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Towards ecological governance in EU energy law

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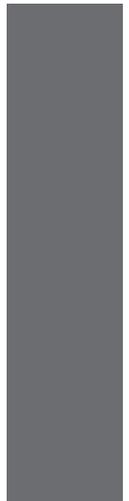
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Annex I

Policy update



Policy update

This Annex discusses (the status of) the relevant legislative and policy updates as adopted up to 1 July 2018.¹

I.1. General amendments and headline targets for 2030

Since the commencement of the work on this dissertation in 2012, various legislative amendments have been implemented. For the purpose of this PhD thesis, the most noteworthy one is Directive (EU) 2015/1513, which significantly amends the RED in order to enhance the sustainability of the biofuels regime. Primarily, this directive puts a cap on so-called 'first generation' biofuels and imposes extra monitoring requirements on Member States regarding ILUC emissions.²

The enhanced insights and experiences gained since then, have led to a further strengthening of the biofuels regime under the (proposed) post-2020 framework. This so-called 'clean energy for all Europeans package', or 'fourth energy package', is currently being drafted and debated, on the basis of a comprehensive set of legislative proposals made by the European Commission in 2016.³ The package consists of eight legislative pieces that combined form the core of the renewed EU energy policy up to 2030 and beyond. The legislative proposals relate to the energy performance in buildings, electricity market design, rules for the regulator ACER, energy efficiency, renewable energy, and governance. At the time of writing (July 2018), political agreement had just been

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- 1 However, for reasons of completeness, I want to point out that on 11 December 2018 amended versions of the drafts discussed in this update have been adopted and signed. (See Commission, 'Commission welcomes political agreement on conclusion of the Clean Energy for All Europeans package' (Press release) 18 December 2018, at http://europa.eu/rapid/press-release_IP-18-6870_en.htm.) A quick scan of the most relevant adopted documents revealed that significant length was (once more) added to the texts. This lengthening was largely due to restructuring and renumbering and partly the result of various new recitals and definitions being inserted. Hence, when reading this chapter, please keep in mind that the references made to specific provision numbers may ultimately not correspond with the numbering of the rules that were eventually adopted. Nevertheless, as no significant amendments appear to have been made in terms of their contents, these latest amendments are not discussed further here, and the focus remains on the changes made prior to 1 July 2018, i.e. this analysis is based on the documents mentioned in footnotes 5 & 6 below.
 - 2 These changes have been summed up in more detail in paragraph 2.6 of this dissertation, and will therefore not be reiterated here.
 - 3 European Commission, 'Commission proposes new rules for consumer centred clean energy transition' (News) 30 Nov. 2016, at: <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>

reached on the (compromise) text of four out of the eight proposals.⁴ Not all four are discussed here, but two pieces of legislation deserve an elaboration, as they touch upon the core of this dissertation and address several of the critiques that I have uttered in it. These are the new Renewable Energy Sources Directive ('RED II')⁵ and the 'Regulation on the Governance of the Energy Union' ('Governance Regulation'),⁶ which will be addressed in more detail in the next sections. On top, it must be mentioned that in May 2018 the 'LULUCF Regulation' was adopted.⁷ This Regulation essentially strengthens and updates the 'LULUCF Decision', as discussed in paragraph 2.4.5 of this dissertation. In short, the new regulation demands that Member States have to ensure that GHG emissions from LULUCF are offset by at least an equivalent removal in the period from 2021 to 2030.⁸

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- 4 Agreement was reached on the rules regarding (i) energy efficiency, (ii) the energy performance of buildings, (iii) renewable energy, and (iv) governance. (European Commission, 'The Energy Union gets simplified, robust and transparent governance: Commission welcomes ambitious agreement' (Press release) 20 June 2018, at: http://europa.eu/rapid/press-release_IP-18-4229_en.htm) The new Energy Efficiency Directive ('EED II') - as agreed so far - is: Council, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency - Analysis of the final compromise text with a view to agreement' (Note, document 10309/18) 26 June 2018 (interinstitutional file 2016/0376 (COD)). Full information on (the progress in) the legislative process can be found at: https://eur-lex.europa.eu/procedure/EN/2016_376. The new Directive on the energy performance of buildings ('EPBD') is: Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency (EPBD) [2018] OJ L156/75. For further information, see <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans>.
- 5 Council, 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources - Analysis of the final compromise text with a view to agreement' (Note, document 10308/18) 21 June 2018 (interinstitutional file 2016/382 (COD)) ('RED II'). Full information on (the progress in) the legislative process can be found at: https://eur-lex.europa.eu/procedure/EN/2016_382?qid=1531999730641&rid=1.
- 6 Council, '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 - Analysis of the final compromise text with a view to agreement' (Note, document 10307/18) 26 June 2018 (interinstitutional file 2016/0375 (COD)) ('Governance Directive'). Full information on (the progress in) the legislative process can be found at: https://eur-lex.europa.eu/procedure/EN/2016_375?qid=1531986474198&rid=1.
- 7 Regulation (EU) 2018/841 - Inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L156/1 ('LULUCF Regulation').
- 8 Ibid, art. 4. Such removals are tradeable between Member States under the Effort Sharing Regulation, which was simultaneously adopted. (This is Regulation (EU) 2018/842 - Binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L156/26.)

The headline targets that have been adopted for 2030 are more ambitious than what was originally envisaged by the Commission in 2014 or what has been proclaimed in the ‘Third Report on the State of the Energy Union’ of 2017.⁹ Agreement was reached to aim (for 2030) for a GHG reduction of 40%, an increase in renewable energy to 32% and a non-binding indicative target of 32.5% for energy efficiency. The latter two targets will, furthermore, be reviewed by 2023 in order to see if they can and/or must be increased further. On top, the new rules implement an explicit, strong connection with the commitments made under the Paris Climate Treaty. The headline targets for 2050 remain unaltered (aiming for 55% renewable energy and a GHG reduction of 80 to 95%),¹⁰ but under the new rules Member States are now required to adopt long-term strategies in order to start progressing towards their ‘Paris-obligations’.¹¹ While the RED and the Governance Regulation still have to go through various steps in the legislative process, and are thus not yet officially adopted, it is worthwhile to discuss the texts agreed upon so far.¹²

1.2. New Renewable Energy Sources Directive

In brief, the new RED (‘RED II’) entails a drastic overhaul compared to its predecessor.¹³ Its general structure has been changed, its contents have been amended significantly and most of the procedural elements and monitoring and reporting requirements have been removed from the RED and were instead incorporated in the new Governance Regulation.¹⁴ Additionally, the emphasis of the new directive has shifted from electricity to heating and cooling and the transport sector, and the preferential treatment of electricity from renewables has been removed entirely. Furthermore, a lot of attention was paid to improving the design and stability of renewables’ support schemes and the possibility of opening up national schemes to other members, which may even become mandatory.¹⁵ More elaborate rules were also adopted in

9 These targets were: at least 40% reduction of GHG emissions, at least 27% renewable energy, 25-30% energy efficiency, and 15% interconnection by 2030. See: Commission, ‘A policy framework for climate and energy in the period from 2020 to 2030’ (Communication) COM(2014) 15 final, at pp. 4, 6 & 8; and Commission, ‘Third Report on the State of the Energy Union’ (Communication) COM(2017) 688 final, at p. 2.

10 These can be found in: European Commission, ‘Energy Roadmap 2050’ (Communication) COM (2011) 885 final.

11 Governance Directive (n 6) art. 14 & annex IIa, as addressed in more detail below.

12 As already mentioned in footnote 1, in December 2018 both of these legislative documents have been formally signed. The full text thereof can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_48_2018_REV_1&from=EN (for the new RED) and https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_55_2018_REV_1&from=EN (for the Governance Regulation). These documents will not be discussed further here.

13 For a full reference to RED II, see footnote 5.

14 Not all details of the new RED will be addressed here. The Governance Regulation is discussed in paragraph 1.3.

15 RED II (n 5) art. 5(5). See also *ibid*, arts. 4-6.

regard to streamlining and reducing administrative procedures.¹⁶ On top, a prominent place was given to rules on self-consumers and energy communities.¹⁷

In terms of targets, a new approach is taken, compared to the 'old' RED. While the new directive sets a mandatory target of 32% renewable energy in 2030 for the EU as a whole, it sets no such national targets.¹⁸ It is left to the Member States to set these collectively,¹⁹ but the Commission retains a right to intervene if their contributions are insufficient.²⁰ Additionally, a sector-specific, indicative target of 1.3 percentage point (p.p.) is introduced for heating and cooling.²¹ For the transport sector, an overall target of at least 14% renewables has been set for 2030.²²

1.2.1. Transport sector rules

While this transport target itself is straightforward, the remainder of the new provision on mainstreaming renewable energy in transport is lengthy and highly complex. This is largely the result of a vigorous (and much needed) revision of the biofuels regime, the outlines of which I will sketch here. To start with, many new definitions were added to the directive, which now refers not only to biomass, biofuels, bioliquids, 'renewable liquid and gaseous transport fuels of non-biological origin' and 'low ILUC-risk fuels' (like the 'old' directive), but also to advanced biofuels, recycled carbon fuels, biowaste, biogas and biomass fuels.²³ These new definitions make it possible to better address the peculiarities of each fuel and their differences in terms of their life-cycle GHG emissions, but it does not aid the clarity of the new rules.

The new provision on renewable energy in transport (article 25) goes at great length to specify in detail how the target of 14% is to be met, and, in particular, which sources may contribute to it to which extent.²⁴ Similar to the overall EU renewable energy target, no national sub-targets have been set for the transport sector, but Member States themselves are to set indicative trajectories and calculate their respective contributions according to the methodology set out in the directive. Also, the transport-target is subjected to an upward revision clause for 2023. The

16 Ibid, arts. 15-17.

17 Ibid, arts. 21 & 22.

18 Ibid, art. 3(1). However, the Governance Regulation (as discussed in paragraph 1.3.) does impose a mandatory trajectory for Member States (Governance Regulation (n 6), art. 4).

19 Following the procedure described in Governance Regulation (n 6) art. 5.

20 RED II (n 5) art. 3(2&3).

21 Ibid, art. 23. On top, Member States are required, on the basis of art. 24, to enable and promote district heating and cooling.

22 Ibid, art. 25(1).

23 Ibid, art. 2. Both the old and the new RED also contain a (nearly identical) list of definitions of various (raw) materials used for the production of biofuels.

24 As a result, the first paragraph of art. 25 of the new RED is now, on its own, almost five pages long.

provision then goes on to specify how, and to what extent, various fuel-types can be counted. This list contains the following.

First of all, 'advanced fuels'²⁵ must contribute at least 0.2% to the overall target in 2022, 1% in 2025, and 3.5% by 2030. In calculating their shares, these fuels can be counted twice.²⁶ On top, electricity from renewables that is used in road vehicles counts four times; if it is used in rail transport, it counts 1.5 times. Furthermore, in order to count towards the target, the minimum GHG savings from the use of 'renewable liquid and gaseous transport fuels of non-biological origin' must be at least 70% from 1 January 2021. For recycled carbon fuels, the GHG threshold is to be set by the Commission, before 1 January 2021.²⁷ The GHG requirements of other (bio) fuel types are addressed in subsequent provisions and annexes of the directive.²⁸ Additionally, in regard to food- & feed-based bio(mass) fuels, a slow-down-clause has been adopted, demanding that their contribution to the 2030 target can be no more than 1% higher than their contribution was in 2020. Simultaneously, the overall cap of 7% - which was incorporated in the RED in 2015 - has been upheld for these fuels. Member States are free to lower this cap further and may also, for reasons of sustainability, distinguish between different food- and feed-based fuels, taking into account the best available evidence on ILUC impacts.

An interesting feature of the new RED is, furthermore, that if Member States make use of this derogation and indeed lower the cap, they are also allowed to lower the overall transport-target of 14%. It may do so by a maximum of seven p.p., so that the overall target can in effect be lowered to 7%. If, under this scenario, only (double counting) 'advanced' biofuels were to be used, the overall target could effectively become as low as 3,5%.

In addition to the more stringent rules on these 'first generation' bio(mass) fuels, a standstill requirement was also incorporated for certain 'high ILUC-risk' fuels. The contribution of such fuels to the 2030-target may not exceed the level of their consumption as it will be in 2019, unless these fuels (will) have been certified on the basis of criteria that are to be developed by the Commission before 1 February 2019.²⁹ After 2023, the contribution of such fuels will gradually decrease to 0.0% by 2030.

25 i.e. second generation biofuels from non-food crops, as listed in RED II (n 5) annex IX.A.

26 Under the new RED, the list of double counting fuels (found in annex IX) has been shortened by three feedstocks.

27 The calculation of GHG emissions and savings is subsequently addressed in RED II (n 5) art. 28.

28 More precisely, in (ibid) arts. 26, 28 and annexes V, VI and VIII.

29 These criteria must furthermore be reviewed by 1 September 2023 (ibid, art. 25(1)).

The next paragraphs of article 25(1) address the calculation of the shares of the various fuels, and of the denominator and numerator.³⁰ Two new elements stand out here: Contributions of biofuels and biogas from used cooking fat and certain animal fats are limited to 1.7%, while they are counted twice; and fuels supplied to the aviation and maritime sectors are counted 1.2 times.³¹ Article 25(3) then describes specifically how the share of electricity from renewables must be calculated. The remainder of the provision concerns itself mainly with enhancing cooperation between Member States, ensuring the availability of recharging and refuelling infrastructure, and the development of a database to enable the tracing of fuels and their emissions.³² Lastly, the Commission is empowered to adopt various delegated acts.³³

1.2.2. The sustainability of biomass and biofuels

The sustainability regime, which the fuels described above must adhere to, has also been vigorously revised and significantly lengthened.³⁴ Largely, this is due to its (much-needed) broadened scope, as a result of which solid and non-transport fuels are now also covered. Like the 'old' provision, the new one proclaims that biofuels, bioliquids and biomass fuels (the latter being newly added) can only count towards the targets if they fulfil the various criteria, irrespectively of the geographical origin of the biomass.³⁵ In terms of contents, the requirements that the raw materials cannot come from land (i) with high biodiversity value; (ii) with high carbon stock, or (iii) land that was peatland in 2008, have not been amended significantly.³⁶ However, they do now apply to a broader array of biomass-based fuels.³⁷ On top, several new paragraphs were added to address the peculiarities of forest and agricultural biomass, as well as of electricity produced from biomass sources.

In order for bio(mass) fuels from agricultural land to count towards the targets, it is now mandatory for Member States to have management or monitoring plans in place regarding soil quality and soil carbon.³⁸ For forest-based biomass, even more elaborate and stringent criteria have been put in place. Hence, forest biomass can now only be counted towards the targets, if the country where the materials were harvested has national laws and/or local management systems

30 These are currently largely found in art. 3(4) of the 'old' RED.

31 RED II (n 5) art. 25(1), at the end & annex IX.B.

32 These are RED II (n 5) arts. 25(3bis), 25(4a) & 25(4&5) respectively.

33 Ibid, art. 25(6-7).

34 Ibid, art. 26.

35 Ibid, art. 26(1). The exception that waste-materials only have to fulfil the GHG-savings-criterion has remained intact.

36 See *ibid*, art. 26(2-4).

37 For instance, 'biomass fuels produced from agricultural biomass' are now explicitly covered, and paragraph 26(2)(aa) was added to the directive to include biodiverse forests and woodlands.

38 Ibid, art. 26(1).

in place to ensure a certain minimum level of sustainable forestry.³⁹ On top, explicit LULUCF-requirements have been incorporated in the new RED,⁴⁰ demanding that the region or country of origin must either be party to the Paris Climate Treaty and must have addressed LULUCF-emissions in its nationally determined contribution (NDC) or its national laws; or evidence must be provided that 'management systems are in place at forest sourcing area level to ensure that carbon stocks and sinks levels in the forest are maintained, or strengthened over the long term.'⁴¹ The effectiveness of these new criteria will be assessed by the Commission by the end of 2026.⁴²

In addition, under the new directive, the required levels of GHG savings have been adjusted upward, and the list now consists of five categories.⁴³ Three of these apply to 'biofuels, biogas consumed in transport and bioliquids'; and two relate to 'electricity, heating and cooling production from biomass fuels'. The first group of fuels must achieve a GHG reduction of (i) at least 50%, if the installation became operational on or before 5 October 2015; or (ii) at least 60% after this date. On top, for these fuels the threshold is 65%, if they are produced in an installation that will be operational after 1 January 2021. For the second group ('electricity, heating and cooling production from biomass fuels') more stringent thresholds are imposed: a (life-cycle) GHG reduction of at least 70% must be achieved for energy/fuels used in installations that become operational after 1 January 2021 and 80 % for installations starting operation after 1 January 2026.

Furthermore, the next paragraph dictates that electricity from biomass fuels can only be taken into account for the targets, if they are produced (i) in a rather small-scale installation (below 50 MW); or (ii) in a larger one (above 50 MW) that uses high efficient cogeneration or biomass carbon capture and storage (CCS). Energy from electricity-only-installations can only be counted if that installation does not use fossil fuels as its main fuel (for installations below 50 MW). Larger installations must additionally (i) meet the Best Available Technology associated net-electrical efficiency levels (BAT-AEELs), or use biomass CCS, if they are between 50-100 MW; or (ii) if they are over 100 MW, they must achieve a net-electrical efficiency of 36%, or use biomass CCS.⁴⁴

The last paragraphs of this provision on sustainability address that Member States (i) cannot refuse to take into account biofuels and bioliquids that abide by the sketched criteria;⁴⁵ but (ii)

39 Ibid, art. 26(5).

40 For completeness, I reiterate here that a 'LULUCF Regulation' (n 7) has also been adopted, demanding that emissions from LULUCF are offset (see also para 7.1).

41 RED II (n 5) art. 26(6). Operational guidance in this will be provided by the Commission by 31 January 2021.

42 Ibid, art. 26(6). This assessment concerns the criteria of art. 26(5) as well as those of art. 26(6).

43 Ibid, art. 26(7).

44 Ibid, art 26(8).

45 Ibid, art. 26(9).

can derogate from the criteria for a limited period of time and for outermost regions only;⁴⁶ or (iii) may impose additional sustainability criteria for biomass fuels.⁴⁷

1.2.3. Compliance and calculations

In line with the changes made in the sustainability criteria, the scope of the provisions dealing with compliance and the calculation of GHG emissions were also broadened to include 'biomass fuels and/or other fuels that are eligible for counting towards the numerator'.⁴⁸ In the provision on compliance, the characteristics of the required mass balance system that operators have to use are described in a longer and more specified manner.⁴⁹ In more detail than previously, it is then discussed how to deal with mixed consignments of biomass and how to calculate the relative shares of GHG emissions if consignments are processed further.⁵⁰ The reliability of information and auditing has also received increased regulatory attention, and now entails not only a broader list of specified fuels, but also an explicit prohibition of fraud, especially in regard to the intentional discarding of biomass to classify it as 'waste'.⁵¹ The possibility of using voluntary schemes approved by the Commission as a means to verify compliance has been updated. The conditions thereof are now more elaborately described, and the Commission's powers of decision in this area have been strengthened.⁵² Lastly, new elements were added to the paragraph that empowers the Commission to examine, upon the request of a Member State, whether the sustainability criteria have been met by a specific operator.⁵³

The amendments that were adopted in relation to the GHG-calculation-methodology are not found so much in the directive's provisions, but rather in its annexes.⁵⁴ Most of the changes made in the provision on calculations are minor, and relate primarily to the expansion of its scope to include biomass fuels.⁵⁵ However, the annexes that entail the actual methodology and GHG-values have increased significantly in scope as well as in length. Where the original Annex V (on biofuels and bioliquids) counted only nine pages, it is now 44 pages long. In a nutshell, it got so much longer for three reasons. First, the list of biofuel production paths that are described in each table of default values is more extensive (each biomass type having various production

46 Ibid, art. 26(9bis).

47 Ibid, art. 26(10). The Commission will assess the need to harmonise these criteria by 31 December 2026.

48 Ibid, art. 27(1). See also art. 28(1).

49 Ibid, art. 27(1).

50 The latter can be found in (ibid) art. 27(2).

51 Ibid, art. 27(3). This classification is important, because waste-materials are subjected to less stringent sustainability criteria than 'regular' biomass (see also n. 35).

52 See *ibid*, art. 27(4-7).

53 Ibid, art. 27(7bis).

54 On the calculations, see also what has been said at the end of paragraph 2.3.1 of this dissertation.

55 See RED II (n 5) art. 28. On top, a couple of changes entail enhanced powers of decision for the Commission (see *ibid*, paras. 4-6).

processes), adding to its length.⁵⁶ Second, a new division was applied in the methodology for calculating GHG emissions from biofuels and bioliquids. Under the 'old' RED, one methodology applies to both, whereas under the new RED, GHG emissions from biofuels and bioliquids are calculated according to different formulae.⁵⁷ Third, and adding most to the length, the tables containing 'disaggregated default values' have increased exponentially in number.⁵⁸ In terms of contents, it stands out that the number of possible production paths has increased significantly since the adoption of the 'old' RED. On top, their level of GHG savings has been recalculated and amended.⁵⁹ Furthermore, various emissions that must be taken into account in the calculations have been described in more detail; in particular those relating to intermediate processes and those dealing with the allocation of emissions to different outputs.⁶⁰ Last, but certainly not least, the fossil fuel comparator that is used for the calculations has been drastically adjusted upward.⁶¹ This has important implications for the level of GHG savings that biofuel and/or bioliquid production paths can achieve. The higher this comparator is set, the easier it is for a biofuel-producer to achieve a certain percentage of GHG savings, so that his product is more likely to be compatible with the sustainability criteria.⁶²

In addition to a longer Annex V, a fully new Annex VI was also added to the directive to cover biomass fuels. The main production pathways that are sketched in it are based on woody materials (especially chips, briquettes and pellets), agricultural residues in various forms, and biogases of different origins (in particular from manure and biowaste). This annex is another 54 pages long, and essentially follows the same outline and methodology as Annex V, so that I will not reiterate it here.

One element worth mentioning, however, is that, for these solid materials, the distance over which it was transported (prior to processing) is an important determinative factor in the level of GHG savings that can be achieved. From a holistic perspective, it is comforting to see that this factor is taken into account in all earnest in each table of estimates.⁶³ For the remainder, the old and the new RED are much the same.

56 Ibid, annex V(A&B).

57 Ibid, annex V.C. In particular the need to allocate shares when using co-generation has made the calculation longer and more complex (see *ibid*, annex V.C, paras. 16-18).

58 Ibid, annex V(D&E).

59 Most of these can be found in (*ibid*) annex V.A.

60 Ibid, annex V.C.

61 Ibid, annex V.C, para. 19.

62 A (fictive) example can clarify this. Let's say a certain biofuel emits 50 gr CO₂/MJ. If its comparator is estimated at emitting 100 gr CO₂/MJ, the biofuel achieves a 50% reduction in CO₂. However, if the comparator were set at 150 gr CO₂/MJ, the biofuel would reduce such emissions by 66%. Under this scenario, for a new installation, the level at which the comparator is set, would hence be decisive in whether that biofuel does or does not abide by the sustainability criteria.

63 See especially RED II (n 5), annex VI(A&D).

1.3. Regulation on the Governance of the Energy Union

In conjunction with the new RED, a compromise text for a new Regulation was (almost simultaneously) agreed upon to address the more procedural aspects and to lay down the details of all the planning, reporting, and monitoring requirements that are enshrined in the RED.⁶⁴ Such requirements are now described in the RED itself, but under the new framework they have been removed, and placed in the separate 'Regulation on the Governance of the Energy Union' ('Governance Regulation').⁶⁵ It is interesting to see that, while the Energy Union at its establishment seemed to have a rather strong emphasis on the diversification of gas supply, the governance of the Energy Union is now centered around renewable energy.⁶⁶ The new Regulation applies to all five dimensions of the Energy Union (energy security, internal energy market, energy efficiency, decarbonisation, and research, innovation and competitiveness), and is structured along these pillars.⁶⁷ The basis for governance are long-term strategies, 'integrated national energy and climate plans' (INECPs) and related reporting and monitoring arrangements. Furthermore, the Regulation has strongly integrated the procedural rules with the commitments made under the Paris Climate Treaty.

In outline, these (procedural) rules entail the following. By the end of 2019, and every ten years thereafter, each Member State has to submit an 'integrated national energy and climate plan' (INECP), containing *inter alia* that state's targets, measures and means for the ten years to come. This INECP must cover all five dimensions of the Energy Union, while bearing in mind the longer-term perspective.⁶⁸ One element in these plans are the national contributions regarding renewable energy. While neither the new RED, nor the Governance Regulation sets national targets for this, the Governance Regulation does impose a mandatory trajectory for achieving the target-to-be.⁶⁹ It furthermore prescribes the process of how the Member States must determine their national renewable energy contributions, and it creates a collective responsibility to meet the EU target of 32%.⁷⁰ The next provisions then describe how and when exactly these plans must be drafted and what they have to entail.⁷¹ By the end of 2018, a draft INECP must be submitted, which will be assessed by the Commission.⁷² The Commission can then provide

64 Similar obligations arising from other energy-related directives (such as the ones mentioned in footnote 4) are also covered by the Governance Directive.

65 For a full reference, see footnote 6.

66 The Energy Union was established with the adoption of: European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM (2015) 080 final.

67 Governance Regulation (n 6), art. 1(2).

68 Ibid, art. 3(1).

69 Ibid, art. 4(2).

70 Ibid, art. 5 & annex Ia. A similar process-description for energy efficiency can be found in (ibid) art. 6 & annex II.

71 See *ibid*, arts. 3-13 & annex I.

72 *Ibid*, art. 9(1).

recommendations, which must be taken seriously by the Member States.⁷³ The definitive plans are then also assessed by the Commission, in particular in regard to their sufficiency (when totalled) in meeting the Union-targets.⁷⁴ These plans must furthermore be updated by 2023, and every ten years thereafter.⁷⁵ Alongside these obligations, Member States also have to submit long-term strategies, with a perspective of at least 30 years.⁷⁶ In short, these strategies entail sketches of various scenarios and their respective implications.⁷⁷ These strategies too, must be reported to the Commission every ten years and be updated every five years.⁷⁸

The next section of the Governance Regulation is mostly concerned with reporting requirements. Member States have to submit biennial progress reports on the implementation of their INECs.⁷⁹ The contents thereof are dictated in separate provisions for each pillar of the Energy Union.⁸⁰ Further biennial reports must be submitted on GHG policies, measures and projections,⁸¹ as well as on national climate change adaptation planning and policies.⁸² On top, annual reporting duties are imposed regarding *inter alia* oil and gas operations and stocks, GHG inventories, and the 2020-targets.⁸³

The following chapter of the Governance Regulation is then dedicated to aggregate assessments and monitoring done by the Commission.⁸⁴ On the basis of (primarily) the Member States' reports, the Commission biennially assesses the following: the progress towards the EU objectives; the progress made by each Member State towards its own targets; the overall impact of aviation on the global climate; the overall impact of the national policies and measures on the Union policy measures, as well as on the operation of the EU ETS.⁸⁵ If the Commission finds that there are inconsistencies or insufficient ambitions or progress, it can issue recommendations to remedy the situation.⁸⁶ The powers bestowed upon the Commission under the 'renewable energy'-pillar are stronger than under the other four pillars. If ambitions are too low in the

73 Ibid, art. 9(2&3). These recommendations relate in particular to the level of ambition, the contents of the (envisaged) measures, and potentially needed additional measures, and interactions with existing and/or planned policies and other dimensions of the Energy Union (ibid, art 9(2)).

74 Ibid, art. 12.

75 Ibid, art. 13.

76 Ibid, arts. 14-14bis & annex IIa.

77 Ibid, art. 14(1); more details in annex IIa.

78 Ibid, art. 14(1).

79 Ibid, art. 15.

80 Ibid, arts. 18-22, including an additional provision (art. 21a) on energy poverty.

81 See ibid, art. 16 & annexes III-V.

82 Regulated in (ibid) art. 17 & annexes VI & VII.

83 See (ibid) arts. 23 & 23bis & annex III.

84 Ibid, arts. 25-33.

85 Ibid, art. 25.

86 Ibid, arts. 24, 26 & 27.

area of renewable energy, the Commission has to issue recommendations – under the other pillars this is not mandatory.⁸⁷ The Member State then has to fix the gap, and explain how it will prevent reoccurrence in the future. In the next update of its INECP, the Member State must subsequently address how it has dealt with the recommendations and provide a reasoning if it has not addressed or has deviated from one of them.⁸⁸ The Commission has to keep the Council and the European Parliament informed of all developments via the yearly 'State of the Energy Union report'.⁸⁹

Furthermore, in order to gather accurate and sufficient data for all this reporting and monitoring, and to be able to access those reports, a further section of the Governance Regulation is dedicated to monitoring systems, i.e. to (the continuous development of) inventory systems for GHG estimates and registries for various reports.⁹⁰ The last elements that this Regulation addresses are cooperation between Member States (and the Union),⁹¹ the roles and powers of the various actors involved,⁹² and amendments and transitional aspects.⁹³

1.4. General appraisal of the new framework

In general, the new legal framework under construction provides a much more holistic, integrated approach to biomass regulation, as well as to renewable energy in a broader sense and in context with other policies.

Under the new RED, the scope of sustainability scheme is significantly broadened, and its contents strengthened, although this has had a negative effect on the directive's clarity. Nevertheless, it is great to see that several of the concerns I have expressed throughout my dissertation have been addressed and dealt with under the new rules. My three main critiques of the 'old' RED, and the biofuels-regime in particular, were that (i) its scope was too narrow as a result of which solid and non-transport fuels were not covered by the sustainability criteria; (ii) that ILUC issues were not (sufficiently) addressed; and (iii) that 'accounting tricks' in the calculations could in effect lower the targets.⁹⁴ Under the new RED, two out of these three concerns have largely been alleviated.

87 These recommendations are to be based on the objective criteria of (ibid) art. 5 and the formulae of annex Ia.

88 Ibid, art. 28.

89 Ibid, arts. 29 & 29bis. One of the elements in that report is a mandatory biennial EU bioenergy sustainability report, as described in (ibid) annex VIII.

90 Ibid, arts. 30-33 & annex X. There are both national and European inventories (ibid, art. 30(1&2)). The Commission is the manager of the latter, and is assisted in this task by the Climate Change Committee (which is established by art. 37 of the Governance Regulation).

91 Ibid, art. 34.

92 Ibid, arts. 35-37.

93 Ibid, arts. 39-49 and arts. 50-52 respectively.

94 For these criticisms, see in particular paras. 2.5 and 6.4 of this dissertation.

Solid and non-transport fuels have come within the scope of the sustainability criteria, leading to a more uniform approach and an overall higher level of biomass' sustainability. On top, while the rules on ILUC have themselves not been amended greatly, several elements have been added to the directive to reduce (the risk of) ILUC emissions. As said, there is now a standstill-requirement for certain 'high ILUC-risk' fuels and a slow-down-requirement for 'first generation' fuels made from food- and feedstocks. As a result, the use of *inter alia* palm oil and ethanol is now frozen at their current levels of import and production.⁹⁵ In addition to all this, my criticism that (the effectiveness of) the Timber Regulation in combatting unsustainably harvested wood hinges on whether the country of origin has imposed national laws in that regard, has also been dealt with under the new biofuels regime.⁹⁶ In fact, having such rules in place is now a precondition for forestry materials to be able to meet the sustainability criteria in the first place. Overall, I hence come to the conclusion that the new RED entails a more integrated, as well a more ecological approach than its predecessor.

A similar remark can be made about the new Governance Regulation. The new regulation takes a rather bold integrated approach by explicitly linking the rules and obligations with the commitments entered into under the Paris Climate Treaty. Additionally, it integrates the five pillars of the Energy Union, and the related obligations of the Member States under each of these five branches. By furthermore requiring long-term strategies from Member States, and coupling them with regular reviews and updates, it is (at least in theory) ensured that the progress towards sustainable practices is not ad hoc or haphazard. As such, the Governance Regulation implements quite an extensive holistic framework. The newly drafted rules also provide a powerful stimulus for reviewing (the effectiveness of) the policies in place, with the goal of keeping us on a sustainable path. Thus, to a large extent, it provides the rolling review that I have been arguing we need.⁹⁷ Coupled, as it is, with sufficient powers and possibilities for amendment, the new legal framework can likely function as a state-of-the-art steering instrument.

Thus, despite the fact that the underlying assumptions of continued economic growth and firm faith in our abilities to assess and predict impacts are not challenged, I can still conclude this Policy Update on a rather bright note: the new framework represents a move in the right direction and forms a bold step in progressing towards ecological governance in EU energy law.

95 See: 'EU strikes deal on 32% renewable energy target and palm oil ban after all-night session' (Euractiv.com, 14 June 2018) <https://www.euractiv.com/section/energy/news/eu-strikes-deal-on-32-renewable-energy-target-and-palm-oil-ban-after-all-night-session/>. Palm oil will be phased out completely by 2030, according to Keating (see: 'Palm oil to be phased out in EU by 2030' (Euractiv.com, 14 June 2018) <https://www.euractiv.com/section/future-of-mobility/news/palm-oil-to-be-phased-out-in-eu-by-2030/>).

96 A little reminder: this situation was the result of the criterion that one cannot put timber on the EU market that has been harvested 'illegally' (see also paragraph 2.4.5 of this dissertation).

97 On this, see in particular Chapter Three and paragraph 6.4 of this dissertation.



