulatory decisions on methods that are kept confidential.

1.2.2 Non-Disclosure of information relating to investigations

This is essentially the third 'additional' exemption from the Aarhus Convention created by the EU for itself. The negative impact of this presumption against disclosure of documents related to investigations in the context of climate and energy governance is illustrated vividly in *ClientEarth v Commission* (2013, under appeal).[10] In this case ClientEarth requested access to conformity-checking studies carried out by the European Commission on the transposition by MS of EU environmental Directives. The Court of First Instance held very broadly that the Commission is entitled to maintain confidentially of documents "relating to investigations of a possible contravention of European Union law which might lead to the initiation of infringement proceedings".[11] This is such a broad formulation that it could be interpreted to cover any documents which could show the possibility of a breach by a MS of EU law, whether or not there is ever an infringement proceeding or not, or whether or not those documents are ever used in such an infringement proceeding. This stretches the notion of "investigation" beyond reasonable limits. ClientEarth has appealed this judgment.

This could have serious implications for the transparency of EU climate and energy governance and in particular the disclosure of information gathered by the Commission under the proposed 2030 "national plans for competitive, secure and sustainable energy" (hereafter referred to as "NEAPs"). It is evident that these plans would be covered by the Aarhus Convention as material that should be accessible to the public. The Commission has indicated that the proposed plans will not initially be adopted pursuant to legislation, but rather only formalised into legislation later if necessary.

[9] The PRIMES energy system model has been developed by the Energy-Economy-Environment modelling laboratory of National Technical University of Athens in the context of a series of research programmes of the European Commission. The PRIMES model is a modelling system that simulates a market equilibrium solution for energy supply and demand.
[10] Case T111/11, September 2013 (under appeal)
[11] Case T111/11, paragraph 58

There is a very great danger that the broad anti-transparency ruling of the Court of First Instance in *ClientEarth v Commission* may mean the NEAPs, or part of them, may not be disclosed. This could be in so far as the plans are held to contain information of MS conformity with EU law - this can be withheld as per the Court of First Instance as long as there is the 'possible contravention' of EU law. The lack of a legislative basis for the NEAPs does not mean that they could not relate to infringement proceedings and escape the ruling. It is very probable that they would contain information on whether MS were complying with other EU laws and that would be enough for those plans to fall within the very broad ruling. This danger is doubly present where the Commission embarks on an iterative process with MS regarding the content of those plans.

Though ClientEarth appealed against the judgement, the CJEU has held in the past that there is a general presumption that the disclosure of any documents forming part of an infringement procedure at the pre-litigation stage would undermine protection of the purpose of an investigation. Therefore it is unfortunately not clear that the CJEU will rule in favour of transparency on appeal. The disclosure of information illustrating the conformity (or lack thereof) by MS with EU law is incredibly important to achieving the transition to a low carbon energy system. Without the information it will be impossible for civil society and other stakeholders to challenge MS on lack of compliance. Such support for the Commission on enforcement by third parties is one of the stated objectives of the 7th European Union Environmental Action Plan.[12] In the specific context of climate and energy governance, access to the NEAPs and all related information will be vital considering the plans may replace the various reporting obligations currently enshrined in law under the 2020 package. The combination of a streamlined, informal reporting process with a lack of compliance with the Union's transparency obligations under the Aarhus Convention could lead to an unenforceable governance landscape. **In effect the 2030 governance proposals could enable the EU to increase its avoidance of disclosing climate and energy information to the public**.

1.2.3 Impact assessment concerns

Transparency is not simply about the disclosure of information. It is also about disclosing information in a manner that enables the information to be understood in a meaningful way by the public and, most importantly, those it directly affects. Unfortunately the Impact Assessment ('IA') process lacks this fundamental element of transparency.

The adoption of EU legislation usually beings with an Impact Assessment (IA) of proposed legislative measures. The work is carried out by the most concerned Directorates-General ("DGs") and often by only the single DG most concerned, which sometimes engage outside contractors to carry out the work. The IA evaluates the potential social, economic and environmental consequences that may arise from potential policy options. Additionally it explains why action (or perhaps no action) is necessary at the EU level, as opposed to Member State level (consistent to the principle of subsidiarity).

Normally, IAs are adopted by the College of Commissioners at the same time as the related proposal. This has two negative implications. The first is that the IA appears to be amended to match the related proposal, rather than the proposal being shaped to incorporate the IA's findings. Secondly, publishing the IA in advance would allow interested parties and specifically the Parliament, MS and civil society to consider the expert findings in advance of the legislative process beginning. Advance publishing would allow errors or inconsistencies to be more clearly

[12] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' states in paragraph 58: "Improving the implementation of the Union environment acquis at Member State level will therefore be given top priority in the coming years. There are significant differences in implementation between and within Member States. There is a need to equip those involved in implementing environment legislation at Union, national, regional and local levels with the knowledge, tools and capacity to improve the delivery of benefits from that legislation, and to improve the governance of the enforcement process."

identified and public pressure to be exercised more effectively to ensure the proposal is consistent with the IA, rather than the current system which allows the IA to be amended to be in line with the proposal. The timing of the release of the IA is vital to ensuring real transparency exists. This is particularly true in the field of climate and energy where IAs are often highly detailed and technical documents.

In consideration of the fact that Article 1 of the Treaty of the European Union states that decisions shall be taken as openly as possible and as closely as possible to the citizen, this means that citizens should have the possibility to participate in the discussion of the different policy options for legislative proposals. The publication of the IA only after the formal adoption of the legislative proposal by the Commission deprives them of this possibility. The CJEU has held on several occasions that transparency and openness in the legislative procedure at EU level is fundamental.[13]

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*4. Given the seismic economic and social changes required to deliver the low carbon transition and the scale of public and private investment, **transparency is fundamental to guaranteeing the legitimacy and credibility of decision making**. Public buy-in to the EU decarbonisation project will not exist unless there is an open and transparent administration governing the low carbon transition.*

[13] See for example joined cases C-39/05P and C-52/05P, Sweden and Turco v Council, ECR 2008, p.I-4723 and case C-280/11P, Council v Access Info Europe, judgment of 17 October 2013.

2 Effectiveness

To be effective, climate and energy governance must be embedded in the rule of law. Legally binding processes are essential in the climate context given that the timely and predictable delivery of emission abatement is absolutely critical to effective action on climate change.

The EU is distinctive in the international sphere in that it has created a strong rule of law framework as evidenced in its constitutional and institutional architecture (via e.g. supremacy, direct effect, MS accountability before the CJEU). EU law has a very real traction upon MS due to its highly enforceable nature and scope for the imposition of sanctions which does not exist in other areas of international law. The EU is thus an excellent laboratory for international collaboration on how best to respond to the risks posed by climate change.

The EU's 2020 package effectively translated three headline targets into a pioneering suite of legal instruments designed to deliver those outcomes. In doing so the EU took the first global step towards exploring the regulatory and investment conditions required to drive the European low carbon transition which in turn reflected a strong acknowledgment of the value of the rule of law to effective climate governance.

The EU's 2030 proposals represent a retreat from binding rule of law approaches. Despite the importance of the energy sector to European decarbonisation and the evident malfunctioning of significant elements of the 2020 package, the 2030 proposals reflect a willingness to depart from the intensive use of law to regulate the energy transition. This retreat is demonstrated most obviously in the proposal not to extend binding MS targets for renewable energy to the post 2020 period, but it is also evident in the Commission's proposals to replace legally binding national energy planning and reporting processes with a planning regime not embedded in a legal framework.

Attempts by the Commission to balance this shift by intensifying the traction of other key legal levers in the energy sphere are misleading. In proposing that 'binding' EU targets are adopted, the Commission is wrongly seeking to capitalise on legal terminology. EU targets - whether adopted as part of a legislative measure or through agreement by the European Council - are effectively unenforceable.

Whether a target is binding or not binding, depends on the specification in secondary legislation. European Council resolutions (while evidencing powerful political commitment) are not legislation and do not have the force of law (Article 15 of the TEU). The EU institutions can be bound via the means of a Decision or Regulation. There are very few examples of the use of secondary legislation to bind the EU institutions, except Decision 2002/358 in which the EU committed itself to targets of the Kyoto Protocol.

The question then becomes whether such a target binding on the EU could be enforced and by whom. Article 265 TFEU grants the EU institutions the right to pursue one another when one EU institution fails to act, where it is obliged to act. This provision would allow EU institutions to bring a case before the CJEU where other EU institutions failed to take the necessary measures to comply with a binding target. The action could be addressed either against the Commission, when it fails to make the necessary proposals, or against the Council, when the Council does not adopt the necessary measures. However, the CJEU has consistently held that the EU institutions have a wide margin of discretion on if, when and how to take action. Bringing such an action would be a highly political action on the part of one of the Institutions and it would be highly likely that the CJEU would continue with their consistent line of jurisprudence to grant the EU institutions wide discretion on the appropriate policies to be enacted to achieve a target.

Therefore, EU targets are only binding in any meaningful sense if they are disaggregated into specific targets for individual MS.

A second strategy deployed by the Commission to compensate for the apparent retreat from the rule of law post 2020 concerns its emphasis on prioritising compliance with key residual legal elements of the 2020 package - in particular, completion of the internal energy market (IEM), utilisation of the State aid guidelines on the environment and energy and reform of the ETS through the creation of a Market Stability Reserve. While ClientEarth welcomes the Commission's intention to drive IEM completion and the adoption of the new State aid guidelines for energy, we regret the retreat from binding MS targets and binding energy planning and reporting obligations. Binding national targets and planning and reporting obligations are critical tools in an effective climate governance regime because they orientate action and facilitate a long term approach (see section 0 for further discussion). MS targets also enable the Commission to use the threat of enforcement action as a lever to drive action. They also enable numerous potential third parties (business and industry, NGOs and other interested stakeholders) to take action before national courts to enforce the rule of EU climate and energy law and thus support the Commission's oversight function. Targets 'binding' solely at EU institutional level do not have the same force of legal traction nor can they be mobilised by other stakeholders beyond the much weaker court of public opinion.

"Renewable energy plays a key role in a competitive, secure and clean energy system. An ambitious and binding target for renewable energy provides the necessary long term certainty and clarity for investors and consumers." – Jeroen de Haas, CEO of Eneco Group[14]

The Commission emphasises that it is formally committed to IEM completion and greater use of State aid for climate and energy objectives but it is far from clear that it possesses the institutional willingness to take concrete action. The governance impact of the Commission's commitment to drive IEM compliance and deploy its State aid jurisdiction to achieve the energy transition is entirely dependent on the Commission's complete discretion to take enforcement action against MS for non-implementation of EU law and the Commission's almost total control over the EU's State aid jurisdiction. Although the Commission has extensive powers of enforcement and almost exclusive control over the State aid approval process, its determination to use those powers is notoriously susceptible to political lobbying. Commission decision making in the context of enforcement and State aid clearance is furthermore almost entirely immune from legal challenge by third parties.

Thus the 2030 proposals will have the net effect of weakening two key governance tools and in respect of IEM and State aid concentrating ever more responsibility for action onto the Commission.

[14] EU 2020 Climate & Energy Declaration on behalf of ACTIAM, ASN Bank, Eneco Group, Heijmans, IKEA Group, Interface, Philips, SPAR Austria Group, Swarovski, Unilever and Zwitserleven, availalbe at: http://www.degroenezaak.com/2030declaration.pdf

2.1 The value of target setting legislation as tool of effectiveness

"***It's the right time for Europe to send a clear signal on climate action to business and the international community. Bold, transformational targets are good for jobs, good for innovation, good for investment and good for the planet. It's time to go all in***." Steve Howard, Chief Sustainability Officer, IKEA Group[15]

Targets are a valuable tool to ensure the effectiveness of legislation. Targets, even non-binding ones, can stimulate MS effort to design strategies to meet targets and allow the MS to retain flexibility to address national circumstances and future developments. The importance for governance can be seen from the strengthening of accountability outcomes through the embedding of targets:

- Where the targets cover an appropriate time period, they may be capable of embedding long term strategic thinking within DGs and MS civil services and focussing work on key priorities.
- Targets can demonstrate commitment. Legislation requiring the EU or MS to meet a target or take all reasonable steps to do so creates an on-going duty over a period of time.
- As an extension, targets may be capable of delivering behavioural change outside of the EU Institutions and MS civil services. In particular, they have a place where long term projects require significant change, commitment and investment from the private sector to succeed (i.e. tackling climate change). Enacting legislation can give the private sector the assurance it needs to make the commitments asked of it.
- Targets represent the MS agreeing to be bound together and thus require a long term approach. To that extent, targets can be seen as constitutionally healthy in terms of MS accountability to the EU and MS accountability to citizens for the required decarbonisation outcomes.
- Legislative targets can limit room for manoeuvre. There is a very strong presumption that any target will be enforceable by the CJEU and/or the courts in the MS, generally via judicial review. This leads to the special care, evidently taken by EU policy makers, in distinguishing between 'binding' and 'non-binding' targets. Legislating for a target therefore elevates that target above an aspiration and creates an obligation to achieve it, whatever new or conflicting priorities may intervene, even more so if it is a 'binding' target.
- At MS level spending decisions and the allocation of resources may become weighted towards the target's objective. A legislative duty to meet or work towards a target could bind MS governments and could ultimately force the courts into having to overrule inconsistent policy choices made.

[15] EU 2020 Climate & Energy Declaration on behalf of ACTIAM, ASN Bank, Eneco Group, Heijmans, IKEA Group, Interface, Philips, SPAR Austria Group, Swarovski, Unilever and Zwitserleven, available at: http://www.degroenezaak.com/2030declaration.pdf

Key Effectiveness Messages

1. To be effective, climate governance must be embedded in the rule of law.

*2. The retreat in the **2030 climate and energy framework** from binding targets at the MS level is regrettable. Targets 'binding' on the EU are not binding in any meaningful sense - to be 'binding' EU targets must be translated into binding MS level targets.*

3. The Commission's increased determination to complete the IEM and utilise the State aid guidelines for decarbonisation purposes in the post-2020 landscape is to be welcomed. However, the Commission will come under intense political lobbying not to enforce and not to deploy its State aid jurisdiction to optimise low carbon and sustainable energy outcome thus the value of this commitment is far from certain.

3 Accountability

Accountability is a fundamental hallmark of good governance in all contexts. Accountability for achieving the outcomes of EU climate and energy policy is central to ensuring good governance in this sphere. At its core, accountability is associated with the process of being called by some authority to account for ones' actions - primarily in this case the EU and Member States. The role of accountability in governance is to guarantee that effective measures will be taken and also that they will be taken in the manner that is agreed or expected. However, effective accountability cannot exist without appropriate accounting processes. Broadly speaking, the components of the process of being called to account can be described by a number of features. Namely, the process should involve:

1. Reporting to an entity that is external to the entity which is held to account;

2. Interaction and the exchange of information between the reporting entity and the addressed entity;

3. Rights of authority embedded in those to whom the report is given, including the right to further clarify the report, for example by means of requesting further information or imposing sanctions.[16]

In considering the quality of accountability for EU climate and energy governance, it is important to emphasise that the process should be evaluated at both EU and MS level. Both tiers of governance play a key role in delivering climate and energy outcomes.

3.1 The quality of MS accountability for their contribution to EU climate governance

In principle, the EU legal system imposes a powerful accountability framework which is laid down in legislative provisions.

EU constitutional law and the more specific requirements of EU climate and energy law substantially empower the EU Commission and CJEU, as bodies external to the MS, to hold them to account for the quality of their contribution to EU decarbonisation. Member States are required under EU constitutional law and according to a vast jurisprudence developed over decades by the CJEU, to comply with the terms of EU legislation - including the 2020 package. The Treaty furthermore specifically tasks the Commission to police compliance by MS with EU law. This accountability arrangement is reinforced by the imposition of extensive reporting obligations under the 2020 package. In addition, the role of the CJEU - the power to rule on compliance, with those rulings being binding on MS, and the power of sanctions - add to this powerful accountability process. The power of the CJEU to levy fines against MS is unique among international courts and importantly gives the national finance/treasury departments an incentive to ensure compliance with the EU law. Finally there is the wider potential for third party enforcement at national level which intensifies the accountability relationship.

[16] See Busuioc, European Agencies, Law and Practices of Accountability, Oxford, 2013.

3.1.1 Defects in accountability for action of MS

1. **Lack of Reporting**: As reported by the EEA, "Member States do not generally report complete information on their existing and additional PAMs [policies and measures for GHGs at MS level] on EU level. What Member States do is not necessarily what they report."[17] There is no indication that the Commission is making the enforcement of reporting obligations a strategic priority to encourage improvement and thus ensure MS reporting under the 2030 Framework will be strengthened.

2. **Fragmented Reporting**: In addition, the planning and reporting processes within the 2020 package are highly fragmented in that they are scattered across numerous measures. It is therefore questionable whether the current processes provide the Commission with sufficient clarity about the quality of national decarbonisation effort to 'interact' with and probe the reported information and thereby whether the 2020 package enables the Commission to genuinely hold the MS to account.[18] The 2030 Framework proposes a streamlining of this fragmented reporting landscape, however without further details it is not clear whether the framework will solve this MS accountability problem.

3. **Commission Failure to Enforce**: To whatever extent the MS are failing to comply, there are equal if not more serious concerns about the Commission's failure to exercise its powers to take enforcement action and thereby protect the final element of the accountability chain – namely, a credible threat of sanction. In addition, where the Commission fails to take action, it is immune from challenge on that decision (see section 3.2.1 below). Enforceability should not be seen as a negative thing which is about punishing MS not meeting targets but about ensuring that the target is binding in a real sense. It is this formulation of accountability that is lacking between MS and the EU and at national level - MS perceive a punishment where the EU or citizens move to hold them to account. However, in the climate context such accountability is absolutely necessary considering the strict decarbonisation trajectory which must be followed.

Lack of Enforcement of Environmental Law

- extract from ENDS Europe news article 2/10/14

"Ludwig Kramer, who was previously the head of DG Environment's legal service, says the Commission is not challenging some cases of poor implementation of environmental legislation, including on air and water quality.

"The environment does not vote," he said by way of explanation.

But the Commission said it "categorically refutes" any suggestion that it doesn't pursue infringements for political reasons.

"The number of infringement cases speaks for itself," the spokesman said."[19]

[17] http://cecilia2050.eu/sites/default/files/events/presentations/Barkman%202014-03-06%20CECILIA2050%20conference%20presentation.pdf
[18] The 2030 proposals are trying to create a more rationalised accountability process but by moving away from legal obligations, are also achieving coherence at the expense of retaining the possibility of sanction, which simply shifts the weak link in the accountability chain to a different stage in the process.
[19] Environment law worst for non-compliance, 2/10/14, available at: http://www.endseurope.com/37158/environment-law-worst-for-noncompliance?referrer=bulletin&DCMP=EMC-ENDS-EUROPE-DAILY

4. **Opportunities to 'Game' the System**: Even where the Commission does take action, it is required to bring MS before the CJEU which has a very overcrowded docket and thus it can take years before a final judgment is made. Although the CJEU is empowered to impose sanctions from the date on which non-compliance arose (as opposed to the date of the hearing), the well documented delays in the enforcement/sanctioning process undoubtedly create an incentive for MS to procrastinate on compliance and thereby 'game' the accountability process. The value of accountability for governance lays not so much in being called to account, as the expectation of being called to account. Considering that proceedings under Article 260 TFEU, which allows the fixing of a financial sanction, take between 8 and 11 years from the start of the procedure to the judgment, MS know that it is unlikely they will be called to account.

5. **Difficult for Third Parties to Enforce**: It is sometimes possible for individuals and third parties to enforce EU law (including reporting/planning obligations) against MS before national courts (depending on the national rules surrounding access to courts) - thus intensifying pressure on MS to comply with EU law. In effect this means that citizens and NGOs can share and indeed considerably amplify the Commission's role in holding the MS to account. However, the absence of harmonised EU rules on access to justice mean that rules governing admissibility before national courts vary considerably, including rules on costs. Thus the capacity for third party mobilisation is uneven across the EU. In addition, many of the MS reports/plans have not been made public. Thus, even where national litigants can establish standing and afford to cover the costs of legal action, key information required to substantiate their case or strengthen their arguments are often not disclosed and they are therefore forced to begin the enforcement process with an often lengthy court battle to enforce information disclosure rules before any other action can be contemplated.

3.2 Accountability for EU institutional action

Practical delivery of the EU low carbon transition is a responsibility that rests very largely with the MS. However, because effective climate and energy governance is by definition a process of co-ordinated international collaboration the EU institutions also play a vital role in controlling the pace, direction and delivery of this process. Key governance tasks performed by the EU institutions include:

1. Effective oversight of MS compliance (as discussed above) - EU Commission and CJEU;

2. Promoting effective climate and energy policy - Commission, Parliament and Council and range of other EU Agencies (EEA, ENTSO-E, ENTSOG, ACER, etc);

3. Using its jurisdiction to strike a balance between the need to protect competition within the EU and optimising market conditions for promoting energy decarbonisation - Commission and CJEU.

3.2.1 Accountability for effective action by EU institutions

In sharp contrast to the accountability regime imposed on MS, the EU itself is subject to much less stringent accountability for its part in delivering outcomes.

1. **Extremely difficult to hold the EU accountable for missing 'binding' targets:** Binding EU targets have great symbolic value – they demonstrate political importance and allow the

mobilisation of the necessary resources, both in finance and policy terms. While 'binding' EU targets evidence powerful political commitment, in legal terms they do not mean very much (see chapter 2 for further discussion).

2. **Impossible to challenge Commission failure to take enforcement action**: One key role required of the EU is to deliver effective oversight. Although the Commission is conferred with extensive enforcement powers, it cannot be challenged for refusing to exercise those powers. The Commission has complete discretion over the decision to enforce. Even though MS are empowered to take enforcement action against one another for non-compliance with EU law, such cases have rarely been taken in the course of the EU's entire history. The Commission is entirely immune from being held to account legally for the decision (or not) to enforce. While the Commission could be the subject of criticism by other institutions and interested parties, no entity is empowered to require the Commission to act, nor can the Commission be compelled to explain a decision not to enforce. The deterrence effect is obviously undermined when the likelihood of enforcement action being taken is so uncertain and so low.

3. **No composite reporting requirement**: Although the Commission is required by EU climate and energy measures to make reports on various aspects of MS implementation of specific legislation, the Commission is not required to make a composite report to the EU Council and Parliament on the overall state of the EU's progress towards meeting its political commitment to substantial economic decarbonisation by 2050 (see section 6.3 for further discussion).

4. **Lack of independent science**: The Commission dominates the process of climate and energy policy development. Because there is no independent, expert EU climate advisor tasked to clarify the science and economics on which policy should be based, there is no infrastructure within EU governance arrangements tasked to ensure that policy is based on the latest state of science and economics. Instead the only opportunity for challenge comes in political form from MS, business, NGOs etc., all of whom have vested interests, and normally may become active only after the policy trajectory has been formulated within the Commission (see section 4 for further discussion).

Key Accountability Messages

1. The role of accountability in governance is to guarantee action and that the action will be taken in the manner that is agreed or expected.

2. In principle, the EU's legal system provides a very powerful framework for holding MS to account for delivery of their responsibilities for EU climate and energy governance, to the extent that those responsibilities are enshrined in legislation.

3. There are significant deficiencies in MS accountability for their obligations under the ***2020 climate and energy package*** *including a lack of reporting by MS, fragmented reporting across various policies, failure on the part of the Commission to enforce, consequent opportunities to game the system and difficulties for 3rd parties (e.g. NGOs) to enforce.*

4. There are also significant deficiencies in enforcement for the EU institutional contribution to achieving the decarbonisation objectives such as the complete discretion which the EU enjoys over the decision to enforce, the lack of a composite reporting requirement on the EU institutions and the lack of independent science underpinning climate policy.

5. While targets must be binding to fully satisfy the principle of accountability, indicative targets are not devoid of value, especially when broken down on a national level. Indicative targets stimulate MS effort to design strategy and allow the MS to retain flexibility to address national circumstances and future developments. However, to be credible targets must be embedded in binding legislation at MS level. For investors to believe the political sincerity of a radical low carbon transition, they need credible targets underpinned by a long-term legal commitment. Enforceability should not be seen as a negative thing to punish MS not meeting targets but about ensuring that the target is binding in a real sense.

4 Legitimacy

There are two broad strands to the concept of legitimacy in governance. First, when decisions are made with the participation of those affected, they are not only better decisions but are fundamentally more legitimate and thereby more likely to attract the support of those living with the consequences. Secondly, there is a consensus that decisions based on independent expert advice are viewed as more credible and thereby more legitimate decisions.[20]

The EU's crisis of democratic legitimacy is long standing and well understood. ClientEarth remains deeply concerned about the undemocratic nature of the EU legislative process, and in particular the weak democratic input to the trilogue process and barriers to effective public participative governance within the EU climate and energy regime.[21] However, ClientEarth also acknowledges that the participative dimension to the 2030 Framework will be strengthened as a result of the wider reforms introduced by the Lisbon Treaty to address the EU's legitimacy crisis.[22] Our primary concern about weak legitimacy in EU climate and energy governance concerns the threat to credibility posed by the lack of formal arrangements for the inclusion of independent expert advice in policy making. It is to be remembered that the coming together of the MS around climate targets is exactly what Europe is for and where governance is strengthened, such aspirations could counter many of the fundamental questions of the democratic legitimacy of the EU.

4.1 Primary legitimacy concern: lack of independent science

The lack of transparency surrounding scientific and other expert evidence underlying policy adds to the general lack of confidence among European citizens for the EU project. Without citizen and MS confidence in the science upon which the EU seeks to base its cuts in emissions, increase efficiency and increase the use of renewable energy, it is unlikely that the necessary political commitment can be found.

"If the 40% target proposed in the earlier Green Paper[23] is adopted, the EU will be signalling its dismissal of the IPCC's carbon budgets associated with a 2°C rise in global temperature. It will give priority to politically expediency at the expense of scientific integrity, irrevocably damaging the climate change negotiations in Paris 2015.

My chief concern with the framework relates to the Commission's assertion that *"emissions would need to be reduced by 40% in the EU to be … consistent with the internationally agreed target to limit atmospheric warming to below 2°C"*[24]. Whilst such a position may have political traction, it is in direct breach of the EU's repeated commitment to reduce its emissions *"consistent with science and on the basis of equity."*[25] " - Professor Kevin Anderson, Deputy Director of the Tyndall Centre for Climate Change Research[26]

[20] See the Royal Commission report on environmental planning available at: http://webarchive.nationalarchives.gov.uk/20110322143804/http://www.rcep.org.uk/reports/23-planning/documents/2002-23planning.pdf
[21] For example decision making about Network Codes: http://www.clientearth.org/201409122640/climate-energy/climate-energy-publications/proposed-interventions-to-optimise-energy-efficiency-a-demand-response-in-eu-network-code-development-2640 and setting EU priorities for energy infrastructure investment: http://www.climnet.org/resources/doc_details/2163-joint-response-to-entso-e-on-visions-2030-14-12-2012
[22] See ClientEarth discussion of climate and energy decision processes, including a discussion of the increased participation of MS national parliaments here: http://www.clientearth.org/201312062648/climate-energy/climate-energy-publications/legal-framework-governing-eu-law-a-policy-making-for-2030-climate-a-energy-process-2648
[23] Green Paper, A 2030 Framework for climate and energy policies. Brussels, 27.3.2013 COM(2013) 169 final
[24] Supra n. 19
[25] Report of the Conference of the Parties; fifteenth session; Copenhagen, 7 to 19 December 2009. See also: President Barroso on the results of the L'Aquila summit; European Commission, MEMO/09/332; 10/07/2009 http://europa.eu/rapid/press-release_MEMO-09-332_en.htm
[26] http://kevinanderson.info/blog/letter-to-the-pm-outlining-how-2c-demands-an-80-cut-in-eu-emissions-by-2030/

An independent science body would have the potential to frame the ensuing political debate in terms of what is in the EU's best interests, and could serve to strike a balance between this interest and mobilised sectoral interests. Such a body would also allow independent monitoring and public reporting to act as the main compliance levers. The mechanism of independent science is already being used (or being considered) in several MS throughout the EU.

For example, in the UK a highly innovative climate governance regime was created by the 2008 UK Climate Change Act. It contains a number of governance innovations which ensure the legitimacy of the regime and should be considered as a model for the inclusion of independent scientific decision making into policy development. The UK regime created a statutory Climate Change Committee tasked to monitor national progress towards meeting the UK's 2050 decarbonisation target and provide the UK government with independent, expert advice concerning the policy pathway for achieving the national low carbon transition. The role of the UK Committee established by law and its monitoring and advisory reports must be made public. The UK Government is furthermore required to take account of its advice in decision making and must provide public explanation of any decision to deviate from its advice. There are furthermore legal controls imposed on the scope for deviating from the Committee's advice on critical issues such as the setting of the national carbon budget and the revision of the UK's 2050 and other intermediate GHG targets. The Act also requires the UK Government to submit legally prescribed 'progress reports' before Parliament in annual and five-yearly statements. Importantly, the CCC maintains a user-friendly website through which the proliferation of statements and reports made under the Act are readily accessible to citizens.

Tensions between the CCC and Government are already apparent, reflecting the genuine independence of the CCC. This degree of transparency is showing itself to be essential if Government is to be held properly accountable for the actions it takes – or fails to take – in reducing its GHG emissions. But it is to be noted that accountability under the UK Climate Change Act is limited as it is difficult to challenge the Government on the basis of the Act except where explicit procedural steps are disregarded. Thus, the most important levers for ensuring that the Act is implemented are the transparency and legitimacy - through independent expert advice - that the Act embeds into UK climate politics.

Examples of such independent advisory bodies already exist at EU in other environmental policy areas e.g. for Genetically Modified Organisms (GMOs) and pesticides in the form of the European Food Safety Authority (EFSA) and for chemicals and biocides in the form of the European Chemicals Agency (ECHA). In both cases the advice is publicly accessible and fully transparent. The advice need not be followed by the Commission, but in practice, this is mostly the case. It is essential that the EU's decarbonisation project be based on independent, and accessible, advice.

The Chief Scientific Adviser to the President of the European Commission

José Manuel Barroso created the post of Chief Scientific Advisor to the President of the European Commission in 2010 with a mandate to:

"*Provide independent expert advice on any aspect of science, technology and innovation as requested by the President; ... To provide analysis and opinion on major policy proposals being submitted to the College touching upon issues of science, technology and innovation; in particular … authoritative guidance on interpretation of scientific evidence in presence of uncertainty, and will be involved in strategic emergency planning...*"[27]

The creation of this role is an acknowledgment that a governance problem exists in the separation of science and policy at EU level. However, the role is generic - lacking in specialised climate & energy expertise and without any formal arrangements for transparent dissemination of the advice provided. In addition, as the role is attached to the Commission President, it is thereby lacking in sufficient independence from policy makers. The failure to properly table this governance issue is also reflected in the recent signals that the Advisor is sending[28] about her ability to speak freely and behave independently.

In essence the creation of the role was an attempt to acknowledge the need to separate science and policy, however, the role is at best a highly partial response to a serious problem and at worst, no solution to the acute need for greater credibility in climate and energy policy making.

This analysis leads to the clear conclusion that an independent expert body to advise on climate and energy must be established. Its role should be at least equivalent to that of the UK Climate Change Committee (similar to the mandates of EFSA and ECHA in their stated policy areas). It must:

- Provide independent advice to the EU on setting and meeting carbon budgets and preparing for climate change;
- Monitor progress in reducing emissions and achieving carbon budgets; and
- Conduct independent analysis into climate change science, economics and policy.[29]

Key Legitimacy Messages

1. Legitimacy contains two fundamental pillars: participation of those who will be affected by the decision and credible decision making on the basis of independent expert advice.

2. The UK Climate Change Committee is an example of the kind of innovative governance that needs to be developed at EU level to ensure legitimate, and thereby credible, decision making is standard for ***the 2030 Framework and beyond****.*

[27] http://ec.europa.eu/commission_2010-2014/president/chief-scientific-adviser/index_en.htm
[28] http://www.euractiv.com/sections/science-policymaking/glover-eu-chief-scientist-should-stay-shadows-307768
[29] See also other civil society actors working to facilitate the low carbon transition have also come to a similar conclusion. See for example E3G's suggestion of a 'European Energy and Climate Security Observatory.' http://e3g.org/x75yb

Chapter 2: Governance principles specific to governance in the EU context

5 Flexibility

Flexibility has emerged as a key principle of climate and energy governance in the EU context, despite the core focus on achieving European harmonisation. In part flexibility has emerged as a result of enlargement and thus the difficulties of forging single solutions for highly divergent national conditions. However, it has also emerged as a strong reaction to growing national resistance to the concentration of greater powers within the EU. The fundamental importance of flexibility to EU governance in all sectors is clearly reflected in the principles of subsidiarity and proportionality which provide the constitutional parameters through which MS and the EU institutions now negotiate the balance between EU led centralisation and the scope for national flexibility.

In the context of EU climate and energy governance flexibility has assumed a critical importance and arises most acutely in relation to the extent to which MS retain the right to determine their national energy mix. Responsibility for meeting EU energy and climate objectives is shared between MS and the EU institutions. However, whereas the Treaty confers a strong mandate to the EU to develop environmental (and thus climate) policy, this is not the case in the energy context. Unlike the environmental sphere where the EU's competence to act has been established for decades, and progressively strengthened with every Treaty amendment, the EU's competence to act on energy is much more recent and unsettled.

Explicit power to adopt EU energy law and policy was only conferred on the EU with the introduction of Article 194 TFEU via the Lisbon Treaty. Although Article 194 gives the EU a broad-ranging energy policy mandate, it also makes clear that the EU does not have power to adopt measures on the basis of Article 194 that affect the national energy mix. In most shared policy areas the broad EU principles of subsidiarity and proportionality are applied in specific circumstances to guide the delineation of the responsibility for action. In contrast, under the energy competence, Article 194 establishes a boundary concerning the limits of the EU's competence to act on energy and formally enshrines MS legal right to flexibility over their national energy mix.

MS resistance to the ceding of control over the national energy mix is also strongly reflected in Article 192 (environment). Even measures adopted on the basis of the environmental chapter of the Treaty that 'significantly affect' the choice of MS between different energy sources and the general structure of their energy supply can only be adopted by means of the special legislative procedure, which requires a unanimous vote in Council and reduces the role of the Parliament.

Thus, while Article 192 does not ban the adoption of EU measures that affect the national energy mix (as is the case for Article 194), the environment provisions nevertheless afford all MS a power to unilaterally veto any measures that significantly affect their national energy mix. ***In effect, the combined operation of Article 192 and 194 makes clear that national flexibility over the energy mix is enshrined as a core principle of EU climate and energy governance.***

It is also clear from the CJEU's case law that the EU is not completely prohibited from adopting measures that interfere with the national energy mix. In the *Commission v Poland*[30] the Court ruled, in essence, that while the EU cannot adopt measures affecting the national energy mix using its powers under Article 194, this ban does not prevent the EU interfering with MS national energy mix by means of legislation adopted under Article 192. While the Court's ruling provides an important reinforcement of the EU's environmental competence, the practical value of this

[30] Case T-370/11, 7 March 2013.

ruling in terms of the evolving 2030 package is uncertain due to parallel EU rules governing the Commission's discretion to choose between different Treaty provisions as the legal basis for new measures, discussed below.

When the Commission brings forward proposals for new legislative measures it must identify its powers to do so within the Treaty. Although the 2020 package was based largely on Article 192 (the environment chapter),[31] MS were nevertheless willing to agree to the adoption of EU measures prescribing nationally binding targets for renewables, which inherently involved EU prescription concerning the national energy mix. In contrast, the 2030 debate has reflected a strong reassertion of the desire for national sovereignty over the energy mix, facilitated and indeed encouraged by the addition of Article 194 into the Treaty, which occurred via the Lisbon Treaty adopted in the wake of the 2020 package. The Commission may seek to circumvent the more absolute flexibility principle contained in Article 194 by identifying Article 192 as the legal basis for 2030 legislation. However, its discretion to choose the legal basis for new measures is significantly constrained by rules set down by the CJEU. The Court ruled that the correct choice of legal basis for a measure does not depend simply on the EU institution's conviction as to the objective being pursued. Instead the choice must be based on objective factors which are amenable to judicial review.[32] In addition, the use of dual legal bases is prohibited where the two bases call for two legislative procedures incompatible with one another, as is the case with Article 192 and 194.[33]

The Court will seek to ascertain the predominant aim and content of the proposed measure and ascribe it accordingly to the appropriate legal basis.[34] Thus, whereas the **Commission** may seek to justify using Article 192 as the legal basis for new 2030 energy related measures on the grounds that they also pursue environmental objectives, the **Court** will prefer the use of a single legal basis *and* is likely to take the view that any new measures with energy policy as the predominant content must be based on the EU's new dedicated energy competence contained in Article 194. The use of Article 194 as the legal basis for the 2012 Energy Efficiency Directive (EED) is testament to the impact of this reasoning. Whereas a compelling argument could have been made for the use of Article 192 as the legal basis or indeed the use of both Article 192 and 194, the Directive was nevertheless based exclusively on Article 194.

What all of this means is that while the CJEU has interpreted the EU's environmental mandate to permit intervention in the national energy mix, the Commission will face significant legal obstacles in using Article 192 as the legal basis for new energy measures - or as a minimum a credible threat of legal challenge by MS should it attempt to do so. Consequently, it is likely that the flexibility principle will exert a much greater impact on the evolution of EU climate and energy policy in the post 2020 period. However, the key risk of allowing too much flexibility is that individual MS will make choices about their national energy mix which will pre-empt the entire carbon budget for the EU as a whole. The 2030 governance regime must ensure that an appropriate balance is struck between facilitating national flexibility over the energy mix on the one hand and achieving the EU's climate objectives on the other. In practical terms, this means that facilitating the flexibility principle may militate against the adoption of nationally binding renewables targets for 2030; however, provided no national binding 2030 targets for renewables are fixed by the EU, the pressure for greater delivery onto the EU's GHG instruments (ETS and Effort Sharing Decision) must be increased.

[31] http://www.clientearth.org/201312062648/climate-energy/climate-energy-publications/legal-framework-governing-eu-law-a-policy-making-for-2030-climate-a-energy-process-2648
[32] Case C-155/07 Parliament v Council EIB Guarantees
[33] ECJ Opinion 2/00, referring to Case C-30089 Commission v Council [1991] ECR I-287, paras 13, 17 and to case C-42/97, Parliament v Council [1999] ECR I-869
[34] Case C-155/07 Parliament v Council, 'EIB Guarantees'

Key Flexibility Messages

*1. There is little doubt that the principle of flexibility with regard to the national energy mix is now a central organising principle of **EU 2030 climate and energy governance**.*

2. However, whereas MS can undoubtedly lay strong claim to a right to flexibility over the national energy mix, this does not allow them to deviate from the EU's climate objectives, which are squarely based on Article 192. In effect, the EU has a strong mandate to act on greenhouse gas abatement and thus the power to adopt a robust regulatory pathway to delivering the 2050 decarbonisation objective.

*3. While flexibility will be a strong organising principle for **EU climate and energy governance for the post 2020 period**, it is not an absolute criterion. The key risk of allowing too much flexibility is that individual MS will make choices about their national energy mix which will pre-empt the carbon budget for the EU as a whole. **The 2030 governance regime** must ensure that an appropriate balance is struck between facilitating national flexibility over the energy mix on the one hand and achieving the EU's climate objectives on the other. In practical terms, this means that facilitating the flexibility principle may militate against the adoption of nationally binding renewables targets for 2030; however, provided no national binding 2030 targets for renewables are fixed by the EU, the pressure must be increased for greater delivery onto the EU's GHG instruments (ETS and ESD).*

*4. The 2030 Framework proposes the introduction of 'national plans for competitive, secure and sustainable energy.' It is not yet clear if these plans will have a legislative base, however, a core part of ClientEarth's analysis of the possibilities for reinvigorating the proposals for the **2030 governance framework** relates to a wider use of the Environment Chapter and greater utilisation of the ordinary legislative procedure - including for these national plans.*

Chapter 3: Governance principles necessary for climate and energy policy

6 Certainty

Certainty is a key hallmark of effective climate governance. It is universally accepted that effective action to mitigate climate change will require a profound economic and social transition spanning at least the next half century. By definition, an effective governance regime must demonstrate a strong commitment to act over a sustained period of time to achieve the necessary outcomes. Embedding the principle of certainty into an effective pathway for decarbonisation requires that the arrangements for decision making are defined by four central characteristics. Namely they must:

1. Reflect a credible commitment to effective action;

2. Take a long term perspective;

3. Facilitate forward planning; and

4. Create a framework for ensuring effective action in the face of uncertainty.

6.1 A credible commitment to effective action

The EU's 2020 package was universally welcomed as a pioneering commitment to effective action on climate change. In particular the package reflected a willingness to translate political commitment into legally binding and enforceable form, to provide genuine international leadership at a time when few other countries were even considering action and a commitment to go further in the event other partners agreed to follow suit. The strength of the EU's commitment was further demonstrated by a willingness, in principle, to take an economy-wide approach to regulating decarbonisation. All sources of EU emissions were covered by at least one instrument (if not immediately when the package was adopted then a commitment existed to ensure their incorporation in due course).

The EU's proposed 2030 Framework represents a marked retreat from the strength of the 2020 commitment. Whereas the IPCC's Fourth Report fundamentally determined the ambition of the 2020 package, the EU's proposals for the 2030 Framework deviate substantially from the Union's earlier willingness to design an ambitious and pioneering policy in response to authoritative climate science. This shift is demonstrated by the gap between the proposed GHG target and the IPCC's advice concerning the required pace and scale of decarbonisation. Uncertainty concerning the Union's willingness to intensify EU action in the event of a global deal reflects a weakened commitment to international climate leadership. The proposals for the 2030 Framework are furthermore characterised by a retreat from climate governance based on the 'rule of law', most obviously in the proposal not to extend the lifetime of binding Member State renewable targets. This problem is not resolved by the proposal to adopt EU targets because even if enshrined in law, they are effectively unenforceable. Although the 2030 Framework proposes the continuation of an ostensibly economy-wide approach, this is more in principle than in practice. In fact, if adopted, the 2030 proposals will perpetuate the highly imbalanced approach to economic decarbonisation since virtually all regulatory attention will be focused on the energy sector. While the current proposals are that the Effort Sharing Decision (ESD) be continued into 2030, there are no proposals to intensify its currently lax legal controls which are undermining its impact. The lack of ambition in the ESD MS targets is compounded by the large flexibility provisions even to the MS to purchase offsets to make up for gaps in compliance. Thus the main effort by the EU to intensify legal traction in the 2030 Framework is being concentrated on the ETS side of GHG emissions.

6.2 A long term perspective

It is widely accepted that effective action on climate change requires specific mitigation outcomes to be achieved by mid-century. Effective climate governance must therefore be designed to ensure that decision making is appropriately orientated towards this timescale. Because the decarbonisation transition is so complex, and its duration so lengthy, effective climate governance must also ensure that progress is evaluated (and if necessary corrective action is taken) at appropriate and frequent junctures in the longer-term pathway.

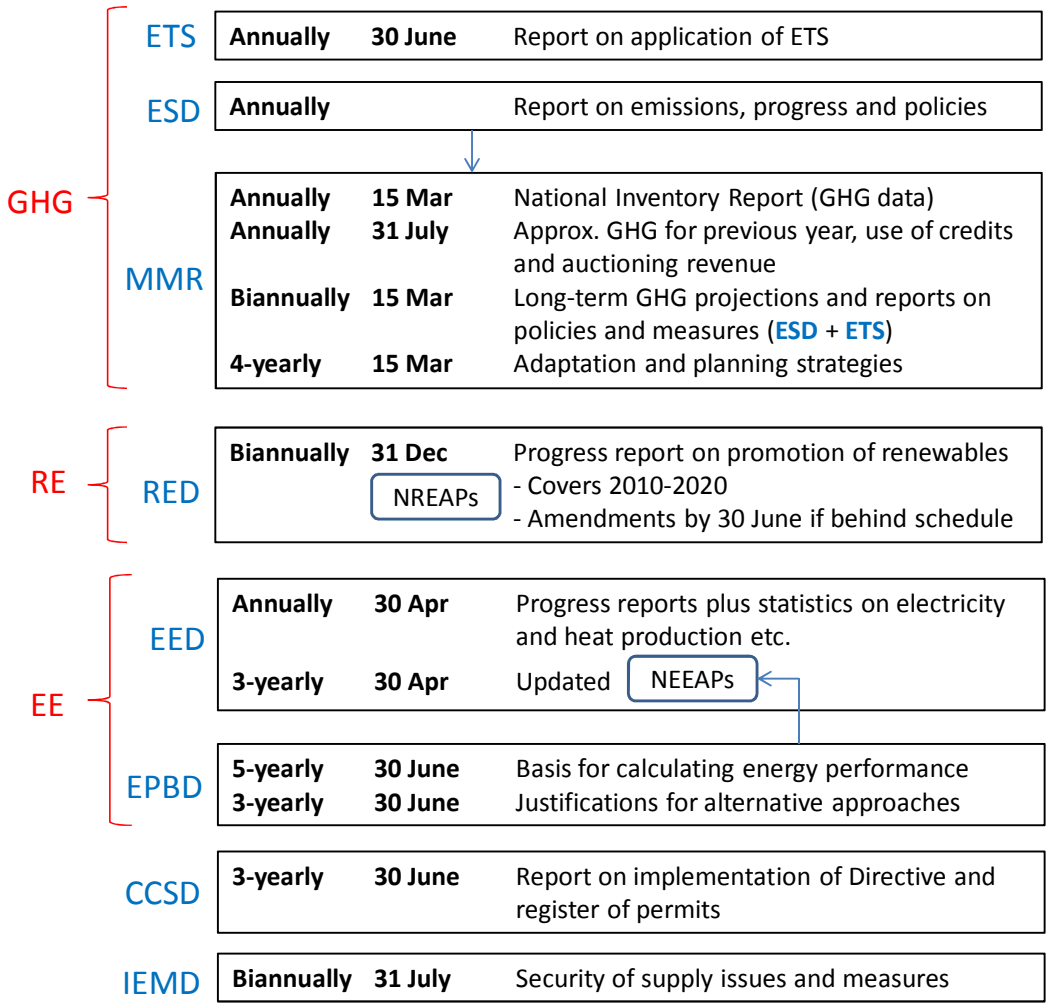
The EU's 2020 package was based on the Union's political commitment to achieve the mid-century decarbonisation objective but the climate governance regime it created to deliver that outcome was at best short term in duration. With the exception of the ETS, the EU lacks an appropriately long-term climate governance obligation. The EU has not made a legal commitment to achieve a 2050 decarbonisation outcome nor has it created a governance pathway that keeps the Union on the appropriate decarbonisation trajectory. Although the ETS linear reduction factor is inherently open-ended, the Effort Sharing Decision, which regulates approximately 60% of the EU's emissions, ceases to exist in 2021. In effect, the 2020 package created a governance regime that requires MS and EU institutions to substantially reaffirm their commitment to effective climate mitigation every 10 years (i.e. presumably in 10 years the EU will start debating the 2040 commitment, etc). As a result, Europe's climate debate has not moved beyond a discussion of 'how far' to act (i.e. what percentage will the target GHG reduction be?), rather than focussing on which policies will achieve the required reductions - wasting valuable political capital that could be focused on the 'how'. A key consequence of this short term approach to climate governance is that it sends a fundamentally ambivalent signal to investors, international partners and citizens concerning the strength of the EU's commitment to effective climate mitigation.

The EU's 2030 proposals represent a continuation of the EU's interim approach to climate governance. Although it has repeatedly emphasised the need to induce greater certainty in order to stimulate investment, the Commission's 2030 Communication does not include proposals designed to address the most fundamental cause of uncertainty. There is no proposal to create a binding long-term climate governance regime explicitly designed to deliver the EU's 2050 objective. Instead the architecture of the 2030 Framework views 2030 as an end in itself rather than an interim landing point embedded in a stable long-term governance pathway. This must be rectified - investors require long-term certainty and the 2030 debate is an opportunity to promote that certainty.

6.3 Facilitate forward planning

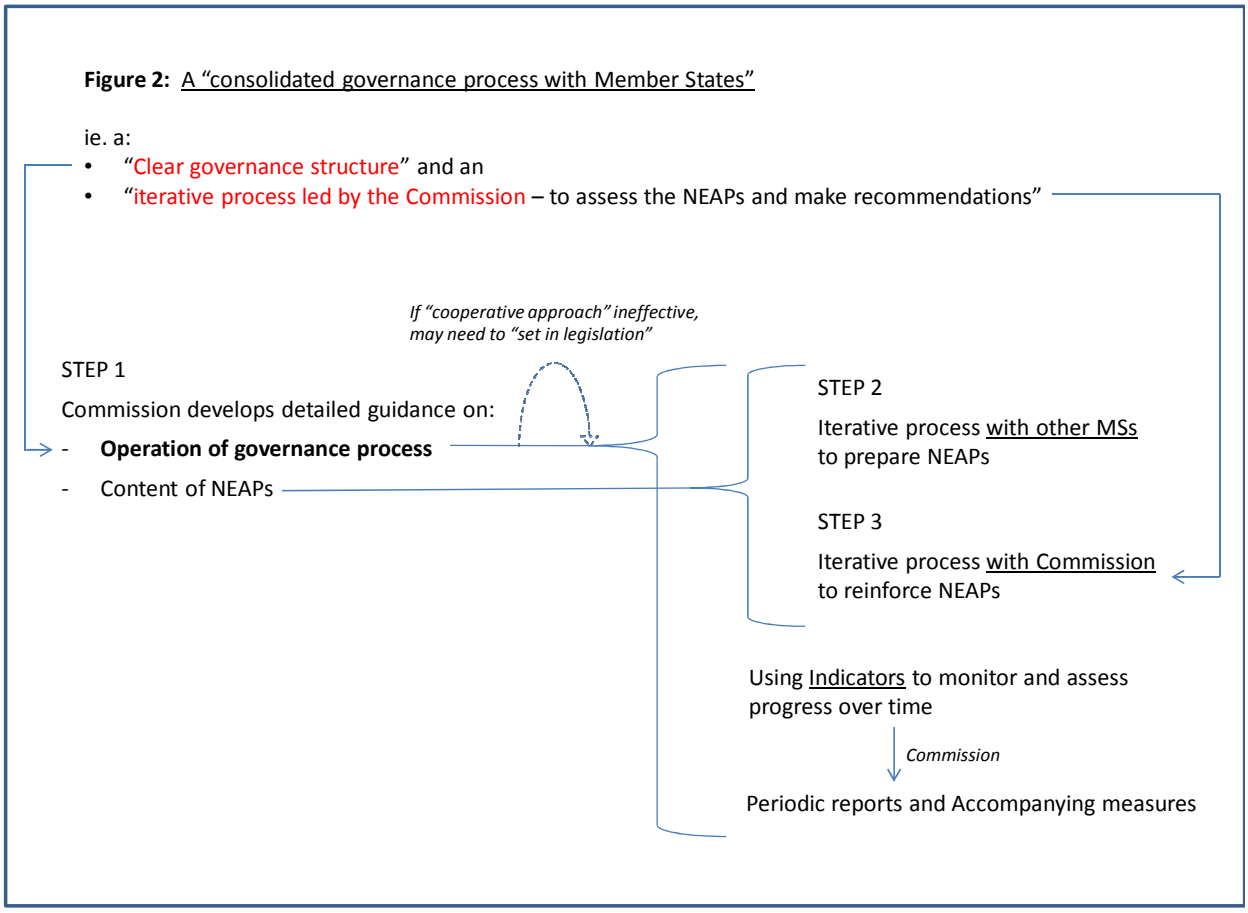
In addition to the required long-term certainty, it is widely acknowledged that investors require certainty regarding the Union's long-term decarbonisation strategy in order to have the confidence required to invest. While part of that certainty must come from binding long-term targets, it must also come from detailed, short term plans: a 5 year focus would embed political accountability into the political system.

The EU's 2020 package included many and varied reporting and planning obligations. The following table sets out an overview of those planning requirements:



While this reporting regime is extensive, there is a question over the quality and control of oversight by the Commission, Parliament and Council. It can be seen above that the regime was not designed holistically but has overlapping and unaligned timetables. It was not designed to ensure the right information was going to the right institution at the right time but rather on a piecemeal basis, legislative instrument by instrument. Building on the earlier argument concerning the necessity for formal arrangements to ensure the integration of independent science, the reporting should contain robust provisions to enable the EU institutions to reliably identify problems or barriers to the European transition. A full technical analysis considering reporting policy gaps are beyond the scope of this paper however, what we can say is that the process of MS reporting to the Commission is highly fragmented in time and content. The EEA has furthermore reported that MS "do not generally report complete information" thus denying the Commission the information required to monitor effectively. As already discussed, the current reporting framework also fails to place the Commission under a composite reporting obligation. On the basis of the manifestly partial MS reporting, the Commission simply decides to report on the macro decarbonisation picture when it is ready to do so. This is not reflective of a stable and transparent process that transcends political cycles. ClientEarth takes the view that to properly facilitate forward planning the Commission should be required to report to the Spring meeting of the European Council and a concurrent session of the European Parliament every year on the overall EU decarbonisation pathway - in effect, 'a state of decarbonisation in the Union' report.

The EU's 2030 proposals concentrate exclusively on reform of the MS side of the reporting process - but much less so the EU side. While ClientEarth welcomes the proposal for substantial simplification and streamlining of the MS reporting and planning process, the Commission's proposals do not contain enough detail to assess exactly what that reporting process would be or how it would work. However, the following diagram attempts to capture the proposals in full:



It is difficult to know the effect that these proposals would have on the quality of climate planning and reporting by the MS and thus the correspondent onward reporting and risk assessment by the Commission. However, the proposals should reduce fragmentation between instruments and thereby could promote policy coherence (see further section 7) and reduce the fragmentation between sectors (e.g. the much deeper governance of the energy sector compared to the light touch regulation of the non-traded sectors). However, most fundamentally, in line with the principle of certainty there is a need to ensure that the reporting and associated monitoring does not just assess policy in line with 2030 targets but also ensures that MS are on the correct long-term decarbonisation pathway to at least 2050.

6.4 Create a framework for ensuring effective action in the face of uncertainty

Any effective framework to ensure action in the face of uncertainty must incorporate responsiveness. Responsiveness is about the governance system creating a robust mechanism for ensuring a credible and timely response to changing circumstances and policy failure. Not all details of the required decarbonisation of the EU economy can be predicted, therefore the

system must be able to respond. A lack of responsiveness can create imbalances e.g. - the almost total dependence on one policy without an alternative where the instrument does not deliver the expected results or the lack of response to rapidly changing circumstances e.g. the fall in the cost of photovoltaic energy by 2/3 over just 5 years. In addition, as the benefits of reducing climate change are diffuse, there is a need to ensure that a legal framework for effective action emerges i.e. systems that can prevent institutional inertia. This will increase the changes of an optimal policy mix and create consensus on what climate law should achieve. ClientEarth has two key concerns that must be addressed before the EU could be said to have a framework that ensures effective action in the face of uncertainty:

1. **Lack of Balanced Indicators**: In the 2030 Framework the Commission has proposed that post 2020 the EU decarbonisation agenda would be systematically monitored by key indicators "to assess progress over time and to inform any future policy intervention."[35] The envisaged introduction of indicators could improve the Commission's own duty to commit to a predictable process of reporting on the Union's decarbonisation objectives. However, the proposed indicators listed by the Commission in its 2030 Communication emphasise the energy security and competitiveness agenda to the exclusion of the sustainability dimension. Effective climate governance requires that the low carbon dimension is not marginalised. Therefore it is essential that they are balanced if responsiveness and action in the face of uncertainty is to be fostered.

2. **Lack of Risk Management**: Another element of responsiveness is the process of risk management. Key risks to be managed include the risk of policy failure (e.g. the ETS carbon price fails to rise; IEM is not completed within the necessary time frame; coal usage continues to increase). Responsibility for highlighting risks is dominated by the Commission which is also responsible for driving policy. The Commission's role is highly conflicted due to its dual role as legislative initiator (in which role it is subject to intensive political lobbying) and enforcer. As a policy initiator the Commission is required to seek a co-operative approach with MS to secure the passage of legislation but in its role as law enforcer it must take a more robust and confrontational stand. The Commission will inevitably be reluctant to admit policy failure and is disincentivised from proactively highlighting the risk of failure. The new indicators may herald the emergence of a more proactive role for the Commission in robust risk management. However, to achieve this outcome it is important that the indicators are appropriately balanced across the 'energy trilemma' (the competing aims of energy security, environmental sustainability, and economic prosperity) and enable the EU to accurately anticipate risks rather than simply react to problems as they arise.[36]

[35] Communication from the Commission to the European Parliament, the Council and European Economic and Social Committee and the Committee of the Regions: A Policy Framework for the Climate and Energy in the period from 2020 to 2030; COM(2014) 15.
[36] See also the proposal from E3G for a 'European Energy and Climate Security Observatory' to monitor systemic risks. http://e3g.org/x75yb

Key Certainty Messages

1. Embedding the principle of certainty into an effective pathway for decarbonisation requires that the arrangements for decision making are defined by 4 central characteristics. Namely they reflect a credible commitment to effective action; take a long term perspective; facilitate forward planning; and create a framework for ensuring effective action in the face of uncertainty.

2. ***The 2020 package*** *created a governance regime that requires MS and EU institutions to substantially reaffirm their commitment to effective climate mitigation every 10 years. As a result, Europe's climate debate has not moved beyond a discussion of 'whether' to act rather than 'how' - wasting valuable political capital.*

3. ***The 2030 Framework*** *views 2030 as an end in itself rather than an interim landing point embedded in a stable long-term governance pathway to at least 2050. This must be rectified - investors require long-term certainty and the 2030 debate is an opportunity to promote that certainty.*

4. It is too early to tell whether the Commission's January 2014 proposals on reporting will improve reporting on climate and energy and whether the final indicators, which are used balance sustainability appropriately against energy security and competiveness, will be a really effective tool.

5. On the basis of partial MS reporting, the Commission simply decides to report on the macro decarbonisation picture when it is ready to do so. This is not reflective of a stable and transparent process that transcends politics. ClientEarth's analysis is that the Commission should be reporting to the Spring meeting of the European Council and a concurrent session of the European Parliament every year on the overall EU decarbonisation pathway - a state of decarbonisation in the Union report.

7 Policy integration

Effective policy integration and consistency are critical to achieving the EU's climate and energy objectives and targets. Achieving the European low carbon transition will require policy development across a wide range of sectors (as a minimum spanning energy, competition, finance, agriculture and transport) to effectively embed a coherent focus on climate impacts.

The importance of policy integration and consistency - and particularly for the environmental sphere - is clearly recognised by the EU Treaties. Article 11 of TFEU explicitly requires environmental protection requirements to be integrated into the definition and implementation of the Union's policies and activities. Article 194 TFEU furthermore requires that EU energy policy must be cognisant of the need to preserve and improve the environment. The importance of policy consistency is explicitly recognised by Article 7 TFEU which requires the Union to ensure consistency between its policies and activities.

Despite the strong legal instruction to ensure policy integration and consistency, the experience of implementing the existing EU climate and energy acquis makes clear that the Union has thus far failed to create institutional and policy processes that effectively deliver these governance outcomes.

A lack of policy integration and policy consistency, compounded by a fragmented European policy are regrettably hallmarks of the EU's 2020 climate and energy package which are clearly having detrimental impacts on achieving the desired low carbon objectives:

1. **A marked imbalance of intensity of controls across the economy**: EU regulation of GHG reductions across the economy reflects a marked imbalance between the intensity of controls imposed on emissions from traded and non-traded sectors. The apparent symmetry of the 2020 targets disguises an uneven hierarchy between the governance measures that support the targets. EU efforts to regulate carbon emissions have been dominated by or concentrated on the ETS sectors. By contrast accounting for over half of the EU's total emissions, the Effort Sharing Decision imposes only very weak controls on national emissions from the energy supply, industrial energy use and processes, household energy use (in particular heating), services energy use, transport (road and rail) energy use, waste and agriculture. This results in a 2020 package that fundamentally fails to integrate climate mitigation considerations across the economy as a whole and thereby fails to consistently optimise the abatement potential of all emitting sectors.[37]

2. **The EU lacks a unifying legal duty to achieve the EU's climate and energy objectives**: The fundamental lack of policy integration is mirrored by the lack of a unifying duty for the EU institutions to achieve the EU's 2050 objective. Even if the structures of the new Juncker Commission are better integrated, the fundamental problem remains that the Commission lacks a unifying duty to achieve the EU's climate and energy objectives. Despite the existence of the long term obligation imposed on ETS sectors to decarbonise, the EU itself does not have a duty to achieve the 2050 GHG objective. Embedding such a long term duty in law, would have a powerful symbolic role as an organising principle which is binding on the Commission and on all other EU institutions and bodies.

[37] http://www.clientearth.org/climate-energy/effort-sharing-initative/

3. **Fragmentation of climate policy between different (and competing) DGs**: The fragmentation of climate policy between sectors is an inevitable result of the fragmentation of responsibility between different (and competing) DGs. A range of DGs take a high level of responsibility for aspects of the decarbonisation project. Commissioners are therefore preoccupied with promoting measures that come under their 'core' areas of competence in order to maximise their influence. As a result consistent action across different policy areas has rarely been forthcoming. The new Juncker Commission creates 'clusters' of Commissioners and the associated DGs. This could theoretically go some way to addressing the lack of policy integration but unfortunately the new structure seems to reflect a downgrading of the importance of climate, and indeed environmental issues generally.

4. **Misalignment of policy and inconsistency is also clear within the IEM framework:** Despite the fundamental importance of the internal energy market to achieving the EU's climate objectives, as currently designed, the IEM framework is very strongly aligned to the Union's energy security and competitiveness objectives but far less to its climate objectives. This problem was clearly reflected in the analysis of the ECF Roadmaps to Reality Report (2013)[38] and is furthermore reflected in E3G's analysis of gas interconnection supports.[39]

5. **Guidelines on State aid for environmental protection and energy 2014-2020 should have the low carbon transition as their key priority:** In adopting the new State aid guidelines, the EU has tried to support policy integration and consistency between EU State aid rules and its climate and energy objectives. However, there are considerable doubts as to whether these guidelines will in reality provide a sufficiently robust driver of policy integration and consistency. The authorisation in July 2014 of the proposed UK Capacity Market electricity generation scheme[40] raises considerable doubts as to whether the application of the guidelines will necessarily achieve optimisation of the low carbon transition. The authorisation strongly suggests that State aid jurisdiction will be politicised - resulting in an unpredictable landscape for the necessary financing of the low carbon transition.

6. **Highly fragmented reporting process**: one of the worries with the Commission's streamlining agenda is that it appears to replace legally binding (albeit fragmented) reporting processes with an entirely intergovernmental (albeit integrated) process.

Key Policy Integration Messages

*1. A lack of policy integration and policy inconsistency, compounded by a fragmented Commission are regrettably hallmarks of the EU's **2020 climate and energy package** which are clearly having detrimental impacts on achieving the desired low carbon objectives.*

2. There should be a legally binding EU target for reducing GHG emissions by at least 80-95% by 2050. Such a target would stimulate greater policy integration and create investment confidence stretching out to mid-century.

[38] http://www.roadmap2050.eu/project/roadmap-to-reality
[39] http://www.e3g.org/news/media-room/energy-security-and-the-connecting-europe-facility01
[40] http://europa.eu/rapid/press-release_IP-14-865_en.htm

Conclusion

Achieving the required radical decarbonisation of the entire EU economy necessitates a climate and energy policy rooted in good governance. The Commission signalled in the 2030 Communication that governance was to be part of the debate on 2030 climate and energy policy. ClientEarth welcomes the opening of a space to consider EU governance, however, this paper has demonstrated that good governance requires a more systemic review than that proposed by the Commission.

Throughout this paper key conclusions have been drawn out for each good governance principle to highlight areas where ClientEarth feels the governance debate needs reinvigoration.

The proposed 2030 Framework could potentially deepen the weaknesses of EU climate governance, as it proposes a general retreat from binding law (apart from in respect of the proposed MSR and the completion of the internal energy market). The Commission's proposal that binding MS level targets be abandoned could significantly erode the functioning of the EU's climate and energy regime.

ClientEarth strongly believes that a decision to adopt a powerful framework for 2030 will play a vital role in maintaining the momentum of global negotiations towards a binding emissions regime. It is thus critical that the 2030 package does not retreat from binding climate and energy governance. If the EU is to discharge its legal duty under the Treaties to promote international efforts to combat climate change (TFEU Article 191), it must use the 2030 design process to strengthen the legal traction of EU climate and energy governance.

The EU and its Member States are at a critical juncture in pursuit of their goal of long-term decarbonisation. The 2020 Climate & Energy Package has shown itself to have a number of important flaws which must now be rectified if real progress is to be made in the coming decades and investors are to be given the necessary confidence to drive and support this progress. What is being proposed in the 2030 Framework is a greater emphasis on 'soft' governance processes and a rowing back from binding, transparent long-term targets. This paper has argued that this is precisely what should be avoided. Such a framework will not deliver effective action. The GHG, renewable energy and energy efficiency targets must be legally binding on Member States and located within an improved governance framework capable of driving national governance to the full range of cost effective policies and provide a strong investment signal. Climate governance is in urgent need of reinvigoration. ClientEarth hopes that this paper will begin to open that debate.

List of abbreviations

ACER	EU Agency for the Cooperation of Energy Regulators
CCC	UK Committee on Climate Change
CCSD	Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006
CJEU	Court of Justice of the European Union
DG	Directorates-General (EU policy departments)
ECHA	The European Chemicals Agency
EEA	The European Environment Agency
EFSA	The European Food Safety Authority
ENTSO-E	European Network of Transmission System Operators for Electricity
ENTSOG	European Network of Transmission System Operators for Gas
EPBD	Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings
ESD	Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020
ETS	Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC
GHG	Greenhouse Gas
GMO	Genetically Modified Organisms
IA	Impact Assessment
IEM	Internal Energy Market of the EU
IEMD	Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC
IPCC	Intergovernmental Panel on Climate Change

MMR	Regulation (EU) No 525/2013 of the European Parliament and of the Council on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change
MS	Member State of the European Union
NEAP	National plans for competitive, secure and sustainable energy as proposed in the 22 January Commission Communication on the 2030 climate and energy framework
RED	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
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, engaged individuals and the UK Department for International Development.

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