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Subject: Why lawyers think that the EU 2030 energy efficiency target should be binding? - The Commission's proposal for the EU Climate and Energy Governance Regulation (COM (2016) 759 final)

The Commission proposal for the EU Governance Regulation¹ (EUGR) sets planning and reporting requirements regarding the five EU Energy Union objectives². It also establishes mechanisms that aim to ensure that the Energy Union objectives are indeed achieved.

This memo touches on two elements of the Energy Union: the EU 2030 targets on renewable sources of energy and on energy efficiency. The focus of the memo is the EU 2030 energy efficiency target.

In the EUGR, the Commission proposed the EU 2030 energy efficiency target to be binding and set at the level of 30%. Art. 1 of the Commission's proposal for a revised Energy Efficiency Directive³ (the EED amending proposal) sets the EU 2030 energy efficiency target in the same binding terms.⁴

However, within the currently ongoing legislative process, there has been quite a lot of political discussion around the binding character of the EU 2030 energy efficiency target. Certain politicians question the necessity of establishing binding EU target and ask to stick to the European Council Conclusions of 23-24 October 2014⁵ where Member States called for the EU 2030 energy efficiency target to be indicative.

This memo aims at providing legal perspective into the political discussion on a binding or non-binding character of the EU 2030 energy efficiency target. It looks at the target's binding character from the point of view of good governance and the EUGR as well as the EU energy efficiency legislation. In certain aspects, it refers to the EU renewable energies target in order to provide comparison with the energy efficiency one.

¹ Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013; Brussels, 30.11.2016; COM(2016)759 final

² The five objectives of the Energy Union are 1. Decarbonisation (incl. a) GHG emissions reductions and b) renewable energies), 2. Energy efficiency, 3. Energy security, 4. Internal energy market, 5. Research, innovation and competitiveness.

³ Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency; Brussels, 30.11.2016; COM(2016) 761 final.

⁴ The EU EE target is often compared with the EU renewable energy target; The EU renewable energy target is also expressed in the EUGR and the Commission's proposal for a revised Renewables Directive as a binding value. It is set at the level of at least 27%.

⁵ European Council; Brussels, 24 October 2014; EUCO 169/14; CO EUR 13; CONCL 5.

EU energy efficiency 2030 target and energy efficiency governance structure in the EU legislation

EUGR and energy efficiency - a governance system based on Member States' flexibility towards binding EU goals

The governance system for energy efficiency proposed by the Commission in the EUGR is set in the following way: the EU sets its EU target and Member States decide how (incl. how much) they contribute to this EU target. The Commission supervises Member States to make sure that the EU achieves its target. In order to be able to hold this supervisory role and assess the Member States' and the EU's progress, the Commission, who is responsible for the implementation of EU objectives, has to be provided by Member States with plans and regular reports. In case the target's achievement is at risk, the Commission would take appropriate action.

A proposed EUGR governance system for energy efficiency is, therefore, based on a binding EU goal, Member States' flexibility on how they contribute to this collective goal and the Commission's overall responsibility for the goal's achievement.

Does EU energy efficiency law set binding measures? If so, do these measures make the EU energy efficiency target obsolete?

From the first sight, it might seem that the EU energy efficiency law hinders Member States' flexibility in how they contribute to the EU energy efficiency target and, in consequence, is not compatible with the governance system proposed under the EUGR. One might be tempted to argue that EU energy efficiency law sets binding measures and, because of that, there is no need to set a binding EU energy efficiency target.

There are indeed **EU product regulations, in particular the ecodesign and energy labelling measures**⁶, which set directly applicable and binding EU energy efficiency product standards.

However, other two main EU legal instruments in the area of energy efficiency, **the Energy Efficiency Directive**⁷ (the EED) and **the Energy Performance of Buildings Directive**⁸ (the EPBD), have a different character and leave Member States lots of flexibility in how they implement their EU obligations.

A thorough look at **the EED** reveals that many of the EED measures are described in very flexible terms or are 'soft' obligations. For example, Member States shall:

⁶ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285, 31.10.2009, p. 10; Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, OJ L 198, 28.7.2017, p. 1; Relevant implementing measures for different kinds of products.

⁷ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EU and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC ; OJ L 315, p.1 ; 14.11.2012.

⁸ Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ L 153, 18.6.2010, p. 13.

- purchase energy efficient products, services and buildings but only in so far as that is consistent with cost-effectiveness, economical feasibility, wider sustainability and sufficient competition; in addition, this obligation applies only to the purchases by central governments,
- promote the availability to all final customers of high quality audits that are cost-effective,
- develop programmes to encourage SMEs to undergo energy audits,
- establish their own building renovation strategies.

In spite of the use of 'shall' in relation to the above obligations, Member States are flexible as to whether and/or how they implement these obligations and/or what specific national actions they take. In addition, many of the EED obligations are difficult to measure and, in consequence, to control by the Commission. In most cases, Member States are the ones who determine how much energy savings the planned and implemented measures would provide. A number of EU energy efficiency provisions may not even need to be transposed into national legislation in spite of being included in an EU directive.⁹ Moreover, in relation to majority of the EED obligations, the Commission does not have any enforcement powers in case a Member State does not make sufficient implementation efforts towards the achievement of the EU EE target.

As to **the EPBD**, it sets sectoral goals (e.g. a requirement that all new buildings are nearly zero energy by 2020) but also establishes general obligations to be implemented by Member States (e.g. rules on energy performance certificates). The EPBD's requirements might overall be stronger than these of the EED but still, at least partly, depend on ambition of national implementation.

To conclude, some EU energy efficiency legislation sets binding measures. However, in relation to the majority of EU energy efficiency measures Member States decide themselves how they implement them. Also, a number of measures, especially within the EED, are 'soft' ones. In this situation, it is necessary to establish a fixed and serious EU goal. It is the only way to allow the Commission to measure the progress and act in case this progress is not sufficient.

Therefore, measures established under the existing EU energy efficiency law do not substitute in any way the EU 2030 energy efficiency binding target.

Why should the EU 2030 energy efficiency target be binding?

Taking into account the construction and the role of the EU climate and energy governance system, it is essential that the EU 2030 energy efficiency target is set in binding terms.

Implementation flexibility by Member States

The EUGR governance system and EU energy efficiency legislation provide certain flexibility as to how much energy efficiency Member States would achieve and how they implement most of the EU energy efficiency policies and measures. To know how Member States are performing,

⁹ This will not change with the ongoing revision of the EED. Actually, there is a risk that the current EED provisions may be weakened and its requirements lowered.

the Commission must be empowered to follow national efforts and be able to compare them with a fixed number. Or, an 'indicative' target would definitely not be a fixed value.

A target as a trigger for Member States' ambition

The current EUGR does not set national targets and there is little possibility for the Commission to require Member States to be ambitious in their energy efficiency actions. The EU energy efficiency target is the only fixed quantified goal of general character and therefore, a necessary trigger for boosting Member States' action on energy efficiency. To be respected by Member States, the target has to be binding. Otherwise, it would be too easy not to comply with it. Describing the EU 2030 energy efficiency target as 'indicative' would mean that the target value is only approximate and a collective achievement of an even considerably lower value could be considered as sufficient.

Results oriented governance process

The governance process can only be effective and bring results if the EU target is binding. If the EU target is set as an indicative value, it would be difficult for the Commission to take any corrective action aiming at the achievement of the EU target. The Commission could not impose in such a case any course correction, enforcement or 'reparatory' action/mechanism. The whole governance effort (by the Member States to plan actions towards the EU target's achievement and report on them; by the Commission to monitor the implementation of national contribution towards the EU target) would just be a meaningless administrative exercise with little value towards the effective achievement of goals. It would clearly be a waste of administrative resources and, in consequence, of public money.

EUGR governance design in danger

Defining the EU 2030 energy efficiency goal as indicative would perturb the whole governance structure set by the EUGR. It could especially have a very negative influence on the supervisory role of the Commission. The authority of the Commission to propose further measures in case the EU target is at risk could be questioned as unfunded. The same would apply to (and be questioned even more) other Commission supervisory, enforcement and correction tasks.

Transparency, simplicity and compliance with the Better Regulation agenda

A non-binding EU energy efficiency target would complicate the Energy Union governance system, as it would set different standards for renewable energies and energy efficiency. That would be contrary to the EU efforts to cut red tape and inconsistent with the Commission's better regulation agenda. It would also mean more obscure and less understandable governance provisions, which should be avoided at times when the EU is already strongly criticised for its complicated rules. Complicated governance provisions could not be a good signal for investors.

Additional administrative burden for Member States

Differentiating between a binding renewables target and an indicative energy efficiency target could lead to two different enforcement systems, which, potentially, could increase the actual work by EU Member States as would require a separate follow up.

Conclusion: good governance requires binding target(s)

Therefore, from the legal perspective, in order to establish the governance system that works, is effective, understandable, transparent and simple it is essential to ensure that the EU 2030 energy efficiency target is binding. Otherwise, what would be the purpose of setting a sophisticated planning and monitoring mechanism if there is no clear goal to achieve but only 'indication' of what would potentially be possible? Why to adopt legislation that is not enforceable and does not provide any mechanisms allowing to pushing Member States to achieve set goals?

From the legal perspective, the EU 2030 energy efficiency binding target is a strict minimum. For it to be genuinely effective, the EU 2030 target should be accompanied by mid-term EU targets (milestones). Ideally, the EU target should also be divided into national targets.