

**Legislative briefing**

**A critical analysis of the review process contained in the  
Commission proposal for a Directive on Energy Efficiency**

October 2011

**Executive Summary and Recommendations**

The Commission's proposal for an Energy Efficiency Directive ('EED Proposal')<sup>1</sup> sets out a two-stage approach whereby national targets should first be set and measures adopted following the Directive by Member States. In a second phase, the Commission would evaluate whether those targets and measures are able to achieve the Union's 20% savings target by 2020, and would decide on the appropriateness of proposing amendments to the Directive.

This briefing shows why this approach is too weak and unsatisfactory: first, the evaluation is essentially based on national reporting but experience shows that there is an important risk that Member States do not report on time or provide incomplete information. Moreover, there is uncertainty whether the Commission will submit a legislative proposal following an evaluation of the Directive that shows that the EU 20% target cannot be attained. Finally, the evaluation process and the submission for a legislative proposal are taking place too late.

Two additional concerns are addressed in this briefing: on the one hand, the monitoring of the impacts of the Energy Efficiency Directive ('EED') on the climate legislation shall take place at an early stage in order to anticipate possible negative effects. On the other hand, the principle of transparency should be increased by expressly recognising the right to public participation and access to all plans to be developed under the EED.

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<sup>1</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on energy efficiency and repealing Directives 2004/8/EC and 2006/32/EC, COM(2011) 370, 22/6/2011.

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## 1. Introduction

In spite of a clear mandate in favour of a binding target for energy savings,<sup>2</sup> the Commission's proposal from June 2011 for an Energy Efficiency Directive ('EED Proposal') does not contain a binding 20% energy savings target. On the contrary, it includes a two step approach whereby Member States set their own targets and adopt measures aiming at achieving them. Then, in 2014, the Commission shall evaluate the aptitude of their energy efficiency targets, policies and measures to meet the Union's 20% target by 2020. The evaluation must be carried out in particular on the basis of two reports to be submitted by the Member States. Following that, and if appropriate, the Commission could submit a legislative proposal introducing mandatory national targets.

This briefing seeks to present the main problems arising from this approach. ClientEarth is indeed of the opinion that the EED Proposal should be amended now to introduce mandatory national targets to achieve the 20% target of the EU and not postpone their adoption to a later stage.<sup>3</sup>

### 1.1 The two step approach

The first step of the Commission's proposed approach requires Member States to set out their own national energy efficiency targets in accordance with Article 3(1) of the EED Proposal. These targets shall be "*expressed as an absolute level of primary energy consumption in 2020.*" Moreover, in order to set the targets, Member States have to take into account the 20% energy savings target of the EU as well as measures provided for in the EED Proposal. In addition, two reporting obligations are imposed on the Member States: annual reports which seek to address progress achieved towards the national targets; and supplementary reports which aim at informing on national energy efficiency policies, action plans, programmes and measures implemented or planned in view of achieving the targets.

The second step consists in an evaluation process established by Articles 3(2) and 19(7) of the EED Proposal. These provisions require the Commission to evaluate the ability of the national targets and measures taken in accordance with the Directive to reach the overall EU 20% energy savings target. If the result of the review process shows that the target is not on track,

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<sup>2</sup> Presidency conclusions and EP resolution

<sup>3</sup> Information on the mandate for such targets and proposal for amendments in that view can be found in: ClientEarth, Legal briefing on *Energy savings targets: Analysis of the Commission's proposal for a Directive on Energy Efficiency*, October 2011, available at <http://www.clientearth.org/climate-energy/climate-energy-publications/energy-savings-targets-analysis-proposed-amendments-1565>.

the Commission should assess the opportunity to submit a legislative proposal, introducing mandatory national targets.

Evidence shows that, as it stands, the proposal cannot deliver the expected target<sup>4</sup> and that the review process will therefore be key to put the EU back on track in increasing its energy savings by 20% compared to projections. This may in fact be the last opportunity to impose binding target on Member States and consequently put the EU back on track to achieving its 20% energy savings objective by 2020.

## 2. Main problems with the current proposal

Contrary to what the Commission argues, it is clear that the two step approach of the EED Proposal contains a number of elements that puts the achievement of the Union's target under serious threat. An important threat resides in the fact that Member States have limited time available to draft and submit two reports which serve as basis for the Commission's evaluation of the Directive. The reporting obligation is not accompanied by any measures to ensure that the evaluation will be carried out in case Member States fail their reporting obligations.

Moreover, the two step approach of the EED Proposal does not have strong enough wording to ensure that the Commission will submit a legislative proposal in 2014 if Member States reports prove that the current Directive will not deliver the 20% target. The Commission is granted a wide margin of discretion.

Finally, whereas the Impact Assessment ('IA') prepared by the Commission clearly showed that the introduction of national binding targets with the EED Proposal would deliver 20% energy savings by 2020, there are currently no studies that indicate whether the introduction of a binding target after the evaluation of 2014 may have comparable results. On the contrary, the timeline for the whole process foreseen in the EED Proposal - from the evaluation to the national implementation of a modified Directive - is inevitably lengthy and likely to end in 2017 at the earliest.

### 2.1 Risk of insufficient reporting from the Member States

Failure by Member States to fulfil their reporting obligations by the short deadline set in the EED Proposal is one of the great risks at stake. The experience from the drafting of national energy efficiency action plans ('NEEAPs') has shown that it is very long process for Member States to elaborate such reports and that deadlines are often postponed in practice. At the deadline for the first NEEAPs, only two Member States had submitted their plans. The last

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<sup>4</sup> Impact assessment, option A3

NEEAP was submitted almost a year after the deadline. At the expiry of the notification deadline for the second NEEAPs, the Commission had received seven plans.

In the case of the national reports following Article 19(1) and (2) of the EED Proposal, it is likely that many of them will not be available at the deadline. The Commission would therefore face difficulties to carry out its assessment if it first has to be in possession of all reports. In that case, no legislative proposal could be taken early enough to achieve the EU 20% energy savings target by 2020.

The Commission has rarely acted against Member States that had not deliver plans or reports according to a Directive's deadline. To this date, the Commission has not taken any formal actions against the eight Member States that have still not submitted that NEEAPs due 30 June 2011.<sup>5</sup>

## 2.2 Uncertainty around the legislative proposal

Following the wording of Article 19(7) of the EED Proposal, the Commission shall submit "*if appropriate [...] a legislative proposal laying down mandatory national targets.*" This provision, grants a large margin of discretion to the Commission to decide whether proposing binding targets is the appropriate way forward or, for example, if it would be sufficient to ensure good implementation of the binding measures required by the Directive.

Hence, there is no guarantee that the Commission will make such proposal in response to the inadequacy of current provisions to the objective of the EU to achieve a 20% target by 2020.

Moreover, the EED Proposal does not set a date by which the Commission shall, at the latest, submit a legislative proposal if that is found appropriate allowing the review process to be extended indefinitely.

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<sup>5</sup> Among the reasons for this failure, we can mention the fact that actions for failure to fulfil an obligation following Article 258 of the TFEU are very lengthy procedures. The first step is the sending of a letter of formal notice during which the Commission requests a Member State to submit its observations on an identified problem regarding the application of EU law within a given time limit. Then, the Commission sets out its position on the infringement in the form of a reasoned opinion and determines the subject matter of any action, requesting the Member State to comply within a given time limit. If the Member State fails to fulfil its obligations at this stage, the Commission may refer to the European Court of Justice which opens the litigation phase. However, this does not deliver the Commission from its responsibility to ensure the application of EU law (Article 17 TEU).

## 2.3 Late evaluation process

The EU has committed to a 20% energy savings target for 2020 which is currently expected to be missed by about half. Yet, the Commission proposes a 'wait and see' approach and postpone the adoption of the only decision that can undoubtedly deliver expected results to 2014, i.e. only six years before deadline for the EU target.

If the Commission finds, in 2014, that the measures adopted following the EED Proposal cannot close the gap, the time left to change that trend might indeed be insufficient. Investment with a long-term perspective - such as deep renovation of buildings - which is essential to achieve a low energy society, takes time not only to put in place but also to deliver the savings.

Following the first reporting from the Member States on 30 April 2014, the Commission has to assess the progress made towards the 20% target.<sup>6</sup> This evaluation will inevitably take time and, if the results the Commission could submit a legislative proposal to the European Parliament and the Council in accordance with Article 294 TFEU. The usual timeframe for the adoption of an act following this procedure is about 12 months at first reading and 23 months if it goes to second reading. Another twelve months between the entry into force and the deadline for transposition would leave Member States, in the best case scenario, three years to the to put in place the necessary measures.

In the event that the Commission has to acknowledge the failure of the measures adopted following the Energy Efficiency Directive ('EED') and proposes mandatory national targets, it would imply an important revision process of the newly adopted policies in most Member States.

## 3. National reporting obligations

### 3.1 Structure and content of the reports

The EED Proposal requires two types of reporting from Member States: first, they have to submit reports annually reviewing the progress made towards national targets provided for in Article 3(1) of the EED Proposal. And, every 3 years, they have to present additional information on the implementation of the Directive. These 'supplementary reports' should contain information on national energy efficiency policies and action plans, programmes and other measures.

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<sup>6</sup> Article 19 (1-2) and (7) of the EED Proposal

### 3.1.1 Annual reports

The purpose of the annual reports is notably to provide a basis for monitoring the progress towards national energy efficiency targets for 2020.<sup>7</sup> Member States are also required to provide information on the other targets contained in the Directive, including a 3% target for public building renovation and 1,5% reduction of energy end use by energy suppliers.

Annual reports are particularly important in view of the evaluation to be carried out by the Commission in 2014. The reporting process should be as clear and comprehensive as possible to ensure that the Commission is able to assess whether the 20% target may be achieved under the existing provisions of the Directive. For that purpose, Member States shall draft their reports following a template provided by the Commission.

This template would not only facilitate the reporting obligations of Member States but also the Commission's evaluation process. On the one hand, a template ensures that Member States provide for at least a minimum required information and helps them to organise and present adequately the information that they have collected. On the other hand, the reviewing process is easier for the Commission if all national reports are presented following the same format.

### 3.1.2 Supplementary reports

#### Need for a compulsory template

The EED Proposal requires the Commission to issue a template for the supplementary reports but there is no obligation to follow the template. For the sake of comparing national measures and assessing whether the 20% target will be achieved by 2020, it would however make sense to require Member States to follow the template.

#### Need for a broader review

The requirements for the supplementary reports need to be amended to ensure that there is enough information so that the quality of the national pledges can be assessed with regard to whether the 20% target will be achieved. The following elements are particularly important:

- National energy efficiency targets should be expressed in Mtoe to reflect the projections of the Commission,<sup>8</sup>

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<sup>7</sup> See Annex XIV of the EED Proposal

<sup>8</sup> EU Commission, slides,  
[http://ec.europa.eu/energy/efficiency/eed/doc/2011\\_directive/20110622\\_energy\\_efficiency\\_directive\\_slides\\_presentation\\_en.pdf](http://ec.europa.eu/energy/efficiency/eed/doc/2011_directive/20110622_energy_efficiency_directive_slides_presentation_en.pdf)

- Primary energy savings should be detailed to show how much saving was achieved through end-use measures and how much through supply-side measures;
- Full details of the national scheme addressing the energy efficiency requirements in Article 6 should be required including measurements of savings expected and achieved;
- Full information on energy audits must be reported, including the savings achieved through audits and the follow-up measures taken nationally with regard to audits;
- Metering and informative billing as defined in Article 8 shall also be reported on; and
- Full information should be given on the certificates issued in certification schemes.

### Need for a follow-up of implementation

Member States should indicate how they will ensure the follow-up of the implementation of the measures taken following the EED Proposal. The following information are particularly important:

- whether and how local and regional authorities are involved in the preparation of plans and programmes;
- whether and how the public is involved in the preparation of plans and programmes following this Directive;
- how the public consultation was carried out for the preparation of this supplementary report;
- whether Member States have a monitoring system, including indicators for individual measures and instruments.

## 3.2 Basis of the evaluation

Given the time constraints for the evaluation of the Directive in view of the 2020 deadline and its importance for ensuring that the 20% energy savings target is met, the Commission should carry out this evaluation and submit it to the European Parliament and the Council even if all national reports are not yet available.

The evaluation can be conducted on the basis of estimations of what the final provisions can deliver as well as on the basis of those national reports that will be already available at the time. In addition, the Commission already has numerous information on the national energy efficiency targets and policies from the NEEAPs that have been submitted this year.

## 4. The legislative proposal

The EU has committed to increase its energy savings up to 20% by 2020 but is currently not on track to attaining it. If the Commission finds that the measures provided for in the final version of the Directive are not able to deliver such target, it would have to propose mandatory national targets. This is in line with the Energy Efficiency Plan ('EEP') where the Commission affirmed that "*[i]f the 2013 review shows that the overall EU target is unlikely to be achieved, then as a second stage the Commission will propose legally binding national targets for 2020.*"

In the current proposal, the statement that a legislative proposal will follow "*if appropriate*" is not sufficient to guarantee that the Commission will propose binding national targets to achieve the 20% energy savings target by 2020. Hence, this wording should be deleted and the Directive shall set out a clear obligation to make proposal if the result of the Commission's assessment is that the Union's target is not on track.

However, if the legislative proposal is submitted at a late stage, the Union's target is unlikely to be achieved because Member States would not have enough time to implement the binding targets. In order to ensure that that process is carried out as promptly as possible, the EED Proposal should contain a deadline for the Commission to submit a legislative proposal to the European Parliament and the Council.

## 5. Timing of the two step approach

The deadline for the second step of the Commission's proposed approach is set on 30 June 2014. At this date, the Commission should submit the assessment of whether the Union is likely to achieve its 20% energy savings target by 2020. As explained above, an evaluation taking place in 2014 would undermine the ability of the two step approach to deliver any results.

### 5.1 Evaluation of the Directive

The 2011 Energy Efficiency Plan prepared by the Commission declared that "*[i]n 2013, the Commission will provide an assessment of the results obtained and whether the programmes will, in combination, deliver the European 20% objective.*"<sup>9</sup> This statement followed the European Council's presidency conclusions of 4 February 2011 which required the Commission to review the implementation of the EU energy efficiency target by 2013 and consider further

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<sup>9</sup> 2011 Energy Efficiency Plan, p. 3

measures if necessary.<sup>10</sup> Following that, the deadline for the Commission's evaluation shall be move from 2014 to 2013.

In the event that the Commission acknowledges the failure of the current framework, Member States would need to quickly react and redress the situation. The later the revision takes place, the more difficult it will be to revise policies that have just been or are about to be adopted at national level.

## **5.2 Submission of national reports and plans**

### **Annual and supplementary reports**

The first annual and supplementary reports prepared by Member States will have a particular importance as they shall serve as the basis for the assessment to be conducted by the Commission. If the assessment is to be submitted on 30 June 2013, the national reports must also be submitted at an earlier date. The Commission's proposal fixed a month period between the submission of the Member States' reports and the Commission's assessment. Therefore, ClientEarth proposes that the first national reports be required for 30 April 2013.

In terms of the content of the national reports, Member States will highly benefit from the work they have already performed to write two NEEAPs - the last had to be notified on 30 June 2011. In particular, they already set an energy savings target, adopted measures and monitored the progress towards achieving it.

Moreover, given our proposal that the Commission carries out its evaluation even in the absence of certain national reports, forwarding the deadline for the submission of those reports does not threaten the evaluation process.

### **Energy transmission and distribution plans**

Article 12(2) of the EED Proposal requires Member States to adopt, by 30 June 2013, plans assessing energy efficiency potentials and identifying concrete measures along with a detailed timetable for introduction of those measures. These plans will be particularly important for the assessment to be carried out by the Commission following Articles 3(2) and 19(7) and shall therefore be expressly referred to as the basis for the Commission's evaluation.

The EED Proposal requires that the plans be adopted by 30 June 2013. However, in order to allow the Commission to assess those reports in view of its evaluation of the achievement of the EU 20% energy savings target, they shall be adopted at an earlier date. ClientEarth proposes the new deadline to be on 31 March 2013 which is in line with the proposed new date for the submission of the supplementary reports. Indeed, the first reports have to contain

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<sup>10</sup> European Council Conclusions, Brussels, 4 February 2011, EUCO 2/1/11 REV 1, p. 3

the plans referred to in Article 12(2) of the EED Proposal which should therefore be adopted prior to the reports.<sup>11</sup>

## 6. Other concerns

### 6.1 The monitoring of impacts on other EU climate policies

The EU has committed to a number of climate goals, including 20% reduction of greenhouse gas emissions. Improving energy efficiency will contribute towards achieving that goal. As the June 2011 Energy Council stated, "*improved energy efficiency throughout the whole energy system will make a major contribution to the EU's wider goals of a competitive low-carbon economy, a more sustainable use of natural resources and security of energy supply.*"<sup>12</sup>

The EED Proposal acknowledges this in Article 19(5), stating that the Commission will monitor the effect of energy efficiency improvements on 3 Directives setting out some of Europe's climate goals:

- the Directive on the Emissions Trading System<sup>13</sup> (Directive 2003/87/EC),
- the Directive increasing the share of renewable energy in Europe's energy mix<sup>14</sup> (Directive 2009/28/EC) and
- the Energy Performance of Buildings Directive<sup>15</sup> (Directive 2010/31/EC).

This is an important process which should be reinforced in two ways. On the one hand, this monitoring should not only take place once the EED is implemented in the Member States and

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<sup>11</sup> Annex XIV, Part 2, point 3.6 of the EED Proposal

<sup>12</sup> Council conclusions on Energy Efficiency Plan, 3097<sup>th</sup> Transport, Telecommunications and Energy Council; Luxembourg, 10/6/11, p.1.

<sup>13</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC; OJ L 275, 25/10/2003, p.32, as amended.

<sup>14</sup> Directive 2009/28/EC 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 L 140, 5/6/2009, p.16.

<sup>15</sup> Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast); OJ L 153, 18/6/2010, p. 13.

its effects have already appeared but also prior to the deadline for transposition of the Directive. We propose therefore that the Commission assesses the impacts of the EED on other EU climate legislation no more than six months after entry into force of the new energy efficiency directive.<sup>16</sup>

On the other hand, it is to be noted that an improvement in energy efficiency will also affect the achievement of the goals under the Effort Sharing Decision.<sup>17</sup> That piece of legislation should also be considered for the monitoring of the EED following this provision.

## 6.2 Transparency

ClientEarth welcomes the requirement contained in Article 19(3) of the EED Proposal aiming at ensuring that the national reports are made publicly available. This transparency obligation should also secure the participation of the public.

Public participation is indeed of major importance for increasing the accountability and transparency of the decision-making process. Directive 2003/35/EC on public participation,<sup>18</sup> which implements certain obligations of the Århus Convention,<sup>19</sup> requires that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes relating to the environment.

Under the EED Proposal, Member States have to ensure the adoption of a number of plans: public authorities are encouraged to adopt energy efficiency plans by following Article 4(4); Member States shall establish national heating and cooling plans under Article 10(1); and finally plans shall be adopted to assess the energy efficiency potentials of the Member States' gas, electricity and district heating and cooling infrastructure, and identify concrete measures

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<sup>16</sup> There is a period of 12 months between the entry into force and the deadline for transposition in the Member States (Article 22 of the EED Proposal)

<sup>17</sup> Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020; OJ L 140, 5/6/2009, p.136.

<sup>18</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of its plans relating to the environment, OJ L 156, 25.6.2003, p. 17

<sup>19</sup> Energy efficiency shall be considered as a matter falling under the definition of environmental related issues. Indeed, the Århus Convention defines environmental information as: "*any information in written, visual, aural, electronic or any other material form on: [...] b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes [...].*"

and investments (Article 12(2)). All interested parties must therefore be allowed to participate in the elaboration of those plans and have access to them once they are elaborated.

### Proposal for amendments

*ClientEarth proposes that Recital (39a) (new) be inserted in the Preamble:*

"(39a) (new) Stakeholders, as well as the general public, should have the opportunity to participate in the drawing up of the plans and programmes, and should have access to them once drawn up, in line with Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of its plans relating to the environment (1).

(1) OJ L 156, 25.6.2003, p. 17."

*ClientEarth proposes that Article 19(10) be amended to the following:*

"Member States shall ensure the active involvement of all interested parties in the implementation of this Directive, in particular the development and implementation of plans and programmes referred to in this Directive. They shall place them on a publicly available website. Upon request, access shall be given to all background documents.

The Commission shall make the reports referred to in paragraphs 1 and 2 publicly available."

## 7. Conclusion

The Commission's proposal for an Energy Efficiency Directive sets out a two-stage approach whereby national targets should first be set and measures adopted following the Directive by Member States. In a second phase, the Commission would evaluate whether those targets and measures are able to achieve the Union's 20% savings target by 2020, and would decide on the appropriateness of proposing amendments to the Directive.

This approach is too weak and unsatisfactory in many aspects: first, the evaluation is essentially based on national reporting but experience shows that there is an important risk that Member States do not report on time or provide incomplete information. Moreover, there is uncertainty whether the Commission will submit a legislative proposal following an evaluation of the Directive that shows that the EU 20% target cannot be attained. Finally, the evaluation process and the submission for a legislative proposal are taking place too late.

ClientEarth believes that introducing binding national targets at this stage would be the most effective way forward. In the absence of political agreement, a number of amendments should be introduced to remedy the problems of this approach.

The Commission should develop templates for both the annual and supplementary reports which shall be obligatory allowing better reporting by Member States and better use of the reports by the Commission. In any case, the Commission's evaluation of the EED should be carried out even if not all national reports are available.

Furthermore, the Commission should be required to submit a legislative proposal if the evaluation of the Directive is negative. That proposal should be submitted to the European Parliament and the Council by 31 January the latest.

Finally, the first reports and the following evaluation should take place a year before what is currently proposed in the EED Proposal, i.e. in 2013 instead of 2014, as originally required by the European Council.

Two additional concerns are addressed in this briefing: firstly, the monitoring of the impacts of the EED on the climate legislation shall take place at an early stage in order to anticipate possible negative effects. Secondly, the principle of transparency should be increased by expressly recognising the right to public participation and access to all plans to be developed under the EED.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice

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