



## **The European Green Deal: In Need of Harder Soft Governance to Reach the New European 55% Climate Target**

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January 2021

The Jean Monnet Network on EU-Canada Relations: *The EU and Canada in Dialogue* is housed at Carleton University in Ottawa, Canada, <https://carleton.ca/caneunet>. The project supports a network involving Carleton University and four European partner universities: University of Antwerp, Technical University Darmstadt, Technical University Munich and University of Latvia.



With the support of the  
Erasmus+ Programme  
of the European Union

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## The European Green Deal: In Need of Harder Soft Governance to Reach the New European 55% Climate Target

In the early-morning hours of 11 December 2020, after long negotiations, heads of government agreed on new EU-wide climate protection targets: Instead of 40% greenhouse gas reduction in 2030 compared to 1990, the new agreement sets a reduction of at least 55% as the new goal for 2030. Net zero emissions are to be achieved in 2050.

In an impact assessment, the European Commission presented several policy scenarios, three of which could achieve the 55% target and pave the way for the EU's ambitious net zero emissions target in 2050 (European Commission 2020; Knodt et al. 2020a).

The first option, the regulatory-based scenario (REG), further develops existing regulatory measures as the leading instrument and concentrates on renewable energies and improved energy efficiency. This scenario does not envision substantial reforms to the European Trading System (EU ETS) but its extension to intra-EU shipping. In contrast, the second option, the carbon pricing-based scenario (CPRICE), envisions extending the EU ETS to the shipping, transport and building sectors and to smaller industrial plants as the key instrument. In turn, these areas would be removed from the Effort Sharing Regulation (ESR, Regulation (EU) 2018/842). It is the third option, however, that the Commission seems to prefer as representing “the best of both worlds” (Knodt et al. 2020a). This option, called the MIX scenario, combines the ambition of regulatory measures in the area of renewable energy and energy efficiency with an extended EU ETS. In this scenario, the scope of the ESR remains the same (European Commission 2020; Knodt et al. 2020a).

For both the REG and MIX scenarios, the latest regulation in the area of renewable energy and energy efficiency plays a crucial role. In 2016, the European Commission developed an ambitious governance strategy to successfully achieve its former 2030 targets (Schlacke & Knodt 2019; Knodt 2019; Schlacke & Lammers 2018; Knodt & Ringel 2018). These targets already constituted ambitious transformation goals (Ringel & Knodt 2018), as the EU was to achieve a reduction of greenhouse gas emissions by 40%, renewable energy covering a minimum share of 32% of final energy consumption, and an increase of energy efficiency by a minimum of 32.5% (Council of the European Union 2018). However, the achievement of these targets was obstructed by limited competences at the European level.

Specifically, Article 194 (1) of the Treaty on the Functioning of the European Union (TFEU) defines the common objectives of European energy policy as the functioning of the energy market, security of energy supply, promotion of energy efficiency and the development of renewable energies as well as the promotion of interconnected energy networks. According to Article 194 (2) TFEU, the EU is competent to act in order to achieve those objectives. But such measures may not affect the Member States' right to determine their own national energy mix and the general structure of the Member States' energy supply. Thus, the Lisbon Treaty introduces safeguards to limit the EU's competence for measures affecting the Member States' energy mix and energy supply (Schlacke & Knodt 2019). Article 194 (2) [2] TFEU is a safeguard for Member States' sovereignty in this respect (Knodt et al. 2020a; Schlacke et al. forthcoming). If Article 192 TFEU is considered to provide the legal basis for defining the EU's environmental competence and environmental legislation in regard to energy measures, the treaty would require unanimity in the Council for “measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply” in accordance

with Article 192 (2) lit. c) TFEU (Schlacke & Knodt 2019). At the same time, energy policy is characterised by a high degree of politicisation. The most important cleavage is between, on the one hand, the Visegrád group along with Romania and Bulgaria, which are striving for security of energy supply as the main goal, and a group of Northern/Western Member States, on the other hand, which are striving for sustainability as the priority. (Knodt et al. 2020). Under these circumstances, unanimous voting appears rather unlikely.

To successfully achieve the former European targets, despite the lack of competences and issues of national commitment, the European Commission developed an ambitious governance strategy in 2016. At its core is the Regulation on the Governance of the Energy Union (Governance Regulation, Regulation (EU) 2018/1999), which entered into force on 24 December 2018. The Governance Regulation is a key element of the legislative package presented under the title of “Clean Energy for All Europeans” in November 2016 (Knodt & Ringel 2018; Schlacke & Knodt 2019; Knodt et al. 2020). This regulation introduced a strategy to gain leverage over Member States’ energy policy without distributing more competences towards the European level and without the need for unanimous decisions.

In general, the terms hard and soft governance are used to characterize different types of governance. Hard governance is characterized by legally binding decisions and enforcement. Within the European Union, the main instrument of hard governance is legislation. Non-compliance can be sanctioned and is used in areas where the EU exerts exclusive or shared competences, as in environmental policy. Soft governance, on the other hand, is voluntary by nature and instruments commonly used are recommendations, guidelines, target setting and diffusion of information. Non-compliance is not sanctioned. The EU uses this mode of governance in areas where competences remain mainly at the national level. Thus, implementation of soft governance, to a high degree, depends on the engagement and will of the member states (Knodt et al. 2020).

The Governance Regulation provides soft governance of energy policy, as it rests on a system of coordination through central goal setting and decentralised implementation responsibilities. Nevertheless, it contains “harder” elements of soft governance (Knodt et al. 2020), summarized in Table 1:

- To detect “harder elements” of soft governance, the nature and degree of obligations, which depend on the precise legal terminology, have to be examined. The Governance Regulation allows for an evaluation of the National Energy and Climate Plans of the Member States (NECPs) to assess whether the objectives, strategies and measures are ambitious enough to fully achieve the European 2030 framework targets via the following procedures: (1) an annual State of the Energy Union report by the Commission delivered to the European Parliament and Council; (2) an aggregate assessment of Member States’ biennial progress reports; and (3) individual feedback to individual Member States on the implementation of sectoral directives and the energy and climate issues of the regulation. Member States must respond to these recommendations by filling ambition or delivery gaps within one year (Schlacke & Lammers 2018). Regarding the draft NECPs, the regulation states that “each Member State shall take due account of any recommendations from the Commission in its integrated national energy and climate plan” (Regulation (EU) 2018/1999, Art. 9 [3]). In general, Article 34 (2) lit. a of the Governance Regulation provides that “the Member States concerned shall take due account” of the Commission’s recommendations whenever reference is made to Article 34 within the Governance Regulation. This formulation should be seen as a kind of

“harder” element of soft governance, as it stresses the obligation to regard the recommendations as necessary changes to the NECPs. Nevertheless, it gives considerable leeway to the Member States, as they only have to take “due account” of recommendations (Schlacke & Knodt 2019; Schlacke & Lammers 2018).

- Closely linked to the degree of obligation is whether a justification for non-compliance is required. A formal requirement for the Member States to justify their reaction/non-reaction to the policy recommendation of the Commission would qualify as “harder” soft governance. The Governance Regulation also contains an obligation for Member States to justify their action and/or non-action. If a Member State does not address the recommendations of the Commission concerning the draft NECPs, it “shall provide and make public its reasons” (Regulation (EU) 2018/1999, Art. 9). Article 34 (2) lit. b additionally provides: “[T]he Member State shall set out, [...], how it has taken due account of the recommendation.” According to this provision, in case a Member State decides not to comply with a recommendation, reasoning shall be provided. Thus, the Member States have to justify any non-compliance vis-à-vis the Commission while the Commission is not obliged to prove non-compliance of Member States, which can be seen as a “harder” element of soft governance.
- The precision of the legal text is an additional criterion. A target could, for example, be described precisely with a number (e.g., X% of something) or imprecisely as “a contribution” to something. A more precise formulation would harden soft governance. The targets of the Governance Regulation with respect to renewable energies and energy efficiency are defined precisely. While, nonetheless, binding national targets for renewable energies to achieve the overarching European targets are not determined, the Governance Regulation contains a so-called gap-filling mechanism (Schlacke & Lammers 2018; Schlacke & Knodt 2019). In the case of ambition gaps with respect to renewable energy sources, Annex II of the Governance Regulation provides an algorithm that defines the allocation of the missing percentage points to the Member States. This formula addresses the lack of binding national targets and is used by the Commission to address ambition gaps. However, the algorithm does not apply to energy efficiency objectives (Regulation (EU) 2018/1999; Schlacke & Knodt 2019; Schlacke & Lammers 2018). In addition, the Commission has to evaluate the implementation of measurements and tracks Member States’ efforts to increase the share of renewable energy. The national contributions must be complemented by an indicative trajectory regarding the increase of renewable energy. The trajectory starts at the level of either the binding national 2020 renewable energy target or the real value of renewable energy shares in gross final consumption in the event that the real value surpasses the 2020 target. The regulation foresees achieving three reference points: 18% of the national contribution being met by 2022, 43% by 2025, and 65% by 2027. Member States falling below their national reference points will have to cover the gap by implementing additional measures within one year. Energy efficiency shares the same reference dates without a fixed percentage (Regulation (EU) 2018/1999). Thus, the imprecise targets, due to the absence of binding national targets, have been specified by the formula in Annex II and by the indicative reference points and values (at least in the case of renewable energies). This adds a harder element to the soft governance for renewable energies but fails to do so in the case of energy efficiency. In particular, the de facto determination of national targets resulting from the formula adds hardness.
- The process of soft governance strongly relies on the public debate over Member States’ efforts to reach commonly agreed targets and objectives. Thus, “blaming and shaming”

is one of the core elements of soft governance. The degree of opportunities to do so depends on the possibility of debating national strategies, Commission rankings, or recommendations in public. “Harder” soft governance would explicitly insert platforms or arenas for “blaming and shaming” to a degree that exceeds the usual reporting by Member States and the Commission. The Governance Regulation has increased opportunities for “blaming and shaming” compared to the monitoring system for the 2020 targets, as the State of the Energy Union report must be submitted to the Parliament and the Council (Regulation (EU) 2018/1999, Art. 35). The EU exerts public pressure through these discourses, combined with the duty to publish all NECPs, reports and recommendations. This newly established area for public discourse can be considered an increase in the hardness of soft governance.

- As soft governance arrangements are highly dependent on the ambition of individual Member States, a strong role of a third-party actor at a higher level is crucial. Such a strong third-party actor, e.g., the European Commission in the case of the EU, can attempt to push Member States not willing to support the European goals and targets through ambitious surveillance and the use of all available instruments. “Harder” soft governance would imply the possibility of exerting such a role for a community actor. For “harder” soft governance, third parties could be equipped with enforcement instruments. Within the Governance Regulation, the European Commission is installed as a strong third-party actor and not only a facilitator. This role is visible in the empowerment of the Commission by the regulation to adopt “delegated acts” subject to the European climate and energy policy (Regulation (EU) 2018/1999, Art. 43). Through this mechanism, the Commission can adopt further legislative acts to force Member States to work towards the European goals. It is a harder element of soft governance intended to strengthen the role of the Commission in the governance of the energy transformation (Knodt & Ringel 2018).
- As soft governance is not binding by nature, the possibility of introducing direct sanctions is limited. Nevertheless, if agreed upon by the Member States, direct sanctions such as financial penalties can be introduced to “harden” soft governance arrangements. In addition to direct sanctions, enforcement could be introduced into soft government arrangements by linking them with policy fields that have sanction potential through financially relevant instruments (Schlacke & Knodt 2019; Acatech et al. 2018). Non-compliance with procedural requirements such as reporting and planning obligations of the Member States can currently be sanctioned through the regular infringement proceedings (Art. 258 TFEU) and it is debated whether infringement procedures might be applicable. However, when a Member State makes no attempt to address its failure to achieve the reference points for renewables (Schlacke & Lammers 2018), the Governance Regulation does not provide for direct or indirect sanctions in case of Member States’ lack of ambition towards the substantial goals for 2030 (Schlacke & Knodt 2019; Acatech et al. 2018; Schlacke & Lammers 2018).

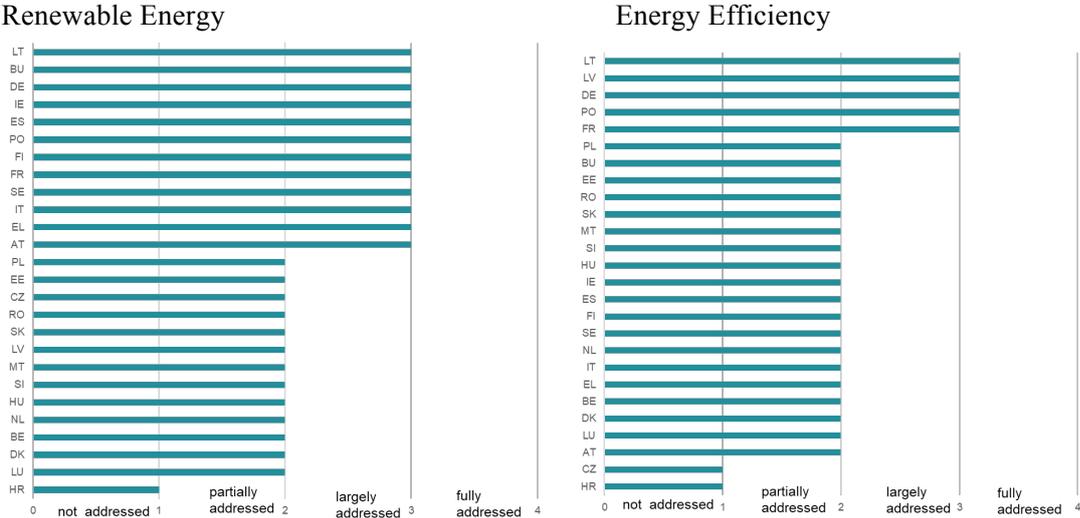
**Table 1: “Harder” Soft Governance within the Governance Regulation 2018**

	<b>Governance Regulation 2018</b>
Obligation	Member States (MS) shall take due account of (non-binding) recommendations
Justification	MS “shall provide its reasoning”/ “shall provide and make public its reasons” where it deviates from recommendations
Precision	In case of renewables COM assesses individual ambition by a formula in the Annex II, based on objective criteria; this does not apply in case of energy efficiency
Degree of “blaming and shaming”	The public is given early and effective opportunities to participate in, and to be consulted on, the preparation of NECPs; Annual public debate required on the progress achieved by the Energy Union by European Parliament and the Council
Role of 3rd party actor at EU level	COM is empowered to adopt delegated acts in defined areas
Sanctions	Voluntary financial contributions can be made by MS to an EU renewable energy financing mechanism There are no sanctions for non-compliance

Source: Knodt et al. 2020

Ultimately, the Governance Regulation has mildly hardened soft governance mechanisms, especially in the field of renewable energy and to a lesser extent, in the field of energy efficiency. In 2019, Member States delivered the first draft of their NECPs, which were evaluated by the Commission, and recommendations were given accordingly. The final NECPs were assessed by the Commission in October 2020. The assessment clearly shows that Member States addressed the recommendations of the Commission in the field of renewable energy, where soft governance was hardened to a greater extent than in the field of energy efficiency.

**Figure 1: Assessment of the first NECPs**



Source: Data taken from European Commission 2020a

The graphs (Figure 1) show the aggregated results for renewables and energy efficiency in the final NECPs. In both cases, no Member State has fully addressed the recommendations of the Commission. In the case of renewables, some Member States largely addressed them; in the case of energy efficiency, only some, mostly recommendations, were partly addressed, which is nearly the worst case. Only Croatia and the Czech Republic did not address the recommendations at all. In sum, in the case of renewables, where at least slightly harder governance mechanisms are in place compared to energy efficiency, this approach is working. However,

there also is less compliance in the case of energy efficiency, where the Regulation provides for a ‘less hard’ soft governance.

Both the REG and MIX scenarios rely on the Governance Regulation in its current form (Schlacke et al. forthcoming). If the REG scenario is to be realised, the Commission will have to raise the targets for renewable energies and energy efficiency. Member States will only attempt to reach those targets if the Commission further hardens the soft governance of the Governance Regulation or if they agree on national binding targets, as was the case for the 2020 targets. Both decisions would reduce the energy sovereignty of Member States to a degree that touches on the reservation safeguarding national sovereignty regarding the Member States’ energy mix and general structure of energy supply (Art. 194 (2) [2] TFEU). Raising EU-wide targets for renewables and energy efficiency without imposing sanctions for non-compliance might not trigger Art. 194 (2) [2] TFEU; without further reforms to the Governance Regulations, the current absence of binding national targets restricts the ability of the Commission to hold Member States accountable, as discussed above (cf. Knodt et al. 2020a; Schlacke et al. forthcoming). On the other hand, a shift back to binding national targets could trigger Art. 194 (2) [2] TFEU. The same holds true in a MIX scenario, which includes substantial parts of the REG scenario. In both scenarios, it is not clear if the Commission is suggesting an expansion and hardening of the Governance Regulation.

The lesson learned from the first round of NECP recommendations and the Member States’ compliance with those recommendations is that both scenarios will not achieve the new 55% target if the Governance Regulation is not reformed towards harder soft governance. This applies not only in the field of renewable energies but also, and especially, in the field of energy efficiency.

The political compromise among the Member States on the 55% target at the December 2020 summit may hamper the hardening of the Governance Regulation because it includes a concession towards Poland and Hungary that the right of the Member States to decide on their national energy mix will be respected. The outcome of implementing either the REG or MIX scenario, and thus the achievement of the new climate targets, relies significantly on the efficacy of the future harder soft governance. This should be urgently addressed in the EU Commission’s proposals for a reform of the regulatory framework that is expected next year.

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