

EMBEDDING PRINCIPLES OF GOOD GOVERNANCE INTO THE 2030 CLIMATE & ENERGY FRAMEWORK

GOVERNANCE TO DELIVER A CLEAN & SECURE ENERGY SYSTEM

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Good governance is fundamental to creating an effective Energy Union and for delivering the EU's 2030 climate and energy targets and objectives. Good governance will:

- Create the policy stability necessary to unlock investment.
- Foster the political trust and solidarity between Member States necessary for deeper energy co-operation.
- Reinforce the legitimacy of, and thus public support for, EU led European decarbonisation.
- Help the EU to retain its reputation as a global leader in climate mitigation.

The 2030 framework provides a critical opportunity to strengthen EU climate and energy governance – but we need to get it right.

Governance concerns the allocation of power and responsibility for the delivery of agreed outcomes. In the context of EU climate and energy policy, governance refers to the procedural and institutional arrangements put in place at *EU and national levels* to achieve a resilient Energy Union with an ambitious climate policy. As such, the *quality* of governance is a critical and systemic issue underpinning Europe's capacity to become a sustainable, low-carbon and climate friendly economy.

When the EU launched the 2020 package it provided global leadership in pioneering the governance arrangements necessary for delivering mid-century economic decarbonisation. Together with its experience of implementing the IEM, the lessons of the 2020 package have reinforced the importance of ensuring that EU climate and energy governance conforms with the core principles of 'good' governance; namely:

1. Good EU governance *always* complies with the principles of effectiveness, transparency, accountability, legitimacy and policy coherence.
2. Consistent with the principles of subsidiarity and proportionality governing the sharing of power over energy policy between the EU and Member States, good climate and energy governance should be flexible but not undermine the collective duty to achieve the EU's 2030 and 2050 targets and objectives.

The Status of these Principles

The core principles of good governance have been widely recognised by expert communities and by the European Commission. In 2001, the Commission explicitly identified transparency, accountability, legitimacy, policy coherence and effectiveness as the five fundamental principles of

European governance.¹ In 2015, the Commission's blueprint for effective global climate governance beyond 2020 (The 'Paris Protocol')² brings these together with the principle of (limited) flexibility as being fundamental to a credible regime.

In 2014, ClientEarth published a detailed 'EU Climate & Energy Governance Health Check'³ evaluating the extent to which the existing 2020 framework and emerging 2030 proposals complied with the core principles of good climate and energy governance. The analysis reveals an uneven embedding of good governance principles within the 2020 framework but a marked deterioration in the extent to which they are embedded within the emerging proposals for the 2030 framework.⁴

Depending on the outcome of the 2030 and Energy Union policy processes, the architecture of EU climate and energy governance may change significantly for the post 2020 period. However, whatever its design, to be credible, the post 2020 governance regime must conform to the minimums demanded by the principles of good governance. We will evaluate the quality of this governance regime in terms of how well it embeds these principles. This document explains what they demand of the 2030 framework and makes practical recommendations for how it can be designed to ensure minimum conformity with those standards.

What do these principles demand of the 2030 Framework?

1. Effectiveness

Good climate and energy governance means putting in place arrangements that will be effective in ensuring the achievement of agreed outcomes. To be effective the governance regime must:

- (a) Be rooted in the rule of law – whether as a new governance instrument or by means of obligations embedded across the EU climate and energy *acquis*.
- (b) Embed arrangements to ensure economic actors have sufficient clarity and confidence in the policy objective to invest in the low carbon transition.
- (c) Facilitate a sufficiently long-term and dynamic forward planning process.

Although governance regimes can successfully combine binding and non-binding elements, there is widespread recognition that law plays a vital role in ensuring governance is effective. Translating fundamental objectives into legal form has powerful symbolic and real effects both of which are explicitly recognised by the EU's blueprint for a Paris Protocol. Binding governance provides the strongest expression of political will to achieve stated commitments thereby sending the clearest possible signal to investors that EU climate and energy policy commitments are stable. It also incentivises national compliance and deters 'free-riders', thus fostering the trust and solidarity necessary for an Energy Union. However, to be effective, EU climate and energy governance also requires a planning and reporting process designed to facilitate a sufficiently long-term and dynamic approach at national and EU levels. The combined effect of

¹ European Governance – A White Paper COM(2001) 428 final, available at:

http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10109_en.htm. It should be noted the White Paper emphasised the participative dimension of the legitimacy principle; however, the second dimension to legitimacy relating to the role of independent expert advice in climate governance was emphasised by the Commission in the 2015 Paris Protocol.

² COM(2015) 81 final, available at: http://ec.europa.eu/priorities/energy-union/docs/paris_en.pdf.

³ <http://www.clientearth.org/reports/141127-eu-climate-and-energy-governance-health-check.pdf>.

⁴ Summarised at p.7.

binding governance and a durable planning and reporting process promotes policy and regulatory stability, reduces transaction costs and strengthens investor confidence.

Ways of embedding EFFECTIVENESS into the 2030 climate & energy framework

The minimum building blocks for an effective 2030 framework include:

- Targets enshrined in legislation
- Legal obligations requiring the removal of financial/ regulatory barriers to achieving those targets.
- A binding process of climate and energy planning and reporting requiring both Member States and the EU institutions to adopt a sufficiently long-term approach to facilitate delivery of the 2030 and 2050 targets and objectives.
- A legal duty requiring the Commission to bring forward course correction proposals where data emerging from the use of EU indicators suggests the EU is not on course to meet its 2030 or 2050 targets.
- A credible commitment by Member States not to backslide or damage the legitimate expectations of investors.

2. Transparency

Open decision making is a universal hallmark of good governance in any context. The seismic economic and social changes required to achieve the low carbon transition combined with the scale of public and private investment needed to deliver this outcome, make transparency a fundamental pre-requisite of good climate and energy governance.

Ways of embedding TRANSPARENCY into the 2030 climate & energy framework:

We welcome the Commission's emphasis on ensuring greater Member State transparency concerning the energy market and in the negotiation of intergovernmental energy agreements. However, there is also a need for more transparent governance by the EU itself. As a minimum the 2030 framework should:

- Guarantee public access to the technical and expert evidence used to inform EU climate and energy policy making, including more transparent modelling.
- Ensure the dissemination of information gathered by the Commission concerning national and EU progress (or lack thereof) towards delivering agreed outcomes.
- Commit to bringing the obligations imposed on the EU institutions to disclose environmental information into line with those imposed on Member States under the Aarhus Convention.

3. Accountability

Good governance depends fundamentally on the existence of credible mechanisms for holding key actors (primarily the Commission and Member States but also the European Council and EU and national energy regulators) to account for their actions or inaction. Most fundamentally,

good governance requires reliable mechanisms for holding the EU to account for meeting its 2030 targets and objectives, and Member States for delivering timely and complete discharge of their obligations to ensure IEM completion and compliance with existing and future binding measures (in secondary legislation) on energy efficiency and renewable energy (including planning and reporting) and climate protection.

Ways of embedding ACCOUNTABILITY into the 2030 climate & energy framework:

In principle, the EU Treaties and existing EU climate and energy law impose a powerful accountability framework for Member States; however, in practice the functioning of these mechanisms has been significantly weakened by a range of factors. We welcome the European Council's emphasis on 'rigorous enforcement' of EU law – not just within the IEM but across the entire climate and energy *acquis*. However, creating sufficient policy stability necessary for investment in the energy transition needs the 2030 framework to additionally support accountability by:

- Immediate and vigorous use by the Commission of soft regulatory tools such as naming and shaming of non-compliant Member States to mobilise peer pressure and unlock NGO capacity to support EU level oversight by taking separate/parallel legal action to enforce EU law before national courts.
- Enshrining the Commission's political commitment to report annually to the European Parliament and Council on the state of the Union's progress towards Energy Union in law to ensure that it functions as a robust process of accountability. This EU level reporting duty should also include a requirement that the Commission would explain what action would be taken to address under-performance by individual Member States and propose appropriate policy correction measures where EU progress towards the 2030 and 2050 targets and objectives is unsatisfactory.
- Conferring new rights on the public to interrogate the Commission's annual report and to obtain answers to questions posed.
- Ensuring that Member States can be held to account for delivering their share of the 2030 and 2050 decarbonisation EU targets and sanctioned for failure.

4. Legitimacy

Embedding the principle of legitimacy into a governance regime requires arrangements that ensure the meaningful participation by those affected by decision making and arrangements to ensure decisions are based on independent expert advice. Both processes are universally viewed as leading to better quality and more credible decision making and ultimately as underpinning public support for decision making.

Ways of embedding LEGITIMACY into the 2030 climate & energy framework

We welcome the Commission's vision of an Energy Union with citizens at its core, where citizens take ownership of the energy transition, participate actively in the market and where vulnerable consumers are protected. However, strengthening the legitimacy of EU led climate and energy policy requires the 2030 framework to:

- Empower citizens, communities, cities, regions and local government to participate in the energy transition as they will be responsible for a large part of its delivery through ownership and management of energy production and infrastructure.

- Create rights for effective civil society participation within the:
 - (a) Proposed Infrastructure Forum
 - (b) Proposed dialogue with energy stakeholders
 - (c) Proposed arrangements to strengthen ACER's ability to function as an EU regulator
 - (d) EU Network Codes adoption procedure

- Create a new independent EU-level expert advisory body tasked to advise:
 - (a) The Commission on the development and delivery of EU climate and energy policy
 - (b) Member States on the development of national energy and climate plans and
 - (c) The Commission on national implementation of those plans.

The Commission and Member States should be required to take account of this publicly disseminated expert advice and where decision making deviates from that advice, both should be required to provide a public statement of the reasons for doing so.

5. Policy Coherence

Making the low carbon transition depends inherently on appropriate policy interventions across numerous sectors (as a minimum spanning energy, competition, finance, agriculture and transport) to effectively embed a coherent focus on climate impacts. Policy coherence (or consistency) is therefore a fundamental principle of good climate governance. The importance of coherence and particularly in the environmental sphere is explicitly recognised by the EU Treaties. Article 11 TFEU requires environmental protection requirements to be integrated into the definition and implementation of Union 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 also recognised by Article 7 TFEU which requires the EU to ensure consistency between its policies and activities. Despite the clear constitutional instruction to ensure coherence, weak policy coherence is one of the hallmarks of the EU's existing climate and energy governance architecture.

Ways of embedding POLICY COHERENCE into the 2030 climate & energy framework

We welcome the Commission's proposals to introduce substantial measures to improve policy coherence within the IEM (e.g., overhauling state interventions in the market and measures to redesign the electricity market, empower consumer participation, fundamentally rethinking energy efficiency and increasing energy efficiency in the transport sector). However, embedding policy coherence into the 2030 framework requires this approach to be extended beyond the energy sector and into the economy as a whole. Most fundamentally:

- The imbalance between relatively intensive EU regulation to achieve energy decarbonisation and very light touch EU regulation of the emission abatement potential inherent in other key economic sectors must be addressed by intensifying (in particular) regulation of waste and agricultural emissions.
- Embedding LULUCF into the 2030 framework must not function as a loophole that weakens the EU's at least 40% GHG target.
- The achievement of the EU's 2050 GHG objective should be clearly embedded as one of the central organising objectives of the new integrated climate and energy planning and reporting regime. In addition, the governance architecture should keep open the possibility

of 95% domestic emission cuts by ensuring that choices are not made that rule out delivering on the higher end of the 80-95% EU target for 2050.

6. Flexibility

The fundamental importance of flexibility to EU governance is clearly reflected in the principles of subsidiarity and proportionality, which provide the constitutional parameters through which Member States and the EU institutions negotiate the most appropriate balance to be struck between EU led harmonisation and the scope for national flexibility where competence is shared. However, in the particular context of EU climate and energy governance, the boundaries of national flexibility have been more specifically delineated by Article 194 TFEU, introduced by the Lisbon Treaty in the wake of the 2020 package. In essence, the combined operation of European Court case law governing the Treaty basis for new EU measures and Article 194 strongly indicate that national flexibility over the energy mix must now be considered as a core principle of EU climate and energy governance at least in so far as new legislative measures governing energy are concerned.

Though flexibility will be a strong organising principle for EU climate and energy governance post 2020, it is not an absolute criterion. While Member States may assert flexibility over the national energy mix, this does not extend to flexibility to ignore their obligation to meet the EU's climate targets and objectives or to use that flexibility to compromise the EU's carbon budget.

Ways of embedding FLEXIBILITY into the 2030 climate & energy framework

Making clear the limits to the principle of national flexibility poses a critical design challenge for the 2030 governance regime. It is essential that it includes measures ensuring that Member States have no residual flexibility to ignore or deviate from delivering the EU's climate and energy targets and objectives. If Member States resist nationally binding economy wide RES and/or energy efficiency targets, the question arises, what alternative governance strategies can be used to make clear the limits to the principle of flexibility? Possible strategies include the following:

- Mandatory minimum requirements, such as the continuation of energy end use savings obligations.
- A requirement that Member States' national energy and climate plans explicitly set out how their proposed action will contribute towards delivering EU targets.
- Publication by the Commission of the anticipated sharing of responsibility between Member States for meeting EU 2030 targets.
- The Commission's annual report to the Parliament and Council concerning progress towards the Energy Union and delivery of the EU low carbon transition should set out whether each Member State is in fact delivering its anticipated contribution to EU targets, and what action will be taken by the EU to address under-performance.
- Member States who wish to implement ambitious climate objectives or who wish to take early action towards compliance with EU rules should be incentivised and rewarded.
- The IEM and State aid must be better aligned with the decarbonisation objective to ensure that Member States who wish to use maximum energy efficiency and renewable are facilitated.