Fifty Shades of Binding: Appraising the Enforcement Toolkit for the EU’s 2030 Renewable Energy Targets

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Fifty shades of binding: Appraising the enforcement toolkit for the EU’s 2030 renewable energy targets

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In December 2018, the European Union (EU) adopted a recast of the Renewable Energy Directive (RED II), which introduces a new target of 32 percent renewable energy to be reached at the EU level by 2030. This target represents a discontinuity with the one enshrined in the previous Directive (RED I), as it is binding only for the EU as a whole but not for individual Member States. Such a policy shift paves the way to new legal challenges for the deployment of renewable energy. Yet, the contextual approval of the Regulation on the Governance of the Energy Union also provides the European Commission with an enforcement toolkit to respond to Member States’ ambition and delivery gaps in their National Energy and Climate Plans. Providing an appraisal of the RED II and the Governance Regulation, this article argues that, despite the lack of binding renewable energy targets at Member State level, the Commission is equipped with the necessary instruments to ensure the enforcement of the collective 2030 renewable energy target.

1 | INTRODUCTION

While the European Union (EU) has adopted an array of prominent targets in the climate domain in the last decades, it has been pointed out that ‘improvements in the EU’s implementation and enforcement powers have failed to keep pace with the rate and scale of policy innovation’. Renewable energy targets, and their fulfilment, are key to EU climate ambition. However, the lack of an effective enforcement toolkit risks leaving targets impaired.

In 2018, the EU adopted several legislative acts, which complement and operationalize its mid-term emissions reduction strategy known as the 2030 Climate and Energy Framework (2030 Framework). Such new pieces of legislation include a recast Renewable Energy Directive (RED II) and a Regulation for the Governance of the Energy Union (Governance Regulation). The former updates the normative framework for the promotion of renewable energy, whereas the latter provides the procedural instruments to ensure the achievement of the whole set of objectives and targets pertaining to the 2030 Framework and the so-called ‘Energy Union’.


2 ‘Mid-term’ is here used as opposed to ‘long-term’ commitments, which, instead, refer to the EU 2050 Climate Strategy. See Commission (EU), ‘A Clean Planet for all – a European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy’ (Communication) COM(2018) 773 final, 28 November 2018.


a comprehensive strategy approved in 2015 to ‘bring greater security, sustainability and competitiveness’ into the EU energy market.6

The promotion of renewable forms of energy is a fundamental goal of EU energy and climate policy, which is only to become more relevant in the light of the European Green Deal.7 As early as 2001, the EU adopted its first Renewable Electricity Directive (RES-E Directive), which for the first time set a target of 12 percent renewable energy in gross EU energy consumption by 2010.8 The RES-E Directive was followed, in 2009, by a Renewable Energy Directive (RED I), which further elaborated the support framework for renewables and introduced a new target of a 20 percent share of energy from renewable sources in the EU’s gross final energy consumption by 2020.9 Throughout the normative evolution of EU renewable energy policy, the EU legislator has openly recognized the multiple benefits of the exploitation of renewable energy sources, as a measure that contributes to environmental protection and sustainable development, as well as to the promotion of energy security, technological development and local employment.10

Moreover, following the reforms brought about in 2009 by the Treaty of Lisbon,11 the promotion of ‘new and renewable forms of energy’ is also explicitly mentioned as one of the primary objectives of the EU’s energy policy, as foreseen under Article 194(1)(c) of the new Treaty on the Functioning of the European Union (TFEU).12 Yet, Article 194(2) TFEU also provides that EU legislation shall not affect a Member State’s right to determine its choice between different energy sources and the general structure of its energy supply.13 This limitation has had important consequences for the legal character of the renewable energy target. Whilst the RED I foresaw a legally binding target for individual Member States, the RED II only provides for an overall EU-wide target of 32 percent renewable energy in the EU’s gross final consumption of energy by 2030, giving Member States leeway to determine their own contribution to the target, according to national circumstances.14

The binding nature of the renewable energy target enshrined in the RED I has been widely praised as a positive element to foster renewable energy deployment across all Member States.15 The European Commission, in its 2009 Renewable Energy Progress Report, considered the shift to legally binding targets a key element for addressing the uncertainties emerging from the legal framework under the RES-E Directive.16 Therefore, the shift back to non-binding renewable energy targets under the 2030 Framework was received with a certain criticism among legal scholars, who pointed out the risk of weakening the EU’s enforcement toolkit, for instance the procedural and judicial ways in which the EU could ensure the achievement of its overall renewable energy target. First, commentators have argued that such a policy reversal could collide with the EU’s climate ambition.17 Second, they have challenged the lack of a clear rationale for reversing the model of legally binding targets at Member State level, which was widely perceived as successful.18 Third, they have criticized the lack of national binding targets as ‘leaving the Commission with empty hands to demand national ambitions for European energy and climate objectives’.19 This refers, in particular, to the limitations in the use of the infringement procedure that may arise from the non-binding nature of the 2030 renewable energy target.20

However, the EU’s 2030 renewable energy target is closely intertwined with the broader enforcement toolkit provided under the 2030 Framework. In this sense, early commentators of the Governance Regulation have highlighted the important role played by the numerous procedural obligations introduced under the Governance Regulation.21 Conversely, previous analyses of the 2020 Package have also cast some doubts over the actual ‘binding’

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7Commission (EU), ‘The European Green Deal’ (Communication) COM(2019) 640 final, 11 December 2019. The policy framework aims, among others, at increasing the EU climate ambition for 2030 and 2050. The framework is to be developed in 2020 and might include a review of targets.
10See, e.g., RES-E Directive (n 8) recital (1); RED I (n 9) recital (1); RED II (n 4) recital (3).
13bid art 194(2).
14RED II (n 4) art 3.
15Iliopoulos, for instance, defines the binding nature of the renewable energy target for 2020 acts as a ‘qualified key driver’ of renewables deployment. See I Iliopoulos, ‘New Debate About the Harmonization of the EU’s Support Instruments for Renewables and Binding Targets’ Relevance?’ (2013) 4 Renewable Energy Law and Policy 254, 264. See, contra, D Helm, ‘The European Framework for Energy and Climate Policies’ (2014) 64 Energy Policy 29, 34, according to whom ‘the most inefficient approach is for each country to have its own target’.
18In this regard, Iliopoulos argues that no clear answer has been provided by the proposers of the amended RED, who have only recalled a generic need for flexibility. See T Iliopoulos, ‘Dilemmas on the Way to a New Renewable Energy Directive’ (2018) 27 European Energy and Environmental Law Review 210, 216.
nature of the renewable energy target enshrined in the RED I, arguing that it represents ‘a mix of more or less unenforceable obligations, hiding behind a façade of mandatory compliance’. Against this background, this article examines the significance of ‘binding’ and ‘non-binding’ renewable energy targets and delves into an analysis of the toolkit available for the enforcement of, respectively, the 2020 and 2030 EU renewable energy targets. Following this introduction, Section 2 provides theoretical insights on targets and their enforcement under EU law in general. Section 3 conducts an in-depth analysis of the 2030 renewable energy targets, as enshrined in the RED II and the Governance Regulation, illustrating the prospects for their enforcement. Section 4 discusses strengths and weaknesses of the 2030 renewable energy target, comparing it with the targets enshrined in the 2001 RES-E Directive and in the 2009 RED I. Section 5 summarizes the main findings.

2 | TARGETS AND THEIR ENFORCEMENT IN EU LAW

2.1 | Binding and non-binding targets

The adoption of targets is a popular legislative technique at EU level and beyond. It is used to quantify the level of progress towards certain policy objectives and provide for short- and medium-term signals with regard to such progress. The field of environmental and climate law, largely characterized by long-term policy goals, is a particularly fertile ground for the adoption of targets. One of the many examples in this respect is the Montreal Protocol on Substances that Deplete the Ozone Layer, which laid out the ‘freeze’ and the gradual reduction targets of the production and consumption of the ozone depleting substances falling under the scope of the protocol. In a similar fashion, the Paris Agreement’s goal of limiting the global average temperature increase to well below 2°C above pre-industrial levels, enshrined in its Article 2(1), represents one of the paramount objectives of the global climate regime. In EU legislation, targets of various nature have been adopted in numerous policy fields, including environmental and climate protection. With specific regard to the renewable energy sector, the adoption of targets is considered an important instrument to provide certainty for investors and encourage the continuous development of renewable energy technologies. Since the first Renewable Energy Directive was enacted in 2001, renewable energy targets have been adopted at EU level, with their legal nature oscillating between binding and non-binding. However, the concept of ‘legally binding’ or ‘non-legally binding’ is not as straightforward as it may seem. To assess the actual scope of an EU target, it is necessary to take into account the instruments that are available to ensure that, in practice, the target is met. To this end, it is useful to briefly consider, on a general level, the concepts of enforcement, compliance and effectiveness.

Enforcement is, in its literal meaning, the process of increasing the strength of something, to compel observance or fulfillment of an obligation. Under EU law, the European Commission is the institution entrusted with the task of ensuring the application of the EU treaties and of the measures adopted by the institutions pursuant to them. To this end, one of the distinct features of EU law, as opposed to other international legal regimes, is the possibility for the Commission to resort to judicial procedures in order to impose binding sanctions on Member States. This power is exercised through the initiation of infringement procedures, according to Articles 258 and 260 TFEU. Compliance, on the other hand, refers to the conduct in conformity with a specific rule. In this sense, it can also be defined as ‘consensual conformity’, as opposed to the imposition of sanctions. Lastly, the concept of effectiveness has a more practical connotation, and is permeated by the idea of ‘making a law operative’. Both voluntary compliance and enforcement procedures can serve the purpose of achieving the overall effectiveness of a given legal instrument.

Enforcement through infringement procedures equips EU law with ‘teeth’ and can serve as a deterrent to stimulate voluntary compliance. Most commonly, an infringement procedure is brought by the Commission against a Member State under Article 258 TFEU. A second and by far less common path is the initiation for infringement procedures by Member States against other Member States, under

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22 A Johnston and E Van der Marel, ‘How Binding are the EU’s “Binding” Renewables Targets?’ (2016) 18 Cambridge Yearbook of European Legal Studies 176, 211.
23 Ibid 176.
24 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3. The targets were established as a percentage from a base year by certain time frames.
26 E.g., with regard to the performance of air traffic controllers; see Commission Regulation 691/2010/EU laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services [2010] OJ L201/1, which sets out a binding performance target concerning air traffic control.
28 See RED I (n 9) recital (14).
29 Non-binding targets were set in the 2001 RES-E Directive; binding targets were then set in the 2009 RED I; non-binding targets have been, once again, adopted in the 2018 RED II.
32 Andersen (n 30) 13.
35 Andersen (n 30) 43.
Article 259 TFEU.36 Infringement procedures also have some drawbacks, as they are characterized by a considerable length (as of December 2018, their estimated average duration is 38.1 months).37 Moreover, they are affected by a lack of transparency, due to the secrecy of the administrative phase of the procedure, which may prevent infringement cases from becoming a learning opportunity for other Member States.38

Besides infringement procedures, ‘softer’ enforcement mechanisms are available under EU law. These are commonly referred to as ‘iterative processes’, ‘iterative dialogues’39 or ‘Open Method of Coordination’,40 and are characterized by a dialogue between Member States and the European Commission, with the aim of monitoring progress towards certain common objectives.41 Several examples of iterative processes can be found in EU legislation. A prominent case, for instance, is the European Semester, a yearly cycle of economic policy coordination which helps to ensure that Member States meet specific commitments related, for instance, to the threshold of 3 percent for the ratio of the planned or actual government deficit to gross domestic product (GDP) at market prices.42 A common trait of such iterative processes is the establishment of a standardized dialogue between Member States and the European Commission, with the possibility for the European Commission to issue ‘country-specific recommendations’ aimed at setting all Member States on the right track to achieve the EU targets.43 However, the success of iterative processes relies on the active cooperation by Member States, given the lack of legally binding sanctions.44

2.2 | EU targets as collective obligations

In the EU context, targets can be set at the level of individual Member States, or at the EU level. In both cases, targets can be ‘indicative’ or ‘binding’. This leads to four possible theoretical scenarios, as targets can be: (i) indicative at Member State level; (ii) indicative at EU level; (iii) binding at Member State level; and (iv) binding at EU level. In the case of indicative targets, both at EU and Member State level, these are not susceptible to enforcement through infringement procedures, as their achievement is not tied to a legal obligation.45 When targets are binding at the Member State level, it is generally considered possible to enforce them through infringement procedures.46 When targets are binding at EU level, as in the case of the 2030 renewable energy targets, the situation is more complex and requires a closer analysis.

Binding targets at the EU level represent, from a theoretical perspective, a particular form of collective obligation. In the case of the 2030 renewable energy targets, Member States are collectively obliged to ensure that the share of energy from renewable sources in the Union’s gross final consumption of energy in 2030 is at least 32 percent.

Collective obligations are well established under general international law. For instance, Article 42 of the Draft Articles on State Responsibility refers to obligations that are ‘owed to ... the international community as a whole’.47 Moreover, Article 48 of the Draft Articles on State Responsibility refers to obligations ‘established for the protection of a collective interest of the group’.48 However, in the ILC Draft Articles the international community is only the beneficiary and not also the holder of collective obligations. In international climate law, it is possible to identify a growing trend towards the establishment of collective obligations of this kind, for instance obligations owed by a community towards the same community. As highlighted in a recent article by Alexander Zahar, such a trend can be identified both in the Paris Agreement and in several pieces of domestic climate legislation.49 In fact, the temperature limit of below 2°C set under Article 2(1) of the Paris Agreement can be understood as an obligation posed by one specific international community (i.e. the parties to the Paris Agreement) towards itself. Similarly, national emission reduction targets, such as the one enshrined in the United Kingdom’s 2008 Climate Change Act, represent an obligation that States owe to themselves. These cases closely resemble that of the renewable energy target enshrined in the RED II, in which there is a substantial identity between the beneficiary and the holder of the obligation.50

With regard to the domestic level, encouraging signals for the enforceability of collective obligations have emerged from recent court cases. One of the most prominent examples in this sense is
the Dutch Urgenda case, in which the Dutch Supreme Court, in December 2019, confirmed the existence of a State’s obligation, on the basis of the European Convention on Human Rights (ECHR), to set ambitious enough greenhouse gas emission reduction targets. A similar outcome can be seen in another recent case of domestic climate litigation, namely a dispute adjudicated in January 2020 by the Court of Appeal of Borgarting (Oslo), in which claimants pursued a ban on Norway’s oil extraction activities in light of their alleged violation of Norway’s international climate obligations. While the Court of Appeal in this case did not rule in favour of the claimants, it still found Norway’s nationally determined contribution (NDC) inadequate to meet the goals set under the Paris Agreement. As a response, the Norwegian government updated its NDC, in February 2020, stepping up its commitment from a 40 to 50 percent greenhouse gas emission reduction by 2030.

Both cases can be seen as representative of a trend towards increased enforcement of collective obligations. At the same time, both court decisions have only concerned the level of ambition in target-setting, and not the actual enforcement of a given target. The same applies at the EU level, where legal decisions concerning the consequences arising from the non-achievement of individual or collective targets are still lacking. With specific regard to collective targets, the possibility of legal enforcement against the EU as a whole seems precluded by the current arsenal of legal instruments available under EU primary law. How could the EU – as an organization – be held accountable for something that it could not achieve without Member State action? The legal mechanisms for the enforcement of the collective target are still unclear. EU law, in particular, does not foresee specific instruments to hold the EU accountable for an obligation it owes to itself and recourse to infringement procedures is logi-
cally precluded. Nevertheless, the non-achievement of a collective EU ‘binding’ target would at least give rise to a political responsibility of the EU, and potentially determine a loss of credibility of the institution as a whole.

For what concerns the 2030 renewable energy target, this risk is mitigated by several specific enforcement procedures, emerging from the interplay between the RED II and the Governance Regulation.

3 | RENEWABLE ENERGY TARGETS IN THE 2030 FRAMEWORK

3.1 | The 2030 climate and energy framework

In January 2014, the European Commission proposed a policy framework for climate and energy for the period from 2020 to 2030. The proposal builds upon the experience with the 2020 Climate and Energy Package, which embodied an integrated approach to climate and energy policy. This approach was assessed positively by the European Commission, which advocated for its continuation also in the period after 2020. In 2018, the renewable energy and energy efficiency targets were ratcheted up to, respectively, 32 percent and 32.5 percent, and adopted as legislation through the RED II and the amended Energy Efficiency Directive.

In the transition from the 2020 Package to the 2030 Framework, the renewable energy target lost its legally binding character at the Member State level. This shift to a non-binding renewable energy target is closely related to the amendments introduced by the Treaty of Lisbon, as well as to political negotiations among Member States.

Before December 2009, the EU did not enjoy any formal competence in the energy sector and this, paradoxically, increased the discretionary margin for the EU institutions to shape Member States’ national energy policies. Indeed, despite the lack of an explicit energy competence, already since the 1990s the EU repeatedly intervened with legislative measures affecting the energy sector, which were based on different EU competences, such as the internal market and the environment. Examples in this sense are legislative measures aimed at strengthening the integration of Member States’
electricity and gas markets, along with measures supporting the deployment of renewable energy sources.

The Treaty of Lisbon introduced, under Article 4(2)(i) TFEU, a shared competence in the area of energy, as well as a specific Title, consisting of the sole Article 194 TFEU, which regulates how this competence should be exercised. Article 194 TFEU performs a dual function. On the one hand, it lays out the four main objectives of EU energy policy, namely (i) ensuring the functioning of the energy market; (ii) ensuring security of energy supply in the Union; (iii) promoting energy efficiency and energy saving and the development of new and renewable forms of energy; and (iv) promoting the interconnection of energy networks. On the other hand, it delimits the perimeter of action at EU level, providing that EU measures shall not ‘significantly affect a Member State’s choice between different energy sources and the general structure of its general supply’.

Therefore, the adoption of legally binding targets at Member State level could have been likely challenged as a violation of the boundaries set under Article 194(2) TFEU. Nevertheless, it has also been noted that the new distribution of competences under Article 194 TFEU does not impede a more direct intervention by the Commission, as long as the principles of subsidiarity and proportionality are observed.

The new distribution of competences between the EU and Member States in the energy sector played an important role in the background of the political negotiations leading to the formulation of the 2030 renewable energy target. Such negotiations were characterized by a trend towards polarization in numerous issues, including renewable energy targets. On one side, a block of environmentally progressive countries, led by Germany and Denmark, pushed for holding on to the triad of targets already enshrined in the 2020 Package. On the other side, a group of central and eastern European countries, led by Poland, emphasized their national sovereignty over the energy mix and opposed the adoption of renewable energy and energy efficiency targets for the post-2020 period. Between these two poles, a number of Member States, including the UK and the Netherlands, advocated for a strong climate target but opposed the adoption of a new legally binding target for renewable energy. As decisions in the European Council are governed by the principle of consensus (Article 15 TEU), a compromise solution was needed. The triad of targets was further adopted also for the 2030 Climate and Energy Framework, yet under the condition that the renewable energy target would become ‘binding’ only at EU level.

In December 2018, the political compromise was enacted in the recast Renewable Energy Directive, which endorses an overall target of 32 percent energy from renewable sources in the EU’s 2030 final energy consumption. Differently from the RED I, the RED II has its legal basis in Article 194 TFEU, which, as mentioned, is an important reason why the Directive does not include binding targets at Member State level. However, the only justification for the lack of binding targets explicitly stated in the preamble to the RED II is the need to leave ‘greater flexibility’ for Member States to meet their greenhouse gas emission reduction targets in the most cost-effective manner and in accordance with their specific circumstances, energy mix and capacity to produce renewable energy.

3.2 The governance regulation and national energy and climate plans

The 2030 renewable energy target set under the RED II is closely interrelated with a new policy instrument, the Governance Regulation. Given the important role of this regulation to ensure the achievement of the 2030 renewable energy target, it is useful to briefly point out its general structure, before delving into an analysis of the specific provisions concerning the renewable energy target. The Governance Regulation is a comprehensive strategy to ‘bring greater security, sustainability and competitiveness’ into the EU energy market, with the purpose of ensuring that energy-related actions at European, national and local level contribute to the achievement of the Energy Union’s objectives and targets.

(See Parliament and Council Directive 2003/54/EC, concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; and Parliament and Council Directive 2003/55/EC, concerning common rules for the internal market in gas and repealing Directive 98/30/EC [2003] OJ L176/57, which both had their legal basis in Articles 47(2), 55 and 95 of the Consolidated Version of the Treaty establishing the European Community (2002) OJ C325/33 TEC. (Directive 2001/77/EC [n 8], which had its legal basis in TEC [n 65] art 175(1). (TFEU [n 12] art 194. (In this sense, Volker Roeben, commenting on Article 194 TFEU argues that ‘no energy source that any Member State wishes to use can be prohibited entirely by the European Union, whether it has the resources on its territory or needs to import them. Nor can the European Union prescribe using a certain source of energy or formulate binding national targets for shares of sources in the energy mix’. See Roeben (n 39) 118; similarly, Michèle Knodt and Marc Ringel, in what they call a ‘hands off policy’, refer the lack of binding targets for renewable energy at Member State level to the formulation of Article 194(2). See Knodt and Ringel [n 19] 192; Leigh Hancher and Francesco Maria Salerno have recognized that the imposition of binding renewable energy targets upon Member States in the RED II was only possible in light of the fact that, at the time of the adoption of the Directive, the Treaty of Lisbon was not yet in force and the Directive took as a basis Article 175(1) TEC. See J Hancher and FM Salerno, ‘Energy Policy after Lisbon’ in A Blondi et al (eds), EU Law after Lisbon (Oxford University Press 2012) 367. (Veum and Bauknecht (n 21) 302. (b)Directive of 2001/77/EC (n 8), which had its legal basis in TEC (n 65) art 175(1). (For an overview of the political drivers behind the adoption of the 2030 Climate and Energy Framework, see S Fischer, ‘The EU’s New Energy and Climate Policy Framework for 2030’ (Stiftung Wissenschaft und Politik 2014). See also A Bürin, ‘National Binding Renewable Energy Targets for 2030, but not for 2050 Anymore: Why the European Commission Developed from a Supporter to a Brakeman’ (2014) 22 Journal of European Public Policy 690. For an extensive analysis on the renewable energy policy divergences between Germany and Poland, see A Ancygier and K Szulecki, ‘A Common Renewable Energy Policy in Europe? Explaining the German–Polish Policy Non-convergence’ (Environmental Studies and Policy Research Institute 2014). For further reports on the position of the United Kingdom, see A Neslen, ‘Big EU Guns Fire for “Crucial” 2030 Renewable Targets’ (Euractiv, 7 January 2014). (RED II [n 4] art 3(1). Similarly to the RED I, the general renewable energy target is also broken down in sectoral targets, such as the 14 percent target for renewable energy in transport laid out in Article 25(1). (ibid recital (9). (Governance Regulation (n 5). (ibid art 1. The Regulation is articulated along the five policy areas of the Energy Union: (i) energy security; (ii) market integration; (iii) energy efficiency; (iv) decarbonization; and (v) research, innovation and competitiveness.)
The Governance Regulation introduces a single governance mechanism, which streamlines the previously scattered reporting obligations of EU Member States with regard to climate and energy policies. In particular, the Governance Regulation replaces the National Renewable Energy Action Plans (NREAPs),75 National Energy Efficiency Action Plans (NEEAPs)76 and Greenhouse Gas Monitoring Mechanism,77 all included in the 2020 Package, with a new, single instrument, the National Energy and Climate Plan (NECP), in which Member States set out their main objectives, targets and contributions related to the five dimensions of the Energy Union. The Regulation specifically indicates the expected content of NECPs, which are to be drafted on the basis of a standardized template, included in Annex I. As of March 2020, most Member States have submitted the final version of their NECPs, which follows the Commission’s recommendations in the individual and joint assessment of the draft NECPs, issued in June 2019.78

Following the submission by Member States of their NECPs (and, subsequently, of their periodic reports), the European Commission conducts an aggregate assessment of progress and evaluates possible policy responses, regulated under Chapter 5 (Articles 29–36) of the Governance Regulation. A general ‘inconsistency’ provision is foreseen under Article 30, which enables the Commission to issue targeted recommendations whenever policy developments in a certain Member State are inconsistent with the objectives of the Energy Union. Moreover, Articles 31 and 32, respectively, indicate which response measures are available in case of ‘ambition gaps’ and ‘delivery gaps’. An ‘ambition gap’ occurs when the ‘objectives, targets and contributions of the Member States are insufficient for the collective achievement of the Energy Union objectives’.79 A ‘delivery gap’ occurs, instead, when ‘insufficient progress is made by a Member State towards meeting its objectives, targets and contributions’.80 For both ambition and delivery gaps, recommendations are one of the main instruments at the Commission’s disposal to bring Member States back on track. However, with specific regard to ‘ambition gaps’, Article 31(2) also foresees the possibility for the Commission to ‘propose measures and exercise its powers at Union level’ whenever it concludes that the objectives, targets and contributions of the NECPs are insufficient for the collective achievement of the Energy Union objectives, and, in particular, of the 2030 targets. With regard to ‘delivery gaps’, Article 32 provides an even wider range of instruments, which are specifically tailored to the areas of renewable energy and energy efficiency. Additionally, to such specific measures, Article 32(1) also foresees the possibility for the Commission to issue general recommendations. These can be issued on the basis of the Commission’s assessment of NECPs and biennial progress reports, where the Commission concludes that insufficient progress has been made by a Member State towards meeting its objectives, targets and contributions. Moreover, the Commission also has the power to issue general recommendations to all Member States pursuant to Article 32(2), first subparagraph, where, on the basis of the aggregate assessment of Member States’ progress reports, it concludes that the Union is ‘at risk of not meeting the targets of the 2030 Climate and Energy Framework’.81

3.3 | Enforcement of the 2030 renewable energy targets

The Governance Regulation counterbalances the lack of mandatory renewable energy targets in the RED II, providing a formula for the calculation of an individual renewable energy target for each Member State.82 The formula is based on five specific criteria, listed in points (e), (i)–(v) of the first subparagraph of Article 5(1).83 This allows the calculation of a numerical target for each Member State, which, although not binding, is taken into consideration as a reference value for the assessment of the Member State’s ambition in its NECPs, as foreseen under Article 31(2).84 In June 2019 the Commission used this formula for the first time, providing an assessment of the 28 draft NECPs, which were assessed jointly, as well as individually.85 In the collective assessment, the Commission determined that the majority (16 out of 28 Member States) of the voluntary national targets are not sufficiently ambitious to ensure the achievement of the overall Union target of 32 percent renewable energy consumption by 2030.86 In its individual recommendations, the European Commission urged those 16 Member States to close the ambition gap and upscale their renewable energy target

81ibid art 32(2).
82The formula is provided in ibid Annex II.
83These are the following: (i) equitable distribution of deployment across the Union; (ii) economic conditions and potential, including GDP per capita; (iii) potential for cost-effective renewable energy deployment; (iv) geographical, environmental and natural constraints, including those of non-interconnected areas and regions; (v) the level of power interconnection between Member States.
84For example, Denmark has incorporated a 55 percent renewable energy gross final consumption target by 2030 in the domestic law through the Danish Energy Agreement (Energialtæt, 29 June 2018). Other countries, such as Austria and Spain, have not yet passed legislation in connection to the renewable energy target for 2030. See ‘Mission 2030: Austrian Climate and Energy Strategy’ (September 2018) 45; and ‘Borrador Actualizado del Plan Nacional Integrado de Energía y Clima 2021–2030’ (January 2020), respectively.
86The Member States whose targets have been assessed not sufficiently ambitious by the Commission are Austria, Belgium, Bulgaria, Cyprus, Czechia, Finland, France, Hungary, Ireland, Latvia, Malta, Poland, Romania, Slovakia, Slovenia and the United Kingdom. In eight cases, the Commission recommended a ‘significant’ increase of the target presented in the NECPs.
to match the value resulting from the formula in Annex II. Hence, individual renewable energy targets at Member State level, although ‘hidden’ behind a formula, are still present also in the 2030 Framework.

Ambition gaps, as well as delivery gaps, are both addressed through specific response measures, foreseen under the Governance Regulation. Concerning ambition gaps, Article 31(2) provides that, where the Commission identifies a gap between the overall 2030 renewable energy target and the collective contributions of Member States, it should assess the adequacy of each respective contribution based on the formula in Annex II, also having regard to relevant circumstances affecting renewable energy deployment. Further corrective criteria include, for example, the potential negative impact on the security of supply and grid stability in small or isolated energy systems. Where, based on this analysis, the Commission finds that the objectives, targets and contributions of one or more Member States are insufficient for the collective achievement of the renewable energy target, it shall issue recommendations to those Member States whose contributions it deems insufficient. Such recommendations represent the only remedy at the Commission’s disposal to fill ambition gaps.

A wider range of remedies is instead available for ‘delivery gaps’ related to renewable energy targets. In this regard, a first distinction can be made between (i) the ‘baseline target’, that is, the binding 2020 target for each Member State set under the RED I and crystalized in Annex I to the RED II; (ii) the ‘intermediate target’, that is, the national reference points for the years 2022, 2025 and 2027; and (iii) the ‘final target’, that is, the final contribution of each Member State for the achievement of the overall EU objective of 32 percent renewable energy by 2030.

The ‘baseline target’ represents the minimum threshold that must always be maintained. In the event that a Member State falls below the baseline share over a one-year period, it must undertake additional measures within one year and close the gap within one further year. Such additional measures may include: (i) implementing national measures to increase deployment of renewable energy; (ii) adjusting the share of renewable energy in the heating and cooling sector; (iii) adjusting the share of renewable energy in the transport sector; (iv) making a voluntary financial payment to the Union renewable energy financing mechanism, set out in accordance with Article 33 of the Governance Regulation; and (v) using cooperation mechanisms set out in RED II. Importantly, for a Member State to fulfil its obligation to maintain its baseline share, it is sufficient that it takes the appropriate measures mentioned above, regardless of whether the Member State actually regains its baseline share.

The additional measures listed above are also foreseen in response to Member States’ shortcomings related to the ‘intermediate target’, for instance the targets set forth in the NECPs for the years 2022, 2025 and 2027, pursuant to Article 4(2) of the Governance Regulation. Both as a response to the baseline and the intermediate target, the choice between the various additional measures is at the Member States’ discretion, even though the Commission, in its recommendations, may formulate suggestions as to which measures the Member States should preferably adopt.

Finally, the Commission’s response to delivery gaps related to the 2030 renewable energy target (i.e. the ‘final target’) is regulated under Article 32(2), subparagraph 2. The provision postulates that, in the case of insufficient national measures, the Commission shall, as appropriate, ‘propose measures and exercise its powers at Union level’, in addition to the recommendations illustrated above. This provision, which enables the Commission to intervene with more intensity in the definition of Member States’ energy policies, represents one of the most controversial aspects of the Governance Regulation. First, the fact that it only refers to the ‘final target’ is not directly stated in its formulation, but it can be inferred from the formulation of Article 32(2), subparagraph 2. This provision enables a more direct Commission intervention only in case of insufficiency of the measures taken under Article 32(3), that is, with respect to the ‘intermediate’ targets for the years 2022, 2025 and 2027. Clearly, the Commission will only be able to appreciate the adequacy of such measures once these have been set in place by Member States. Hence, the following requirements need to be fulfilled for the Commission to adopt the further steps referred to in Article 32(2), second subparagraph: (i) an intermediate target has been missed by a Member State; and (ii) the Commission has recommended a Member State to adopt the additional measures foreseen by Article 32(3); and (iii) such additional measures have proven to be ineffective.

In response to delivery gaps related to the ‘final target’, the Commission may ‘propose measures and exercise its powers at Union level’. This formulation is open to interpretation and needs to be read in conjunction with the ‘binding’ character attributed to the 2030 renewable energy target under Article 3 RED II. Although it has been clarified that no specific legal remedies exist for the enforcement of collective targets against the EU as a whole, the ‘binding’ character of the EU target is not devoid of legal implications. In particular, it can serve to justify an EU intervention in the Member States’ sovereign right to determine the composition of the energy mix.

Energy being a shared competence, the sovereignty of Member States is limited by the need to ensure the achievement of the EU’s objectives. When a competence is shared between the EU and its Member States, action at the EU level is not precluded, but subject to the observance of the two fundamental principles of subsidiarity and proportionality. The subsidiarity principle postulates that, in the case of shared competences, legislative action can only be undertaken at EU level when this is necessary for the achievement
of one or more of the Union’s objectives. The proportionality principle, on the other hand, requires that the content and form of the EU’s action shall not exceed what is necessary for the achievement of the objectives of the Treaties. Within these boundaries, the formulation of Article 194 TFEU does not preclude a direct EU intervention in the definition of Member States’ energy policies, should the EU be at risk of not achieving its final, binding renewable energy target.

4 | APPRAISING THE ENFORCEMENT TOOLKIT FOR THE 2030 RENEWABLE ENERGY TARGETS

In the 2030 Framework, the lack of legally binding renewable energy targets is compensated by the presence of more stringent procedural obligations, including, in particular, specific mechanisms for the enforcement of the interim targets, as provided under the Governance Regulation. The practical implications of these newly established procedures can be better appreciated when compared to the enforcement mechanisms previously available under the RES-E Directive.

The 2001 Renewable Energy Directive was the first legal instrument to introduce targets for the promotion of renewable energy, although limited to the market penetration of electricity produced from renewable energy sources. In the negotiation process, the European Parliament supported the adoption of legally binding renewable energy targets. These, however, did not find their way into the final legislative text. In fact, the RES-E Directive only endorsed global indicative renewable energy targets at EU level, namely a 12 percent target in gross energy consumption and a 22.1 percent indicative share of renewable electricity by 2010. Member States, on their part, had an obligation to set national indicative targets, taking into account specific reference values indicated in the Annex to the same Directive. Such targets were (i) of a voluntary nature, for instance Member States could adopt targets diverging from the reference values indicated in the Annex; and (ii) not legally binding, for instance individual Member States had an obligation of conduct (i.e. setting the targets) but not an obligation of result (i.e. reaching the targets). Additionally, Member States had the duty, enshrined in Article 3(3) of the RES-E Directive, to publish a report every two years illustrating their progress towards the achievement of their national indicative targets. Yet, the legal provisions concerning the content of this report were significantly less detailed than those laid out in the Governance Regulation.

Despite the non-binding nature of the targets enshrined in the RES-E Directive, the European Commission initiated several contentious proceedings against Member States for incomplete or delayed implementation of the Directive. In the years 2004–2009, over 61 infringement proceedings were brought against numerous Member States, including Italy, Spain, Austria, the Czech Republic, France, Latvia and Poland. Such proceedings concerned, in particular, the violation of various procedural and substantial provisions of the RES-E Directive, such as the timely transposition of the Directive into national law or the definition of a national renewable energy target. However, none of these infringement procedures went beyond the pre-contentious stage; hence, the arguments raised by the Commission are not public. In particular, the non-binding nature of the targets impeded the pursuit of court action against those Member States that failed to meet their 2010 target, in light of its merely indicative nature.

Indeed, several countries did not achieve their 2010 renewable energy target, although Eurostat data reveal that, in 2010, the EU-27 collectively reached the 12 percent target set in the RES-E Directive. It was in light of these shortcomings that the Commission proposed the implementation of binding targets for 2020, with the purpose of fostering a steady growth of the renewable energy share across all Member States and providing a higher degree of certainty for renewable energy investors.

Against this background, the RED I introduced a binding renewable energy target for 2020, based on the political agreement reached at the 2007 European Council. In particular, the adoption of legally binding renewable energy targets at the Member State level could also rely on the circumstance that the RED I was adopted just a few months prior to the entry into force of the Treaty of Lisbon, so that it found its legal basis in Articles 175(1) and 95 TEC, instead of Article 194 TFEU.


See Section 2.

This was explicitly confirmed by the European Commission in response to a petition raised by an Italian citizen with regard to the incomplete progress of Italy towards its 2010 target. See European Parliament, ‘Petition 1216/2008 by Paolo Brundu (Italian) on the incomplete progress of Italy towards its 2010 target.’ Eurostat, ‘Statistics in Focus 44/2012, Environment and Energy’ (2012) 2: ‘It should be noted that the 2010 targets are indicative. In the light of these findings, the Commission does not consider at this stage that an infringement procedure against Italy can be initiated.’ Eurostat, ‘Statistics in Focus 44/2012, Environment and Energy’ (2012) https://ec.europa.eu/eurostat/documents/3433488/5585312/KS-SF-12-044-EN.PDF/d3d8d6e0-5af8-4510-856b-287a6f015665.


Commission (EU) (n 58).

European Council (n 59) 21.

RED I was adopted on 23 April 2009, whereas the Treaty of Lisbon entered into force on 1 December 2009.
In addition to the adoption of a new and binding target, the RED I also strengthened Member States’ procedural obligations by foreseeing the adoption of NREAPs, in which Member States set out their national targets and the measures to be taken for their achievement. The mandatory requirements for NREAPs under Article 4 RED I are more far-reaching than the generic ‘reports’ foreseen under Article 3 of the RES-E Directive. However, the binding nature of the 2020 targets is weakened by the merely indicative nature of the trajectory towards the final target, one of the ‘missed opportunities’ of the RED I. Indeed, a number of mechanisms had been proposed to help keep Member States on track for the achievement of their 2020 targets. These include the introduction of mandatory interim targets and a corresponding penalty fee of €90 per missed megawatt-hour of renewable energy, as proposed by the European Parliament’s ENVI Committee.

The lack of ‘interim’ obligations suggests that the enforcement of the RED I through infringement procedures would only be possible after the expiration of the final deadline in 2020. This appears as a sub-optimal solution, given that enforcement would only occur once it is too late to reach the target. Nevertheless, the adoption of the RED I was followed by a certain Commission ‘enforcement activism’ regarding procedural obligations. Soon after the adoption of the RED I, the Commission initiated several contentious proceedings against Member States that had failed to (fully) transpose the Directive into their national legislation. Reasoned opinions were sent by the Commission to the governments of Hungary, Luxembourg, Austria, Bulgaria, Finland, Poland, Greece, Cyprus, Ireland, Malta, Slovenia, Belgium and Estonia. In four of these cases, namely...

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TABLE 1 Overview of responses for ambition and delivery gaps concerning renewable energy targets.

<table>
<thead>
<tr>
<th>Article</th>
<th>Issue</th>
<th>Response</th>
<th>Deadline (before/after)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AMBITION GAPS</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30(1) GovR</td>
<td>General inconsistencies between Member State policies and objectives of the Energy Union</td>
<td>Commission shall issue country-specific recommendations</td>
<td>Anytime</td>
</tr>
<tr>
<td>31(2) GovR</td>
<td>Gap between the 2030 renewable energy target and collective Member States’ contributions in NECPs</td>
<td>Commission shall issue country-specific recommendations based on the formula in Annex II</td>
<td>After 31 December 2018</td>
</tr>
<tr>
<td><strong>DELIVERY GAPS</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>32(4) GovR</td>
<td>Member States’ renewable energy share below 2020 baseline</td>
<td>Member States shall adopt renewable energy-specific additional measures, as specified under Article 32(3)</td>
<td>After 1 January 2021</td>
</tr>
<tr>
<td>32(3) GovR</td>
<td>Member States’ renewable energy share below indicative trajectory for 2022, 2025 and 2027</td>
<td>Commission shall issue recommendation pursuant to Article 32(1), Member States shall adopt additional measures as specified under Article 32(3)</td>
<td>After 2022, 2025 and 2027</td>
</tr>
<tr>
<td>32(2) GovR</td>
<td>EU at risk of missing overall 2030 renewable energy target</td>
<td>Commission shall issue recommendation to all Member States and propose measures/exercise powers at Union level in addition to such recommendation</td>
<td>Before 2030</td>
</tr>
</tbody>
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106 RED I (n 9) art 4.
107 The indicative trajectory is foreseen under RED I (n 9) art 3(2), RED I and calculated according to the formula in ibid Annex 1, Part B.

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against Austria, Cyprus, Ireland and Poland, the Commission brought claims before the Court of Justice of the EU, seeking penalty payments from the non-compliant Member States under the general provision of Article 260(3) TFEU.118 These actions seemed to fulfil their objective, since in the aforementioned four cases, Member States spontaneously complied with their obligations after being referred to the Court of Justice, leading the Commission to withdraw its claims.119 Yet, the claims brought under the RED I did not substantially differ from those previously brought under the RES-E Directive, as they did not concern the actual achievement of the target, but the violation of procedural obligations related to the timely and full transposition of the Directive.

Against this background, the 2030 renewable energy targets, despite their non-binding nature, could surprisingly be more effective than their predecessors, thanks to the numerous procedural obligations foreseen under the Governance Regulation (see Table 1). Moreover, the open formulation of Article 32(2) Governance Regulation with regard to the achievement of the ‘final targets’ equips the EU with sufficient flexibility to directly intervene, when necessary, with normative instruments that may directly influence the composition of Member States’ national energy mixes.

5 | CONCLUSION

The adoption of the 2030 Framework has marked the formal shift to non-binding renewable energy targets at the Member State level. This policy change has led to several uncertainties, in light of the positive results achieved with the previous binding targets in the 2020 package. The establishment of a collective obligation through an overall renewable energy target at EU level may seem like a weaker policy choice, compared to the previous individually binding target at Member State level. However, the 2030 target is accompanied by the adoption of a novel instrument, the Governance Regulation, which introduces numerous procedural obligations, as well as a specific formula for the calculation of the optimal renewable energy target for each Member State. Such elements mitigate the non-binding nature of the 2030 renewable energy target at the Member State level.

The interplay between the RED II and the Governance Regulation can serve to address some of the shortcomings related to the non-binding nature of the 2030 renewable energy target. The potential of the new policy architecture to ensure the effectiveness of the renewable energy target also emerges when compared to the previous experiences under the 2001 RES-E Directive and the 2009 RED. In both cases, the actual achievement of the targets has never been enforced through infringement procedures. Instead, these were only used in relation to the violation of procedural obligations.

The Governance Regulation introduces more stringent procedural obligations, but also leaves several open questions. Once all final NECPs have been submitted, it will be necessary to observe which strategy the European Commission will pursue for the enforcement of the baseline targets (i.e. the previous 2020 targets). While these were formally binding under the RED I, the RED II seems to exclude the possibility to activate infringement procedures as long as the procedural obligations foreseen under the Governance Regulation have been met.

Further, the binding nature of the 2030 renewable energy target at the EU level, as well as the broadly formulated possibility for the Commission to ‘propose measures and exercise its powers at Union level’ may well include a direct EU intervention in the definition of Member States’ energy policies, as long as the subsidiarity and proportionality principles are observed. It remains to be seen whether and how the Commission will make use of such powers.

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118 However, weaknesses in the capacity of the Commission for suing for non-compliance have been exposed after judgments have been rendered affecting the enforcement of EU law. See G Falkner, ‘A Causal Loop? The Commission’s New Enforcement Approach in the Context of Non-compliance with EU Law even after CJEU Judgments’ (2018) 40 Journal of European Integration 769.

119 Case C-320/13 European Commission v Republic of Poland, ECLI:EU:C:2015:221; Case C-386/13 European Commission v Republic of Cyprus, ECLI:EU:C:2014:2257; Case C-663/13 European Commission v Republic of Austria, ECLI:EU:C:2015:323; C-236/14 European Commission v Ireland, ECLI:EU:C:2015:41.