

**How binding are the EU's
'binding' renewables targets?
A Legal Perspective**

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Outline

- 1. Introduction**
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1. Introduction (1)

1.1 Debate on whether targets should be ‘binding’ prior to adoption of 2001 Directive (e.g. Commission White Paper, COM(1997)599):

- targets to stimulate Member State efforts to exploit available RES potential;
- but important that each Member State design its own strategy, retaining flexibility to address national circumstances and future developments.

1. Introduction (2)

1.2 Legal enforcement perspectives:

- *EU level*: by Commission, bringing an ‘enforcement action’ against Member State(s) in the EU courts;
- *National level*: by Quasi-‘Executive’ bodies (regulators/agencies, etc), *and by private parties against government (in national courts).*

2. The 2001 Renewables Directive (1)

2.1 Article 3 – ‘National indicative targets’

- (1) Member States shall take ‘appropriate steps’;
- (2) MS report setting ‘national indicative targets’, outlining measures taken or planned, etc;
- (3) National report every 2 years, indicating success (or not!) in meeting those targets;
- (4) Commission role to assess: MS progress towards national targets & consistency with EU targets/shares.
 - Commission report every 2 years, possibility for Commission to propose mandatory targets for adoption in EU legislation by EP + Council.

2. The 2001 Renewables Directive (2)

2.2 N.B. also Biofuels Directive 2003:

2.2.1 Contains targets for minimum proportion of such fuels, with reference values and requires Member States to set national indicative targets (see Article 3);

2.2.2 *Yet* nothing in text of the Directive requires Member States actually to achieve these targets.

→ Has been some target-related Commission enforcement activity here: see IP/06/862 (28/6/06) re Italian failure to provide reasons for setting biofuels target significantly below the relevant reference value.

2. The 2001 Renewables Directive (3)

2.3 Implications

- Possible to enforce where Member States:
 - set targets too low (e.g. below reference figures without explanation);
 - fail to take ‘appropriate steps’ (e.g.: set no targets at all; measures proposed clearly not capable of achieving targets, etc).
- BUT no breach of the Directive where a Member State simply fails to attain the target set ...

3. The 2009 Renewables Directive (1)

3.1 A move to 'binding' targets ...

- Commission publication of 'Renewable Energy Roadmap' (January 2007);
- European Council Conclusions (2 May 2007);
- European Parliament Report on the 'Roadmap' (September 2007);
- Commission proposal for a new Renewables Directive (13 January 2008).

3. The 2009 Renewables Directive (2)

3.2 Binding targets under the 2009 Directive

- *Article 3(2):* ‘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.’

- **Links to other provisions of the Directive, e.g.:**
 - **Article 4 (NREAPs: see esp. Art. 4(3) re trajectory); and**
 - **Articles 13 (administrative procedures, regulations & codes), 14 (information & training), 15 (GOs from RES) and 16 (Grids: access and operation)...**

- ... may also be relevant for compliance and enforcement purposes.

3. The 2009 Renewables Directive (3)

3.3 Various details:

- ‘effectively designed measures’;
- ‘indicative trajectory’;
- National Renewable Energy Action Plans;
- reporting and monitoring by Member States (Article 22) and Commission (Article 23), including ‘online public transparency platform’ (Article 24).

3. The 2009 Renewables Directive (4)

3.4 Missed opportunities? E.g.:

- (i): failure to include a direct penalty mechanism in the Directive for Member State failure to achieve the targets (or even to follow the trajectory closely enough: link to disappearance of mechanism for trade in Guarantees of Origin, not reinstated re eligibility to participate in inter-MS statistical transfers (see Article 6)) – timing of timely enforcement action, etc ...;
- (ii) failure of the Directive specifically to encourage development of a portfolio of renewables technologies.

4. Enforcement Mechanisms (1)

4.1 EU level

(i) Main focus on (threat of) Article 258 TFEU ‘enforcement proceedings’ brought by the Commission (including possible financial penalties: Article 260 TFEU) against Member States:

- Informal and Formal stages, leading to Commission Reasoned Opinion and eventual reference to the ECJ for hearing and final ruling;
- Issues re:
 - ‘Diplomacy’;
 - ‘Naming and shaming’;
 - Duration of procedure;
 - Effectiveness at securing outcomes.

4. Enforcement Mechanisms (2)

4.1 EU level (continued)

(ii) Possibility of action by one Member State against another for breach of EU law obligations (Article 259 TFEU) ...

(iii) Political pressure on recalcitrant Member States (either directly or as part of negotiation process in other EU-level activities (whether related to renewables or not ...)).

4. Enforcement Mechanisms (3)

4.2 National level

(i) Oversight/advisory/regulatory functions delegated by central government to independent agencies/bodies?

(ii) Attempts by private individuals (including companies, pressure groups, etc) to hold national governments to their obligations and policy targets.

4. Enforcement Mechanisms (4)

4.3 Likely implications?

- **Reliance upon regular monitoring and reporting (enforcement via publicity, etc);**
- **and/or hard(er)-edged ‘enforcement’ (legal actions, penalties, etc).**

5. Conclusions

5.1 Enforcement is likely to be a challenging task for the Commission, although the 2009 Directive provides it with many more tools than the 2001 Directive.

5.2 Securing the ‘binding’ nature of such targets seems likely to involve a number of actors at EU and national level, and this may yet include a role for the courts ...

5.3 Practical impact? Too early to tell ... implementation of the Directive required by 5 December 2010.