

Dilemmas of a New Renewable Energy Directive

Dilemmas on the Way to a New Renewable Energy Directive

Theodoros Iliopoulos*

Abstract

In 2016 the Commission put forward a Proposal for a revised Renewable Energy Directive for the period 2020 to 2030. This article focuses on the dilemmas on the way to this new Renewable Energy Directive, as reflected by the Commission's Proposal, but also by the European Parliament's amendments that followed in January 2018. Within this context, the Renewable Energy Directive currently in force is analyzed with the help of recent case law, and two core dilemmas are identified, to wit 1) whether the new RE target should be merely determined at the EU level or it should also be translated into national binding targets and 2) whether RE support schemes should be harmonised and open to other Member States.

I. Introduction

Energy concerns at the European Union (hereinafter "EU") level have been present already from the founding Treaties. In 1951, the Treaty establishing the European Coal and Steel Community (known as "ECSC") set a common coal and steel market, while six years later the Treaty establishing the European Atomic Energy Community (known as "EURATOM") aimed to create common ground for the development of nuclear energy, which, at the time, was being considered a promising, unlimited and low-cost energy source.¹

Yet, it took a lot of years for the EU to take far-reaching action in the field of energy, which also denotes a relative reluctance from the Member States to be deprived of significant energy competences. Nevertheless, in more recent decades a plethora of energy-related legal acts, soft law instruments and policy documents have given shape to EU energy policy.² Issues of security of energy supply, but also concerns about the environmental protection and sustainable development brought renewable energy (hereinafter "RE") to the fore. From late 1980s, but mostly during the 1990s, EU energy policy turned to the deployment of RE sources³ and the term "renewable energy policy" appeared as a special section of the broader category of energy policy.⁴

This article focuses on RE policy. The emphasis is placed on the Commission's Proposal for a revised Renewable Energy Directive for the period 2020 to

2030⁵ and on the amendments made by the European Parliament within the context of the ongoing legislative procedure.⁶ The aim of the article is to examine the submissions put forward, which will probably lead to the enactment of a new RE legal framework. Accordingly, two core dilemmas are identified, to wit 1) whether the new RE target should be merely determined at the EU level or it should also be translated into national binding targets and 2) whether RE support schemes should be harmonised and open to other Member States.

In terms of the article's structure, Part I contained the Introduction. Part II provides a short overview of the EU RE legislation. Part III examines the first dilemma, which refers to the RE target for the period 2020–2030 and Part IV involves the support schemes-related quandary. Lastly, Part V contains the article's conclusions.

II. The Renewable Energy Legislation Currently in Force

EU RE policy has been put into effect by the provisions of secondary EU law, and more specifically

* Theodoros Iliopoulos is doctoral researcher in Energy and Environmental Law at Hasselt University. Communication: theodoros.ilopoulos@uhasselt.be

¹ Kim Talus, *EU Energy Law and Policy* (Oxford University Press 2013), 16–22. See also M. Kanellakis, G. Martinopoulos and T. Zachariadis, "European Energy Policy – A Review" 2013 (62) *Energy Policy* 1020, 1020.

² Marie Vandendriessche, Angel Saz-Carranza and Jean-Michel Glachant, "The Governance of the EU's Energy Union: Bridging the Gap?" 2017 *EUI Working Paper RSCAS 2017/51* 2. See also Dieter Helm, "The European Framework for Energy and Climate Policies" 2014 (64) *Energy Policy* 29.

³ See for example Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States (OJ 1986 C241, p. 1); Council Decision 93/500/EEC of 13 September 1993 concerning the promotion of renewable energy sources in the Community (Altener programme) (OJ 1993, L235, p. 41); Commission, "An Energy Policy for the European Union" COM(95) 682 final (13 December 1995) 9, 14, 31–32. See also Kim Talus, *EU Energy Law and Policy* (Oxford University Press 2013), 190–192.

⁴ See for example Commission, "Energy for the Future: Renewable Sources of Energy – Green Paper for a Community Strategy" COM(96) 576 final (20 November 1996).

⁵ Commission, "Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast)" COM(2016) 767 final/2 (23 February 2017).

⁶ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018).

Dilemmas of a New Renewable Energy Directive

the Directive 2001/77/EEC⁷,⁸ and the Directive 2009/28/EC,⁹ which is still in force. Assimilating past and currently in force RE legislation is necessary in order to grasp the debate regarding future legislative and policy developments. Besides, future developments will be shaped on the basis of the successes and failures of already applied provisions. Part II of this article focuses attention on the abovementioned Directives.

2.1. A Short Historical Overview of the Two RE Directives

The first RE Directive, adopted in 2001,¹⁰ was “one of the first milestones in the promotion of renewable energies in the EU”.¹¹ Article 3 in conjunction with the Annex of this Directive required the Member States to encourage the consumption of electricity generated from RE sources and to set national targets for future renewable electricity consumption to be met by 2010.

However, these targets were merely indicative. While the European Parliament was arguing in favour of binding targets, the Commission and the Council pleaded for the opposite path. Finally, the Directive established a system of indicative targets, which simply emphasized the importance of RE sources’ development and provided “guidance for increased efforts at [EU] level as well as in Member States”.¹² Within this context, the EU had a limited role in ensuring the actual fulfilment of these targets.

At the same time, recital 12 of the Directive 2001/77/EC recognized “the need for public support in favour of renewable energy sources”. Indeed, it is widely accepted that in the absence of such support, RE sources could not compete conventional energy sources and RE could not be promoted. This is because RE technologies are costly comparing to conventional energy sources. Furthermore, RE sources are intermittent; they do not have a constant flow, which causes uncertainty over generation and increases investors’ risk.¹³ In spite of the Commission’s insistence on a harmonized support system that would guarantee the proper functioning of the internal energy market, the Directive allowed Member States to establish their own, national support schemes.¹⁴ Accordingly, Article 4 of the Directive 2001/77/EC only gave the Commission the power to evaluate the support schemes enacted by the Member States. Moreover, recital 14 highlighted that “Member States operate different mechanisms of support” and recital 15 noted that “[i]t is too early to decide on a [EU]-wide framework regarding support schemes, in view of the limited experience with national schemes”, which, of course, left room for harmonization in the future.

As momentous as the Directive 2001/77/EC was, it could not boost the deployment of RE sources, at least not to the desirable extent.¹⁵ In point of fact, in 2007, a progress report showed that only few Member States were satisfactorily heading towards meeting their 2010 targets.¹⁶ The effectiveness of the chosen indicative

targets’ system was in doubt. The Commission reconsidered its stance and stated that “the attainment of policy goals requires mandatory targets”.¹⁷ Thus, in

⁷ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L283, p.33).

⁸ In 2003, the first biofuels Directive was enacted. See Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport. It is out of the scope of this article to delve specifically into biofuels legislation.

⁹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L140, p. 16).

¹⁰ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L283, p. 33).

¹¹ Gonzalo Sáenz de Miera and Miguel Ángel Muñoz Rodríguez, “EU Policies and Regulation on CO₂, Renewables and Energy Efficiency: A Critical Assessment of Recent Experiences” in Alberto Ansueagi, Juan Delgado and Ibon Galarraga (eds.) *Green Energy and Efficiency* (Springer 2015), 32.

¹² Council Resolution of 8 June 1998 on renewable sources of energy (OJ 1998 C198, p. 1)

¹³ Ignacio Mauleón, “The Cost of Renewable Power: A Survey of Recent Estimates” in Alberto Ansueagi, Juan Delgado and Ibon Galarraga (eds.), *Green Energy and Efficiency* (Springer 2015), 237–239; Temitope Tunbi Onifade, “Global Clues for Choosing Suitable Support Systems for Renewable Energy in the Power Sector” 2015 (1) *Renewable Energy Law and Policy* 25, 26–28; Nil Atmaca and Ilaria Lojodice, “The Impact of Support Schemes on RES Installations and Retail Electricity Prices” 2014 (1) *Renewable Energy Law and Policy* 67, 67–68; Craig A. Hart and Dominic Marcellino, “Subsidies or Free Markets to Promote Renewables?” 2012 (3) *Renewable Energy Law and Policy* 196, 196–198. See also Commission, “Guidelines on State aid for environmental protection and energy 2014–2020” OJ C200/1, 13–14; Commission, “European Commission guidance for the design of renewables support schemes” COM(2013) 439 final (5 November 2013).

¹⁴ David Jacobs, “Designing Financing Mechanisms for Electricity from Renewable Energy Sources: The Role of the European Commission as an Agenda Shaper” in Jale Tosun, Sophie Biesenbender and Kai Schulze (eds.), *Energy Policy Making in the EU* (Springer 2015), 116–118.

¹⁵ See Philip Lowe, “Regulating Renewable Energy in the European Union” 2010 (1) *Renewable Energy Law and Policy Review* 17, 17.

¹⁶ Commission, “Green Paper follow-up action – Report on progress in renewable electricity” COM(2006) 849 final (10 January 2007).

¹⁷ Commission, “Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future” SEC(2006) 1719 final (10 January 2007).

Dilemmas of a New Renewable Energy Directive

2009, a new RE Directive¹⁸ marked a paradigm shift and inaugurated “the second generation”¹⁹ of Union RE legislation.²⁰

Article 3 of the Directive 2009/28/EC set a mandatory Union target of “at least a 20% share of energy from renewable sources in the [EU]’s gross final consumption of energy in 2020”.²¹ This target was then translated into national mandatory targets, also determined at the EU level. Thus, each Member State is required to reach a specific share of RE in its energy consumption by 2020. Furthermore, Article 4(1) required the Member States to adopt and notify to the Commission national renewable energy action plans (hereinafter “NREAP”) that set out the measures that would be taken for attaining this target.²²

Furthermore, according to Article 3(2) of the same Directive, on the way to 2020 “Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I”. In other words, next to the then novel mandatory national targets, the Directive 2009/28/EC put in place a system of indicative interim targets, which are detailed in the Directive’s Annex I. According to Article 4(4) and (5) of the Directive 2009/28/EC, in case a Member State does not meet these interim targets, its NREAP shall be amended and submitted again to the Commission. The Commission, in response, may issue a recommendation, which, however is not binding for the Member States.

2.2 The Renewable Energy Use Obligations and Recent Case Law

The co-existence of indicative and binding targets creates certain confusion over the nature of the Member States’ obligations. Of course, the Directive 2009/28/EC seems enforceable only after 2020, in the sense that only then will the Member States’ compliance be assessed. The question is what is the nature of the obligations imposed by the indicative trajectory targets and the NREAPs? And what is the intervening power of the Commission during the pre-2020 period?

Recent case law from the Court of Justice of the European Union (hereinafter “CJEU”) provides valuable guidance in answering the foregoing questions.

In the *Elecdey Carcelen* case,²³ certain wind turbines operators in Castilla-La Mancha²⁴ turned against a regional levy, specifically imposed on wind energy, with the argument that such a tax militates against the objectives of the Directive 2009/28/EC. The applicants claimed that the levy at issue was making the generation and use of RE less attractive, thus, undermining the attainment of the national target. In paragraph 39 of its judgement, the CJEU affirmed that levies on wind energy probably lead to a deceleration in RE deployment. Nevertheless, the CJEU stated in paragraph 40 that even if such a levy

is found to cause the non-fulfilment of the mandatory national target, it will not be held in itself incompatible with the Directive 2009/28/EC, but the result will be “at most, an infringement [of the Member States’] obligations under that directive”.

Reading between the lines of that dictum, one could conclude the following: firstly, the CJEU did not clarify the nature of and the difference between the obligations imposed by the mandatory and by the indicative targets set by the Directive 2009/28/EC. Of course, in paragraph 40 of its ruling, the CJEU only referred to “the mandatory national overall target set out in part A of Annex I to Directive 2009/28”. This could imply it is only the mandatory targets that impose an obligation to Member States. If this is correct, then the indicative trajectory cannot be used, but only as a guidance tool for Member States to keep track of their progress in RE use. Nevertheless, Article 3(2) of the Directive 2009/28/EC does not merely advise the Member States, but it uses a language conjuring up an obligation. Besides, as already mentioned, Article 4(4) and (5) of that Directive clarifies the consequences of underperforming the indicative trajectory.

Given the above, it is recommended that a literal interpretation is employed to place the emphasis on the wording of paragraph 40 of the *Elecdey Carcelen* judgement. The CJEU used a conditional clause to introduce an *argumentum a maiore ad minus*: since a certain tax measure preventing a Member State from meeting the mandatory national target, which is the

¹⁸ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L140, p. 16).

¹⁹ Angus Johnston and Eva Van Der Marel, “How Binding Are the EU’s ‘Binding’ Renewables Targets?” 2016 (18) *Cambridge Yearbook of European Legal Studies*, 176, 178.

²⁰ It should be also noted that, contrarily to its predecessor, the Directive 2009/28/EC does not only relate to electricity from renewable sources, but to RE in general.

²¹ See also Commission, “Energy 2020 A strategy for competitive, sustainable and secure energy” COM(2010) 639 final (10 November 2010).

²² Hungary was the last Member State that submitted its NREAP in January 2011. See L.W.M. Beurskens and M. Hekkenberg, “Renewable Energy Projections as Published in the National Renewable Energy Action Plans of the European Member States” Energy Research Centre of the Netherlands (ECN) and European Environment Agency (EEA) (1 February 2011), 28.

²³ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases.

²⁴ Where “Don Quixote has already fought windmills”, as Advocate General Juliane Kokott brightly observed in the first sentence of her Opinion in the case.

Dilemmas of a New Renewable Energy Directive

central obligation,²⁵ would not be in itself incompatible with EU law, a certain measure impeding the attainment of a subordinate obligation, like the fulfilment of the indicative trajectory targets, cannot be incompatible with EU law either.

Secondly, the aforementioned reluctance of the CJEU to declare incompatibility of the levy at issue proves that Member States enjoy wide discretion when selecting and designing the measures to promote RE. The EU only has very limited power to intervene to the choice of the national – and regional – support schemes. Having always Article 3(2) and Article 4(4) and (5) of the Directive 2009/28/EC in mind, it is argued that the EU's intervening powers expand in case the national indicative targets are not met. In this case, the Member States are required to review their NREAPs and the Commission has the power to issue a recommendation. Still, the recommendation is not binding and, hence, the Member States' discretion is not diminished.

At this point, it is interesting to turn to the Opinion of Advocate General (hereinafter "AG") Juliane Kokott, who seems to be in *dissensus* with the CJEU. Contrarily to the CJEU, the AG did not only focus on Article 3(1), but also on Article 3(2) of the Directive 2009/28/EC. In paragraphs 29 and 30 of her Opinion, the AG emphasized that the Directive 2009/28/EC "defines the shares of renewable energy which Member States are required to achieve both in 2020 and during the transitional period up to then" and that "[c]ompliance with Article 3(2) [...] ensures that, in the transitional period up to [2020], Member States already take the necessary measures to achieve that target". Most importantly, while the CJEU held that a levy cannot be considered in itself contrary to the Directive 2009/28/EC, the AG had opted to call attention to the potential outcome of a certain measure and supported that a levy does infringe Article 3(1) and (2) of Directive 2009/28 if it entails that the Member State at issue will "fail to achieve the shares of renewable energy stipulated under those provisions".²⁶ ²⁷ Accordingly, while the CJEU ruled that the Directive 2009/28/EC requirements do not preclude a levy on wind turbines designed to produce electricity, AG Kokott had proposed the inclusion of an extra condition: a levy on wind power plants is not precluded by the Directive 2009/28/EC, "if it does not prevent the Member State concerned from achieving the minimum shares of renewable energy provided for in the directive".²⁸

Nonetheless, AG Kokott did not find an infringement of the Directive 2009/28/EC, because "Spain consistently used [...] a higher share of renewable energy than is required by the directive" and there was no convincing evidence that this trend will not continue.²⁹

In conclusion, the *Elecdey Carcelen* judgement opened a significant interpretative path, but it did not clarify the nature of the indicative trajectory

obligations. It remains unknown what the CJEU ruling would be if Spain did not meet the indicative national targets. Given that the case involved a preliminary question submitted by a Spanish court and not an infringement procedure, the CJEU would probably reach the same ruling, also emphasizing the risk of infringing EU law if the levy at hand stays. Still, this is a speculation and it is uncertain that there will ever be a definitive judicial answer to the question what happens if a Member State does not reach the national indicative RE targets and still adopts measures impeding RE development. Besides, to date only three Member States have failed to meet certain years' indicative targets – and by only a slight shortfall.³⁰ This evidence also suggests the success of the paradigm employed for the development of RE sources, which combines long-term mandatory national targets and periodical indicative national targets. The use of RE sources in the EU energy mix has increased and it seems that the EU will reach the target of 20% use of RE by 2020.³¹

It is also interesting to note that the use of indicative targets is a distinct feature of EU RE policy; indeed, similar indicative targets have only marginally been used in EU (soft) law and only in few other fields. Accordingly, one could mention the digitization of cultural material and the anticipated contribution of

²⁵ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases, Opinion of AG Juliane Kokott, para. 27.

²⁶ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases, Opinion of AG Juliane Kokott, para. 31.

²⁷ It is also important to note that in para. 32 of her Opinion, AG Kokott underlined in a seemingly *obiter dictum* the difficulty in establishing causation between a regional levy, like the one at issue in this case, and the failure of a Member State to meet its targets.

²⁸ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases, Opinion of AG Juliane Kokott, para. 74.

²⁹ Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases, Opinion of AG Juliane Kokott, paras 33, 34.

³⁰ European Environment Agency, "Progress of renewable energy sources" 19 December 2017 <https://www.eea.europa.eu/data-and-maps/daviz/actual-res-progress-indicative-trajectory-6#tab-chart_2_filters=%7B%22rowFilters%22%3A%7B%7D%3B%22columnFilters%22%3A%7B%22pre_config_country%22%3A%5B%22EU-28%22%5D%7D%7D%7D> retrieved 10 April 2018.

³¹ Commission, "Third Report on the State of the Energy Union" COM(2017) 688 final (23 November 2017).

Dilemmas of a New Renewable Energy Directive

each Member State to a European digital library,³² or the EU indicative trajectory for achieving the emissions reduction in accordance with the World Health Organization's guideline values.³³

2.3 Support Schemes

In terms of support schemes, Article 3(3) of the Directive 2009/28/EC explicitly recognizes them as a legitimate means of promoting RE sources: "Member States may, *inter alia*, apply the following measures: (a) support schemes". This formulation shows that the Member States have the possibility to use support schemes, but they are not obliged to do so. *A fortiori*, if they do decide to adopt one or more support schemes, they enjoy wide discretion regarding the form and design.³⁴

Therefore, RE support policies are not harmonized. The Directive 2009/28/EC rather affirmed the already adopted stance and granted a significant degree of flexibility to the Member States. Thus, the support schemes' definition in Article 2(k) of the Directive is quite broad, including "any instrument, scheme or mechanism [...] that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased".

As might be expected, the Directive 2009/28/EC aims to stimulate convergence of national support schemes. In this regard, the use of cooperative schemes is encouraged, but not prescribed. Indeed, Articles 6 of the Directive 2009/28/EC refers to the possibility of statistical transfers between Member States and Articles 7 to 10 provide for Member States' cooperation on joint RE projects. Most importantly, and most relevantly to the present analysis, Article 11 states that "two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes". Support schemes' coordination can lead to important efficiency gains, to better localization of RE projects and to a better RE integration into the market.³⁵ Besides, the coordination of national support schemes will result in a certain convergence, which, in its turn, can create fertile ground for harmonization.³⁶ Of course, similarly to the foregoing analysis, the adoption of joint or coordinated support schemes is not an obligation, but a possibility, and the truth is that Member States have proved unwilling to put this possibility into service.³⁷ On the contrary, Member States have preferred to legislate national-wide support schemes that are limited to domestic production of energy.

This line of action can discourage energy imports and restrict free energy trade, which is not in conformity with the internal market rules. The problem is demonstrated by a series of legal disputes and controversial CJEU judgements³⁸ that culminated in 2014, with the *Ålands Vindkraft* case.³⁹ It is out of the scope of this article to thoroughly examine this

case law; suffice it to say that the aforementioned legal disputes have shown the need for adopting support schemes that do not distort the internal market.

2.4 Interim Conclusion

The shift from indicative to mandatory national targets is the main novelty brought by the Directive

³² See Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (OJ 2011 L283, p. 39).

³³ Commission, "Staff Working Document Accompanying the documents Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions a Clean Air Programme for Europe Proposal for a Directive of the European Parliament and of the Council on the limitation of emissions of certain pollutants into the air from medium combustion plants Proposal for a Directive of the European Parliament and of the Council on the reduction of national emissions of certain atmospheric pollutants and amending Directive 2003/35/EC Proposal for a Council Decision on the acceptance of the Amendment to the 1999 Protocol to the 1979 Convention on Long-Range Trans-boundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone" SWD(2013) 532 final (18 December 2013).

³⁴ See Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 *Elecdey Carcelen SA and Others v Comunidad Autónoma de Castilla-La Mancha* [2017] published in the electronic Reports of Cases, paras 31, 32.

³⁵ Henrik Klinge Jacobsen *et al.*, "Cooperation mechanisms to achieve EU renewable targets" (2014) 63 *Renewable Energy*, 345, 345–347.

³⁶ Theodoros Iliopoulos, "Renewable Energy Regulation: Feed-in Tariff Schemes under Recession Conditions?" (2016) 2 *European Networks Law and Regulation*, 110, 116–117.

³⁷ The cooperation between Sweden and Norway has been the only cooperation mechanism until 2015. More recently, more schemes have started to emerge, like the Baltic Energy Market Interconnection Plan (BEMIP), the energy cooperation between the North Sea Countries and the joint pilot tender between Denmark and Germany. See Commission, "Annex 2 to the Third Report on the State of the Energy Union" COM(2017) 688 final (23 November 2017), 5; Commission, "Second Report on the State of the Energy Union" COM(2017) 53 final (1 February 2017), 9; Commission, "State of the Energy Union 2015" COM(2015) 572 final (18 November 2015), 4.

³⁸ See for example Case C-379/98 *PreussenElektra AG v Schleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [2001] ECR I-2099 and Case C-206/06 *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV* [2008] ECR I-5497.

³⁹ Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] published in the electronic Reports of Cases.

Dilemmas of a New Renewable Energy Directive

2009/28/EC. This element introduced the second generation of EU RE legislation, which has irrefutably proved successful in boosting deployment of RE sources. The share of RE in the EU increased by approximately 50% in less than a decade, from 11.1% in 2008 to 17% in 2016.⁴⁰ Furthermore, the Directive 2009/28/EC decisively contributed *inter alia* to the attainment of the EU climate policy goals and to the creation of a flourishing and innovative European RE industry.⁴¹ Still, there is much more needed to be done. Although the EU is on track to meet its 2020 target, a deceleration in RE development pace can be observed. In this respect, from 2014 to 2016 the increase in use of RE sources was just below 0.80%: from 16.13% to 16.91%.⁴² Furthermore, as 2020 is approaching, the discussion for a new Directive laying down rules for RE promotion for the next decade is becoming more timely. Next Parts discuss the suggested proposals for a new legislative framework. It is found that the major dilemmas still remain the same: the RE target and the degree of coordination of the support schemes.

III. Towards a New Renewable Energy Target

The need for reaching a greater share of RE for the years after 2020 had already been recognized shortly after the enactment of the Directive 2009/28/EC.⁴³ Accordingly, the Commission inaugurated this debate in 2014, when a Communication asked for “a greater share of renewable energy in the EU of at least 27%”.⁴⁴ Part III examines the Commission’s legislative proposal for a new RE target and the response given by the European Parliament.

3.1 The Commission’s Proposal

The aforementioned Communication did not only put forward a proposal for a 27% (or more) share of RE by 2030, but also a proposal for a paradigm change with the RE target being binding for the EU as a whole and not individually for each Member State. The Commission did not state reasons for such a fundamental change in the legislation rationale, but only supported that flexibility for Member States to set national objectives will allow them to make cost-effective decisions on the basis of “their specific circumstances, energy mixes and capacities to produce renewable energy”.⁴⁵ It was also added that this flexibility should be combined with a strong energy governance framework that will ensure the attainment of the energy targets and the completion of the internal energy market.⁴⁶ Thus, the Commission proclaimed its willingness to enact not only a new RE Directive, but also a brand new energy governance legal act. As beneficial as both national flexibility and a strong governance framework can prove, it is not clear why they cannot be characteristics of a system of

national mandatory targets and why the EU RE policy should diverge from it.

In late 2016 the Proposal for a recast of the RE Directive was published.⁴⁷ A few weeks earlier, a momentous international law development had taken place, i.e. the entry into force of the Paris Agreement of 2015.⁴⁸ The Paris Agreement set a collective global goal of limiting the planet’s warming to well below 2°C and of rapidly achieving emissions reduction. This objective is not translated into individual binding targets, such as emission reduction targets. Contrarily, it is for the Parties to decide through national plans ‘how and how much’ they will contribute to the collective target.⁴⁹

The Commission seems to follow a comparable path. In this respect, Article 3 of the proposal for a new RE Directive has the title “Union binding overall target for 2030” and Article 3(1) states that “Member

⁴⁰ Eurostat, “Table – Share of renewable energy in gross final energy consumption” January 2018 <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nrg_ind_335a&lang=en> retrieved 10 April 2018.

⁴¹ Commission, Report, Renewable Energy Progress Report, COM(2017) 57 final (1 February 2017), pp. 2–3; Commission, “REFIT Evaluation of the Directive 2009/28/EC of the European Parliament and of the Council” SWD(2016) 416 final (30 November 2016), 1, 21, 56.

⁴² 2016 data are preliminary estimations. See European Environment Agency, “Progress of renewable energy sources” 19 December 2017 <https://www.eea.europa.eu/data-and-maps/daviz/actual-res-progress-indicative-trajectory-6#tab-chart_2_filters=%7B%22rowFilters%22%3A%7B%7D%3B%22columnFilters%22%3A%7B%22pre_config_country%22%3A%5B%22EU-28%22%5D%7D%7D> retrieved 10 April 2018

⁴³ See Commission, “Green Paper – A 2030 Framework for Climate and Energy Policies” COM(2013) 169 final (27 March 2013), 8; Commission, “Renewable Energy: a Major Player in the European Energy Market” COM(2012) 271 final (6 June 2012), 12, 13.

⁴⁴ Commission, “A Policy Framework for Climate and Energy in the Period from 2020 to 2030” COM(2014) 15 final (22 November 2014), 6.

⁴⁵ Commission, “A Policy Framework for Climate and Energy in the Period from 2020 to 2030” COM(2014) 15 final (22 November 2014), 6.

⁴⁶ Commission, “A Policy Framework for Climate and Energy in the Period from 2020 to 2030” COM(2014) 15 final (22 November 2014), 5, 7.

⁴⁷ Commission, “Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources” COM(2016) 767 final (30 November 2016).

⁴⁸ The Paris Agreement entered into force on 4 November 2016. See UNFCCC, “Paris Agreement – Status of Ratification” February 2018 <http://unfccc.int/paris_agreement/items/9444.php> retrieved 5 April 2018.

⁴⁹ Charlotte Streck, Paul Keenlyside and Moritz von Unger, “The Paris Agreement: A New Beginning” 2016 (13) *Journal for European Environmental & Planning Law* 3.

Dilemmas of a New Renewable Energy Directive

States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 27%". Member States shall contribute to this overall target, but their contributions will be determined on the basis of national decisions.⁵⁰ Such a model grants Member States a wide, but not boundless discretion. First, according to Article 3(3) of the legislative proposal, the share of RE in each Member State's gross final consumption of energy shall not be lower than its 2020 target share. Thus, the 2020 national mandatory targets remain valid and they are rendered the minimum national contributions required. Second, Article 3(2) and (5) introduce certain important limitations: Member States shall notify their contributions, along with other information, to the Commission, in accordance with the envisaged energy governance legislation. Accordingly, the Commission has submitted a Proposal for a Regulation on the Governance of the Energy Union.⁵¹ In short, this Proposal aspires to establish a comprehensive framework of planning and reporting requirements. Member States will develop Integrated National Energy and Climate Plans and the Commission will have the power to assess the progress made. As far as it specifically concerns the attainment of the RE targets, if a Member State underperforms, the Commission shall issue a recommendation, which shall be taken into the utmost consideration by the addressee. If the progress assessment reveals that underperformance does not only relate to a Member State, but is the general situation, the Commission shall take measures at the EU level.⁵²

Still, in spite of the foregoing checks, the contributions are not equivalent to mandatory national targets and the question remains the same: why change a successful model? As already mentioned, the proposers have not given a clear answer, but they rather state generalities, such as the need for enhanced Member States' flexibility. Nevertheless, since the proposed system gives much attention to the trajectory for the attainment of the RE target, Member States only gain flexibility within a framework of a stronger EU governance and of a more stringent intervention and monitoring by the Commission. Establishing such a governance system might be the real stake for the Commission.⁵³ In this sense, it might also be worth experimenting with a new RE target paradigm, especially if the Member States were not disposed to accept national mandatory targets determined by EU law plus a strong governance framework. Besides, enacting a Union RE target to be collectively reached and a thorough Energy Governance Regulation opens a path to Europeanization.

Yet, it is normal that a new paradigm bears effectiveness risks. In this regard, having a collective target might spur on certain Member States to free-ride and to undertake to meet low targets in the hope that the others will be inclined to take on higher

responsibilities. In this way, certain Member States will make few or no efforts and they will still act in conformity with the new RE Directive. An expected counterargument to this point is that Member States will show high ambition and that, in any case, the new governance system equips the Commission with disciplining powers that will avoid such abuses.

3.2. The European Parliament's Amendments

In January 2018 the European Parliament adopted its position on the Commission's Proposal and materially amended it,⁵⁴ thus revealing a huge gap between its stance and the Commission's line, especially as far as it concerns the target for RE share.

The European Parliament regards the new RE Directive as a step towards the aim to "reach net-zero emission domestically by 2050 at the latest".⁵⁵ In this respect, the need for the EU to move forward with "much deeper and faster cuts in emissions than previously foreseen" is highlighted.⁵⁶ This proclaimed high level of ambition is in conformity with the Paris Agreement, but it also stems from technological developments and economic analysis: RE technologies have entered a phase of maturity that brings reductions

⁵⁰ Commission, "Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources" COM(2016) 767 final (30 November 2016), Article 3(2).

⁵¹ Commission, "Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013" COM(2016) 759 final (30 November 2016),

⁵² Commission, "Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013" COM(2016) 759 final (30 November 2016), Articles 25, 27, 28.

⁵³ See also Susana Galera Rodrigo, "Changing the Energy Model: Step Back on the Europe 2050 Strategy?" 2016 (2) *European Energy and Environmental Law Review* 65, 69.

⁵⁴ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018).

⁵⁵ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendment 2.

⁵⁶ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendment 3.

Dilemmas of a New Renewable Energy Directive

in investment costs, which creates fertile ground for a more zealous deployment of RE sources.⁵⁷ It is estimated that if no new RE policies are put in place the share of RE will still increase and will reach 24.3% in 2030.⁵⁸

Given the above, the Commission's target of 27% is considered "disappointingly unambitious".⁵⁹ In response, the amendments call for a Union binding target of at least 35% share of RE in 2030,⁶⁰ which raises the bar even higher comparing to what was previously put forward by the European Parliament.⁶¹

Quantifying the ambition is not the only point of disharmony between the two institutions. In point of fact, the European Parliament did not accept the abandonment of national targets, but opted for a hybrid paradigm: the aforementioned Union target will be accompanied by national targets, determined, in principle, by the Member States themselves. Nevertheless, in case these national targets are found to lead to a shortfall in achieving the collective target, there shall be adjustments on the basis of Annex Ia of the new RE Directive.

The European Parliament designed two phases of target-setting. In the first phase, the Member States are required to set national targets that will cumulatively lead to the attainment of the collective target. According to the amendment of Article 3(2), which also refers to the anticipated Energy Governance Regulation, by 1 January 2019, these national targets shall be notified to the Commission. Next, the second phase starts: the Commission examines whether the national targets, taken as a whole, are adequate for collectively achieving the overall 2030 RE target. If the answer is positive, the submitted national targets are rendered binding, in the sense that no downwards divergence is allowed, but only in exceptional circumstances and under strict conditions. In case of negative answer, Annex Ia, which lays down a formula for determining the Member States' targets for 2030, shall come into play. Then, the formula shall be applied and the targets derived from it are compared to the national targets actually notified. The Member States whose set target is lower than what Annex Ia sets down, shall increase it accordingly.

Furthermore, the European Parliament introduced a very specific binding national target relating to transport. Its amendments added Article 3(1a) that dictates "[e]ach Member State shall ensure that the share of energy from renewable sources in all forms of transport in 2030 is at least 12% of the final consumption of energy in transport in that Member State".

The foregoing amendments show the European Parliament aspires to combine the Commission's proposal for enhanced national discretion with the established pattern of binding national target. Admittedly, there is certain merit in such a model. Member States can determine their own level of ambition without endangering the overall EU RE policy, since

Annex Ia functions as a security layer. Yet, certain doubts remain. Just like the Commission's Proposal, the European Parliament's amendments create fertile ground for free-riding. Theoretically, during the first target-setting phase, each Member State can attempt to secure the lowest possible RE commitments. Of course, in practice, Member States may prove such fears wrong. Besides, it cannot be excluded that Member States will select to apply the Annex Ia formula on their own, already from the first target-setting phase. This option also has the benefit of certainty, in the sense that in no case can the Commission demand an increase in a target derived from the Annex Ia prescription. Thus, a Member State turning to Annex Ia can be sure that its national RE target and strategy will not be in need of a supranational adaptation. Interestingly, if Annex Ia happens to play such a role, it will much resemble soft law, in the sense that it will decisively affect the Member States' actions already from the first target-setting phase, during which it is not activated and it is not binding.

Moreover, it should be noted the European Parliament's system relies on a Union governance system that is even stronger than what the Commission had suggested. In short, the European Parliament has also amended the Commission's Proposal for an Energy Governance Regulation, which is directly linked with the new RE Directive, and has reinforced reporting and monitoring mechanisms.⁶²

⁵⁷ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendments 3, 4, 7, 10 and 324.

⁵⁸ Commission, "Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources" COM(2016) 767 final (30 November 2016), Explanatory Memorandum, 2.

⁵⁹ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Explanatory Statement.

⁶⁰ European Parliament, "Promotion of the use of energy from renewable sources***" P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendments 11, 109 and 324.

⁶¹ In 2016, the European Parliament had asked for at least 30% share of RE by 2030. See European Parliament, "Resolution of 23 June 2016 on the renewable energy progress report" 2016/2041(INI) (23 June 2016), para. 22.

⁶² See European Parliament, "Governance of the Energy Union***" P8_TA-PROV(2018)0011 A8-0402/2017 (17 January 2018); Commission, "Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013" COM(2016) 759 final (30 November 2016).

Dilemmas of a New Renewable Energy Directive

3.3. Interim Conclusion

The Commission's proposal shows a disposition to inaugurate the next stage of RE legislation. Indeed, it departs from the logic of mandatory national targets determined by secondary EU law and propounds a rather modest collective target. At the same time, a stronger governance model has been put forward, which provides the Commission with more power to intervene in the national sphere, with the aim to ensure the attainment of the Union target. While the Commission has rather not thoroughly explained why the RE policy needs such radical changes, the foregoing enhanced ability of intervention is probably a key reason. Indeed, a collective Union-wide target seems to better justify EU action throughout the whole period of validity of the RE Directive.

The European Parliament's recent amendments have demonstrated much more ambition. The newly suggested target is considerably higher than the one submitted in 2016 by the Commission. Similarly, the amendments further reinforce the anticipated energy governance model. Furthermore, the amendments approximated the legislative proposal with the current paradigm. Member States will still have mandatory targets, but, in principle, they will be free to determine them on their own. Union prescription will only happen in case the collective target is at risk. Such a system might prove effective, but there is always a chance the Member States attempt to free-ride. Of course, the anticipation of an effective and stable development of RE rather does offset such a potential disadvantage.

IV. Towards Cross-Border Support Schemes

The debate for the new RE legislative framework could not but also launch the debate on the opening of national support schemes. Under legislation currently in force, Member States are not required to apply cross-border support schemes. Of course, soft law has aspired to stimulate cross-border cooperation and coordination with the argument that a convergence of national support schemes will lead to a cost-effective and stable growth in renewables.⁶³ Yet, to date little progress can be observed. The new RE Directive could spark a wave of cooperation mechanisms. Part IV of this article presents the Commission's proposal for the opening of support schemes and the European Parliament's stance.

4.1. The Commission's Proposal

The Commission's Proposal introduces three new Articles concerning issues of support schemes' design and cross-border character, i.e. Articles 4, 5 and 6.⁶⁴

Starting with Article 4, with the title "Financial support for electricity from renewable sources", it can be regarded as expanding Article 3(3)(a) of the

Directive 2009/28/EC. Not only does it affirm the possibility of the Member States to apply support schemes, but it also lays down general principles for the design of the support schemes for RE sources for electricity.

Accordingly, such support schemes shall be designed so as to avoid unnecessary market distortions, to not ignore the law of supply and demand, to account for possible grid constraints, to ensure market integration of electricity from RE sources and to ensure RE generators will respond to market price signals".⁶⁵ Furthermore, the grant of support shall be "open, transparent, competitive, non-discriminatory and cost-effective".⁶⁶ Last, Article 4(4) of the Proposal introduces a monitoring obligation: the Member States shall assess the effectiveness and decide on the continuance of the support schemes put into action at least once every four years.

As important as Article 4 might prove, it does not bring about unprecedented changes, but, in essence, it transposes certain well known principles from soft law to a binding legal act. Indeed, the principles of Article 4 of the Proposal can also be found in a relevant Communication from the Commission, namely the "Guidance for the design of renewables support schemes", dating from 2013.⁶⁷ This soft law instrument has aspired to set forth best practices in designing effective RE support schemes. Within this context, the Commission's guidance has emphasized the need to avoid market distortions and has devoted Chapter 3 to calling for support schemes that facilitate the market integration of renewables through, *inter alia*, exposing RE producers to market price signals and taking grid constraints into account.⁶⁸ The Guidance advances specific, market-oriented support schemes, i.e. premium tariffs and auctions. Premium

⁶³ Commission, "European Commission guidance for the design of renewables support schemes" COM(2013) 439 final (5 November 2013), 22.

⁶⁴ There is also Article 2(i), which contains the definition of the concept of support scheme, and Article 13, which has to do with the voluntary decision of two or more Member States to coordinate their support schemes. These Articles are also present in the Directive 2009/28/EC, which is the reason why no further analysis follows.

⁶⁵ Commission, "Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources" COM(2016) 767 final (30 November 2016), Article 4(1), (2).

⁶⁶ Commission, "Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources" COM(2016) 767 final (30 November 2016), Article 4(3).

⁶⁷ Commission, "European Commission guidance for the design of renewables support schemes" COM(2013) 439 final (5 November 2013).

⁶⁸ Commission, "European Commission guidance for the design of renewables support schemes" COM(2013) 439 final (5 November 2013), 5, 13.

Dilemmas of a New Renewable Energy Directive

tariffs are contracts that offer RE generators the market price plus an add-on to it. Furthermore, they often do not contain a purchase guarantee, which means that RE generators are not relieved from the burden to find a buyer for the energy they produce, but they have to act like market actors.⁶⁹ In terms of auctions or tendering or bidding, they have the virtue of making potential RE investors compete for a contract with the authority. If transparent, competitive and open, an auction is expected to lead to cost-effective bids, thus lowering the level of support required.⁷⁰

Similar has been the stance of another important soft law instrument, namely the “Guidelines on State aid for environmental protection and energy 2014-2020”,⁷¹ elucidating the criteria on the basis of which the Commission assesses the compatibility of national environment- or energy-related state aid measures with the internal market. The Guidelines do affirm the Union’s faith in competitive markets, but they also acknowledge the need to correct market failures through mild state intervention or, if necessary, state aid. The proper functioning of a competitive market is the underlying principle of the whole text. In this respect, it is emphatically stated that state aid to renewables should be granted as a premium and in a competitive, transparent and non-discriminatory bidding process.⁷² The aim is to expose beneficiaries to market conditions, which will accelerate the market integration of RE sources. Of course, the existence of soft law and the up to now voluntary adoption of market-oriented support schemes does not diminish the significance of hard law provisions laying down certain design principles.

Still, and with no intention to underestimate other provisions of the Proposal, Article 5 can be distinguished as the one having the potential to create a new landscape in RE policy and in RE support schemes. Article 5(1) explicitly requires Member States to “open support for electricity generated from renewable sources to generators located in other Member States”. This is the general obligation introduced by Article 5. And this is a novel obligation. Of course, the Commission’s wishes for cross-border support schemes date back to the early 2000s. The above-mentioned Guidance endorses convergence of national support schemes and the establishment of cooperation mechanisms. Article 11 of the currently in force Directive provides that “two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes”. Yet, it is the first time an explicit requirement that support schemes shall be open is introduced. Thus, Article 5 expands on past desires and past directions and introduces a groundbreaking obligation.

Furthermore, this obligation is not broadly or generally formulated, but it is very specific, in the sense that it has a clear-cut content with precise percentages and timescales. In this regard, according

to Article 5(2), “Member States shall ensure that support for at least 10% of the newly-supported capacity in each year between 2021 and 2025 and at least 15% of the newly-supported capacity in each year between 2026 and 2030 is open to installations located in other Member States”. The aforementioned percentages can be increased in accordance with Article 5(4).

Another interesting aspect of the Proposal is that it does not express a leaning towards a certain form of support. Contrarily to soft law, Article 5 does not distinguish a specific instrument or a specific combination of instruments. Indeed, Article 5(3) of the Proposal states that “[s]upport schemes may be opened to cross-border participation through, inter alia, opened tenders, joint tenders, opened certificate schemes or joint support schemes”. Apparently, this is a very broad formulation that does not prescribe a certain line of action.

However, the formulation of Article 5 can also create certain confusion. More specifically, should an open national support scheme address to every Member State or it could be limited to some of them, on the basis, for instance, of technical criteria, like the existence of interconnectors, or even other criteria?

4.2. The European Parliament’s Amendments

The European Parliament’s amendments as far as it concerns support schemes were not only substantial but also considerably extensive. Starting with Article 4, the European Parliament made 12 amendments including a change in the title, which after the amendments refers to “support for energy from renewable sources” instead of “financial support for electricity from renewable sources”.

First of all, the European Parliament clarified that Member States may apply support schemes not only in order to reach, but also in order to exceed the Union and national targets.⁷³ This might go without saying, but an explicit pronouncement shows a high level of ambition.

In addition, the amendments set stricter requirements regarding the design of support schemes. Accordingly, European Parliament’s Article 4(1) states

⁶⁹ Toby Couture and Yves Gagnon, “An Analysis of Feed-In Tariff Remuneration Models: Implications for Renewable Energy Investment” 2010 (38) *Energy Policy* 955.

⁷⁰ Pablo del Rio *et al.*, “Overview of Design Elements for RES-E Auction” Report D2.2 (a), AURES – EU Horizon 2020, October 2015.

⁷¹ Commission, “Guidelines on State aid for environmental protection and energy 2014-2020” OJ C200/1.

⁷² Commission, “Guidelines on State aid for environmental protection and energy 2014-2020” OJ C200/1, paras 124–126.

⁷³ European Parliament, “Promotion of the use of energy from renewable sources***” P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendment 322/rev.

Dilemmas of a New Renewable Energy Directive

that “support schemes for electricity from renewable sources shall be market-based so as to avoid the distortion of electricity markets and shall ensure that producers take into account the supply and demand of electricity as well as possible system integration costs or grid constraints”. Three novelties are underlined in this formulation. First, the explicit statement that support schemes shall be “market-based”. Second, the distortion of electricity market shall be avoided in general, while the Commission’s Proposal only referred to “unnecessary distortions”. Third, support schemes shall ensure that energy producers take also into account “possible system integration costs”. Furthermore, the European Parliament added Article 4(1a), which allows Member States to apply both technology-neutral and technology-specific support schemes, but it also provides an indicative list of five factors that can justify the adoption of technology-specific support schemes. This rather implies that technology-neutral support schemes shall be the default position, in the sense that technology-specific measures shall be taken only in order to serve a particular and legitimate reason. The question is to what extent the presumptive prioritization of the technology-neutral support schemes will be an enforceable obligation for the Member States.

Just like the Commission’s Proposal, and in spite of the strict design requirements it set, the European Parliament did not express a clear preference for a specific support instrument. Nevertheless, it devotes Article 4(3a) to setting rules for tendering procedures, with the aim to ensure “a high project realization rate”. In this regard, tenders shall be non-discriminatory, transparent and shall clearly indicate what the delivery period is. Additionally, Member States shall “consult stakeholders to review the draft tender specifications” and shall “publish information about past tenders including project realisation rates”. Moreover, according to Article 4(3b), “Member States shall publish a long-term schedule in relation to the expected allocation of support, covering at least the next five years and including the indicative timing, including frequency of tenders where appropriate, the capacity, the budget or the maximum unitary support expected to be allocated and the eligible technologies”.

Apart from the above requirements, the amendments also contain certain exceptions from the strict rules, in favor of small-scale installations, energy communities, small islands and the outermost regions of the EU.⁷⁴ Moreover, Article 4(2) was amended so as to require the “maximization” of the integration of renewables and not the integration itself. Thus, the obligation of Member States will not be absolute, but will be defined by the meaning of “maximization”.

The amendments have also expanded on the monitoring obligations put forward by the Commission. While the requirement for a four-yearly assessment of the effectiveness of the national support schemes of course remains, Article 4(4) now underlines

that this assessment should also involve the support schemes’ “distributive effects on different consumer groups, including on industrial competitiveness” and “the effect of possible changes to the support schemes on investments”. The results of the assessment, in conjunction with comprehensive effectiveness considerations, “such as affordability and the development of energy communities” will serve as the basis for the long-term planning of support schemes.⁷⁵ Furthermore, Article 4(4a) imposes a reporting obligation on the Commission. On a three-yearly basis, the Commission shall report to the European Parliament and to the Council on the performance of support granted by means of tendering procedures. This report shall focus on the analysis of the ability of tenders to achieve cost-reduction, technological improvement and high realization rates as well as on the non-discriminatory participation of small actors and local authorities.⁷⁶

The European Parliament also introduced Article 4(4b), which calls for an expeditious review and modernization of the Guidelines on State aid for environmental protection and energy.

The already mentioned gap between the Commission’s posture and the European Parliament’s standpoint is also affirmed when it comes to the opening of support schemes and Article 5 of the Proposal. However, here, it is the European Parliament that shows less ambition and favours more cautious steps.

The most striking amendment in Article 5 is probably the one in the paragraph 2, where the European Parliament reduced the percentages of the minimum level of opening the newly-supported capacities. The amended percentages are 8% for the period 2021–2025 and 13% for the period 2026–2030, while the Commission had put forward 10% and 15% respectively. Perhaps the diminution is small, but this 2% difference is not insignificant. Besides, if it was, the European Parliament would not bother to proceed to this amendment. Suffice it to state that the 2% of the total supported renewable electricity generated in Europe in 2014 equalled to 9,787,761,480 Kilowatt hours⁷⁷ and the world kilowatt hour per capita electric consumption for the same year was 3,125.395 Kilowatt

⁷⁴ European Parliament, “Promotion of the use of energy from renewable sources***” P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendments 117, 118 and 122.

⁷⁵ European Parliament, “Promotion of the use of energy from renewable sources***” P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendment 123.

⁷⁶ European Parliament, “Promotion of the use of energy from renewable sources***” P8_TA-PROV(2018)0009 A8-0392/2017 (17 January 2018), Amendment 124.

⁷⁷ See Council of European Energy Regulators (CEER), “Status Review of Renewable Support Schemes in Europe” Ref: C16-SDE TF-56-03 (CEER, 11 April 2017), p. 12.

Dilemmas of a New Renewable Energy Directive

hours.⁷⁸ Furthermore, the following sentence was added: “[b]eyond [the] minimum levels, Member States shall have the right to decide, in accordance with Articles 7 to 13 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State”. It is unclear what the added value of this phrase is. The Commission’s Proposal explicitly lays down that Member States should reach “at least” the aforementioned percentages. And, obviously, setting a minimum level always means that the addressee is free to exceed it. Consequently, an accentuated comment on the Member States’ possibility to increase the openness of their support schemes beyond the minimum required level does not seem to have any significant legal effects or a noteworthy interpretative value, but it is rather closer to a policy declaration that aspires to encourage Member States to follow a specific path. Another salient amendment that also denotes a relative wariness regarding the opening of national support schemes is the one in Article 5(4) *in finem*. While this provision laid down the Commission may propose to increase the percentages set out in Article 5(2), the European Parliament replaced the verb “increase” with the word “modify”. It will, thus, be possible to even decrease the percentages.

Apart from reducing the minimum opening requirements, the European Parliament also limited the scope of the core obligation of Article 5 of the Proposal. Accordingly, an important sentence was added to Article 5(1): “Member States may limit their support to installations in Member States to which there is a direct connection via interconnectors”. Therefore, the Article 5(1) obligation is not absolute, but subject to a technical condition, which allows that the opening of a support scheme occurs only between directly connected Member States. However, it should be noted that the essential concept of direct connection is defined neither by Article 2 of the Proposal⁷⁹ nor by the amendments, and as a result, it is possible that interpretative problems emerge. Furthermore, Article 5(2a) was added, which introduces an exemption from the Article 5 obligation for one of the following energy-security related reasons: insufficient interconnection capacity, insufficient natural resources, or/and detrimental effects on energy security or the smooth functioning of the national energy market. Any exemption shall be granted by the Commission after a relevant request. The question here is what the Commission’s assessment power will be. Since the issues allowing an exemption are purely national, it seems appropriate the Commission will merely be competent to examine a possible manifest error of assessment committed by the Member State requesting the exemption, similarly to what happens in the field of services of general economic interest (Article 106(2) TFEU).⁸⁰

Last, according to Article 5(4) as amended by the European Parliament, the Commission shall have an

assisting and guiding role “throughout the negotiation process and the setting up of the cooperation arrangements”. The same provision specifies the Commission shall provide information, analysis, guidance and technical expertise. The formulation seems like a hint about new soft law in the field.

4.3. Interim Conclusion

It seems the new RE Directive will make steps to achieve a certain degree of Europeanization of support schemes, in the sense that it brings more convergence of national support schemes’ design and increases cross-border participation in them.⁸¹

The Commission’s Proposal adopted a more principle-based approach. Member States have a wider freedom to decide about their support schemes’ design. National support schemes have to comply with more general requirements. For instance, they shall be market-based, transparent, non-discriminatory and cost-effective, and they shall ensure the market integration of renewables. Nonetheless, the Commission introduced a strict obligation with specific percentages relating to the cross-border participation in national support schemes to be met.

On the other hand, the European Parliament’s amendments elaborate on the principles put forward by the Commission and composes a more thorough framework of specific obligations that Member States have to follow. Therefore, the amendments are stricter comparing to the Commission’s Proposal. Still, when it comes to the opening of support schemes, the European Parliament’s elaborate framework reduces the percentages of the required open support schemes. Furthermore, it puts in place certain exceptions that justify support of purely national character.

V. Conclusion

The Commission’s Proposal can be outlined with the following elements: first, a modest new RE share

⁷⁸ See The World Bank, “Electric power consumption (kWh per capita)” 2018, <<https://data.worldbank.org/indicator/EG.USE.ELEC.KH.PC>> retrieved 5 April 2018.

⁷⁹ Article 2 contains the definitions.

⁸⁰ Caroline Wehlander, *Services of General Economic Interest as a Constitutional Concept of EU Law* (T.M.C. Asser Press/ Springer 2016), 117–120; Panagiotis Delimatsis, “Services of General Interest and the External Dimension of the EU Energy Policy” in Markus Krajewski (ed.), *Services of General Interest Beyond the Single Market* (T.M.C. Asser Press/ Springer 2015). See also Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* [2008] ECR II-00081, para. 166.

⁸¹ Commission, “European Commission guidance for the design of renewables support schemes” COM(2013) 439 final (5 November 2013), 22.

Dilemmas of a New Renewable Energy Directive

target. Second, a change in paradigm, since this target is envisaged as collective and only binding for the EU as a whole, which is supplemented by the inauguration of a stronger Union governance system. This will grant the Commission a wide intervention power. Third, rules providing general instructions for national support schemes' design. And, four, an explicit requirement for the opening of national support schemes to non-domestic generation.

At this point, it should be noted that the Commission's Proposal for a new RE Directive is linked with the proclaimed Energy Union strategy⁸² and is part of the well-known Winter Package, which consists of eight legislative proposals aspiring to mould a cohesive Union energy policy.⁸³ Given the above, it comes as no surprise the Commission has not opted for a rigorous framework with extensive obligations, but for a principle-based legal act that grants flexibility to Member States, but it also reinforces its position to constantly orchestrate renewable energy policy. The latter takes semblance of being the most important for the Commission at this stage.

On the other hand, the European Parliament amendments are not in line with the Commission's Proposal, which sounds like looser national obligations for a stronger Energy Union governance. The European Parliament seems to agree with the reinforced governance model, but also requires these enhanced powers to be exercised within a context of stricter and more clearly defined obligations. And, of

course, it has adopted a much more ambitious stance with a RE target increased by about 30% comparing to the one the Commission had submitted. However, in terms of the opening of support schemes, the European Parliament has shown less ambition and seems to justify to some extent the restriction of support schemes to domestic energy generation.

In accordance with Article 194 TFEU that governs the ordinary legislative procedure, which is being followed in this case, it is now the Council's turn to adopt its position. While it is possible that European Parliament's amendments will be adopted and the new RE Directive will be adopted, it is also possible that the Council's position brings new changes to the text, which will start the so-called second reading, i.e. the second round of the legislative procedure. For the moment, one can only be optimist that a new RE Directive will sooner or later be adopted, thus marking the third generation of Union RE secondary legislation.

⁸² Commission, "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy" COM(2015) 80 final, (25 February 2015).

⁸³ See Marc Ringel and Michèle Knott, "The governance of the European Energy Union: Efficiency, effectiveness and acceptance of the Winter Package 2016" 2018 (112) *Energy Policy*, 209.