

## EXPLANATORY MEMORANDUM

Ladies and Gentlemen,

Russia's invasion of Ukraine has exacerbated the various energy challenges facing the European Union, to the point where some Member States are almost implementing a real war economy. As a result of the sanctions adopted against Russia, an essential supplier for Europe, energy prices, which were already on the rise at the beginning of the summer of 2021 with the economic recovery that followed the Covid-19 crisis, have soared, reminding us even more acutely of the issues of energy security and sovereignty to which all European countries must urgently provide answers. The Ukrainian conflict has particularly highlighted the vulnerability and dependence of European economies on Russian gas, coal and oil supplies. According to the latest Eurostat data, in the first half of 2021, more than 48 % of gas imports, 45 % of coal imports and more than 25 % of oil imports into the EU came from the Russian Federation. However, the level of dependence of each Member State varies greatly. For example, Russian gas accounts for only 17 % of total gas imports for France, compared to over 75 % for ten Member States<sup>1</sup>.

- *Energy sovereignty and security become EU priorities*

Energy sovereignty and security issues, linked to the geopolitical situation, have continued to dominate the European agenda in the first half of 2022, during which the EU adopted six packages of sanctions against Russia, including a ban on all coal imports from Russia by August and on 90 % of oil imports from Russia by December. These issues are made more acute by Russia's decision to cut gas supplies to Europe, with the risk of supply disruption if Russian exports are completely cut off. This is why new measures were announced by the European Commission on 20 July 2022, including a 15 % reduction in EU gas consumption.

At the Versailles Summit on 10 and 11 March, the EU Heads of State or Government invited the European Commission to propose, by the end of May 2022, a REPowerEU plan to make the EU independent of Russian fossil fuels.

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<sup>1</sup> Austria, Bulgaria, Czech Republic, Estonia, Finland, Hungary, Latvia, Romania, Slovakia, Slovenia.

Presented on 18 May by the Commission, this plan is based on three axes : energy savings, diversification of supply and energy transition. It aims to respond to the consequences of the war in Ukraine on the energy market, to put an end to European dependence on Russian fossil fuels and to limit the rise in energy prices. The European Commission Vice-President, Frans Timmermans said : *“we will first of all reduce our imports of Russian gas to one third already this year, and then working towards 2027 reduce our dependency to zero, if all works well”*. The European Commission estimates that the plan will save the EU almost €100 billion per year in fossil fuel import costs. In addition, almost €300 billion should be mobilised by 2030 for its implementation.

In the context of the interparliamentary conference on the EU's strategic economic autonomy, held in the Senate on 14 March 2022, as part of the French Presidency of the European Union (FPEU), the Senate's Economic Affairs Committee supported this European mobilisation; The French Presidency of this conference also published conclusions proposing to *“accelerate the implementation of the exit of European economies from fossil fuels, as provided for in the "Fit for 55" package”, “adopt a European strategy to secure the supply of strategic metals for the energy transition, and “to urgently limit the dependence of European economies on imports of hydrocarbons, in particular gas, and strategic metals, in particular aluminium, nickel, palladium and titanium, from Russia”*.

- *The answer: the REPowerEU plan, even more ambitious than the "Fit for 55" package*

The REPowerEU plan provides for a set of measures to support the Union's energy policy objectives concerning the acceleration of the deployment of renewable energies, the reinforcement of energy efficiency, the consolidation of the security of electricity and gas supply, the establishment of a joint gas purchase mechanism, and additional financing under the Recovery and Resilience Facility (RRF). The reform of the European electricity market, with discussions on the revision of the marginal cost principle, and the reform of the European carbon market are also under discussion.

The transition to carbon-neutral energy sources and the acceleration of energy efficiency offer levers to move away from dependence on Russian fossil fuels and to ensure the security of the EU's energy supply.

As part of this plan, several legislative initiatives are proposed to increase the European Union's ambitions in terms of energy transition. The main thrust is to raise the renewable energy and energy efficiency targets set out in the 2018 and 2012 directives respectively, which were already increased in the Fit for 55' package. The plan is also accompanied by other initiatives, including a

working document on investment needs, targets for accelerating the development of the hydrogen market, a bio-methane action plan, a dedicated EU solar strategy to double solar photovoltaic capacity by 2025 and a recommendation on authorisation procedures for renewable energy.

- *The proposal for a Directive COM(2022) 222, part of the REPowerEU plan focusing on RES and energy efficiency*

The proposal for a directive COM(2022) 222 of the European Parliament and of the Council, published on 18 May and resulting from the REPowerEU plan, aims to revise three directives whose recasting or modification is already proposed in the "Fit for 55" package, currently being negotiated: Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency. The concomitance of the two procedures for revising the same directives is quite unprecedented: it demonstrates the extent to which recent events are shaking up the Union, to the point of forcing it to revise its objectives even before they have been definitively set.

As part of this package, published on 14 July 2021, which aims to implement the European climate law in order to reduce net greenhouse gas emissions by at least 55 % by 2030, the European Commission has proposed, among other things, a revision of the 2012 directive on energy efficiency to raise the target for reducing primary and final energy consumption to 39 % and 36 % respectively by 2030. It also proposed raising the EU-wide target for the share of energy from renewable sources in final EU consumption to 40 % by 2030.

The negotiations on the "Fit for 55 target" package took place under the French Presidency. During these negotiations, the choice was made to set aside the new targets proposed in the REPowerEU plan, so as not to compromise and delay the adoption of compromise positions in the Council. Only an item on the permitting procedures for renewable energy projects was included in the discussion. General guidelines were thus adopted at the meeting of energy ministers on 27 June 2022 on the proposals for directives on renewable energy and energy efficiency, without introducing at this stage the higher targets advocated by the present proposal, submitted to the Senate under the subsidiarity check. The plenary vote in the European Parliament on these two texts should take place in September. The trilogues will then be able to begin and will allow these new objectives to be debated. Discussions on the recast of the 2010 directive on the energy performance of buildings, proposed later by the Commission, on 15 December 2021, as part of the "Fit for 55" package, also began under the French Presidency and were the subject of a progress report at the Energy Council of 27 June.

In order to accelerate the deployment of renewable energies and energy efficiency in the European Union, in the current geopolitical context which requires us to reduce our dependence on Russian fossil fuels, several very ambitious measures were therefore proposed by the European Commission on 18 May.

With regard to the Directive on the promotion of the use of energy from renewable sources, this proposal amends several provisions and inserts new articles in order to :

- increase the Union's renewable energy target in 2030 from 40 % to 45% ;
- oblige Member States to identify renewables go-to areas and to set up these areas;
- simplify and shorten the administrative permit-granting process ;
- requiring Member States to encourage the testing of new renewable energy technologies.

Regarding the Energy Efficiency Directive, the proposal proposes to strengthen it by increasing the EU's energy consumption reduction target from 9% to at least 13% by 2030, compared to the 2020 reference scenario.

Finally, the Commission's initiative is accompanied by a legislative provision to insert a new Article 9a on solar roofs in the Energy Performance of Buildings Directive. In order to develop the integration of solar energy in buildings, it asks Member States to ensure the deployment of solar installations on public and commercial buildings with a useful floor area of more than 250 m<sup>2</sup> by 31 December 2026 for new buildings and by 31 December 2027 for existing buildings, as well as on all new residential buildings by 31 December 2029. Member States should also define the criteria for the implementation of these obligations and provide for possible exemptions for certain types of buildings, " *in accordance with the assessed technical and economic potential of the solar energy installations and the characteristics of the buildings covered by this obligation* ". This measure is intended to contribute to the Commission's objective of having more than 320 GW of solar PV capacity in the EU by 2025 and almost 600 GW by 2030.

- *The Commission's voluntarism undermines the principles of subsidiarity and proportionality*

Without denying the importance and the role of renewable energies in the energy and climate transition, it can be observed that several measures adopted by the Commission appear particularly voluntarist and question the realistic and timely nature of their implementation in the current geopolitical context. Furthermore, by imposing technological preferences for certain energy sources at EU level, the Commission neglects national specificities, particularly in terms of the energy mix and the adaptation of the structure of Member States' energy systems to the challenges of decarbonisation.

Similarly, without calling into question the carbon emission reduction objectives and the trajectory drawn up by the European Union, one must question the choice made by the Commission to raise certain objectives even further, more particularly the one relating to renewable energies, the raising of which was already proposed by the "Fit for 55" package, rather than securing their achievement, in view of the diversity of the initial situations of each Member State in the energy field.

However, Article 5 of the Treaty on European Union stipulates that the Union may intervene, in accordance with the principle of subsidiarity, only "*if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*". The principles of subsidiarity and proportionality are inseparable. According to these principles, the rules proposed by the Commission must leave Member States sufficient room for manoeuvre to achieve the objectives set for the climate and energy transition, while respecting the specificity of their energy mix and the current degree of decarbonisation of their energy production.

The compliance of the proposed directive COM(2022) 222, as presented, with the principles of subsidiarity and proportionality seems questionable in this respect.

- *The EU's energy policy, a competence shared with the Member States and precisely defined by the Treaties*

In order to provide a legal basis, via this text, for a new revision of the three directives mentioned above, the European Commission invokes two legal bases:

- Article 194(2) of the Treaty on the Functioning of the European Union, which defines the EU's competences in energy matters. It provides that the

Union may act, in "*a spirit of solidarity between Member States*", to ensure the functioning of the energy market and the security of energy supply, to promote energy efficiency and energy saving as well as the development of new and renewable forms of energy and the interconnection of energy networks. However, measures taken at Community level shall not affect Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply;

- Article 192(1) of the Treaty on the Functioning of the European Union, which lays down the procedures for the adoption by the European Union of regulations with a view to achieving the Union's objectives in the environmental field.

Since the Treaty of Lisbon, these specific provisions clearly define the framework for EU intervention in energy matters and provide for the ordinary legislative procedure for such intervention.

Article 194 is therefore limited to defining the general objectives of the Union's energy policy and provides for shared competence between the EU and the Member States in the service of these objectives, without prejudice to the right of a Member State to decide on its energy mix and to choose the technologies used. This right, which recognises the energy sovereignty of States, also requires the EU to guarantee technological neutrality between processes or technologies. It has been recalled on several occasions by European leaders. At its meeting on 19 December 2019, the European Council concluded, in the context of achieving the objective of climate neutrality, that it was aware "*of the need to ensure energy security and to respect the right of Member States to decide on their energy mix and to choose the most appropriate technologies*". This principle has, moreover, been included in the EU's "*Long-term Low-Greenhouse Gas Development Strategy*", notified on 6 March 2020 to the United Nations Framework Convention on Climate Change (UNFCCC).

European energy policy must be in line with these treaty provisions. It must therefore guarantee the competence of Member States to choose the energy mix and ensure technological neutrality. Respecting technological neutrality is particularly important for countries that already have a highly decarbonised electricity production: diversification objectives that are not adapted to the very structure of their energy system cannot be imposed on them. The exit from fossil fuels is indeed an undisputed priority for the EU, which has taken on its full dimension with the Ukrainian crisis, but European energy policy must take account of all low-carbon energy sources. In this respect, nuclear energy and low-carbon hydrogen are alternatives that must be integrated into the choice of energy mixes that is the responsibility of each Member State.

In its resolution on the inclusion of nuclear energy in the green taxonomy, adopted on 7 December 2021, and that on the "Fit for 55" package, adopted on 5 April 2022, the Senate has already recalled the need for European energy legislation to be technology-neutral, with targets and standards adapted and proportionate to the different mixes of Member States.

The adoption of measures by the Union in the field of energy must therefore respect a balance that ensures room for manoeuvre for the Member States. Consequently, the objective of “*speeding up the phase-out of EU’s dependence by increasing the availability of affordable, secure and sustainable energy in the Union*”<sup>2</sup> cannot be understood without taking into account all decarbonised energy sources and cannot legitimise the setting of too high a share of renewables in energy consumption, as this would lead to calling into question the free choice of Member States to determine their energy mix.

- *Incomplete legal basis and lack of impact assessment*

It should also be noted that Article 194 TFEU, in its paragraph 2, inserts a reservation according to which the EU will not be able to intervene in the choice of Member States in relation to their sources of energy supply, except by unanimity and for environmental reasons<sup>3</sup>, this strengthens the energy sovereignty of the Member States in this area. However, it appears that the European Commission has not expressly chosen Article 192(2)(c) as the basis for its proposal and that the text presented is subject to the ordinary legislative procedure. However, in a judgment of 7 March 2013, the General Court of the EU held that this article is likely to be the applicable legal basis since the measures indicated in the act fall under point (c)<sup>4</sup>. Consequently, the procedure chosen by the Commission for the adoption of this proposal appears contentious and does not leave sufficient flexibility to Member States in the exercise of their energy sovereignty.

Furthermore, this proposal, which the European Commission considers necessary and politically sensitive, has not been the subject of any impact study on its added value, particularly in terms of reducing greenhouse gas emissions, nor on its feasibility, nor finally on its compliance with the principle of subsidiarity. However, the effort required of certain Member States in terms of deploying renewable energies in order to collectively reach the target of a 45% share of renewable energies in the EU's energy consumption, compared to 1990

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<sup>2</sup> Recital 3 of the proposal for a directive COM(2022) 222 of 18 May 2022.

<sup>3</sup> Unanimity is thus required in the Council for “*measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply*” (Article 192(2)(c)).

<sup>4</sup> Judgment of 7 March 2013, Poland v Commission, T-370/11, paragraph 18).

levels, is considerable. This share reached 22% in 2020 at EU level, 2 percentage points higher than the 20% target set by the 2009 directive. With the exception of France, all Member States have met or exceeded their national 2020 target under the Directive. In order to reach the 20% EU-wide target, each Member State set itself a binding target, which differed from one national context to another. On this basis, the European Union was to achieve a target of more than 33.1% of renewable energy by 2030. However, the effort requested by the Commission, in application of the REPowerEU plan, is almost 12 points higher, which implies a level of investment, between now and 2030, equivalent to what has been achieved over the last thirty years. It therefore seems disproportionate to the existing overall structure of energy supply in Member States.

Similarly, with regard to the objective of the text, which is to be part of the Green Pact for Europe, no assessment of the carbon impact of the technologies required for the development of renewable energy has been carried out. Many of these technologies are produced outside Europe under conditions that are not very environmentally friendly and their importation requires carbon-emitting transport. In a report published on 7 July, the International Energy Agency (IEA) indicated that the world will depend almost entirely on China for the production of solar panels until 2025. For France, the Energy Regulation Commission (CRE) has evaluated the share of winners of calls for tenders for photovoltaic systems in which one of the manufacturing stages is French or European at only 17% in 2019<sup>5</sup>.

While considering the interest of installing solar panels on buildings in terms of available surface area and installation conditions, it is important to question the risk of encouraging new European dependencies on non-European suppliers of such panels. Furthermore, in the absence of an impact analysis, the threshold retained by the Commission for the deployment of these installations on new and existing buildings is not justified. However, this provision tends to replace an obligation of means with an obligation of results - which was to ensure that all structures built from 2030 onwards are zero-emission - and therefore amounts to imposing technological choices on Member States. The decision to achieve this by installing solar panels must remain an option. The European Commission's proposal therefore does not respect the principle of technological neutrality as laid down in the TFEU.

Consequently, several provisions proposed by the Commission appear disproportionate to the objectives of reducing dependence on imported fossil

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<sup>5</sup> Senate Information Report No. 553 (2021-2021), Where is the application of the "Energy-Climate" law? Where is the "carbon neutrality" objective, by Daniel Gremillet, on behalf of the Committee on Economic Affairs, 5 May 2021, p. 48.



fuels and reducing CO2 emissions, and infringe on the sovereignty of the Member States in determining the general structure of their energy supply.

For all these reasons, the Senate's Committee on European Affairs considered that the proposed directive did not respect the principles of subsidiarity and proportionality. It therefore adopted the following motion for a European resolution containing a reasoned opinion:

**European draft resolution delivering a reasoned opinion on the compliance with the principle of subsidiarity of the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final**

- ① The proposal for a Directive of the European Parliament and of the Council of 18 May 2022, COM(2022) 222 final, is the legislative translation of the REPowerEU plan presented by the European Commission on 18 May 2022 and aims to amend Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency. The recast or amendment of these texts is already being discussed in parallel as part of the "Fit for 55" package.
- ② The aim of this proposal for a directive is to accelerate the deployment of renewable energies, reduce energy consumption and increase energy efficiency in the European Union (EU), in particular to rapidly reduce Europe's dependence on Russian fossil fuels. To this end, it is planned to:
  - ③ - increase the EU's 2030 target for renewable energy in final consumption from the current 40% to 45%;
  - ④ - raise the 2030 target for energy efficiency to at least 13%, compared to the 2020 reference scenario;
  - ⑤ - accelerate the deployment of renewable energy projects by defining go-to areas and speeding up permit-granting process for installations;
  - ⑥ - developing solar energy in new and existing buildings.
- ⑦ Having regard to Article 88-6 of the Constitution,
- ⑧ Having regard to Rule 73 *octies* of the Rules of Procedure of the Senate,

- ⑨ The Senate makes the following observations:
- ⑩ - the geopolitical context arising from the war in Ukraine and the Union's heavy energy dependence on the Russian Federation urgently reinforce the more global need to guarantee the energy sovereignty and security of all Member States; for this reason, the objectives of the REPowerUE plan, which are capable of guaranteeing this sovereignty, while respecting technological neutrality, deserve full support;
- ⑪ - according to the Treaties, the European Union's policy in the field of energy aims, in a "*spirit of solidarity*", to ensure the functioning of the energy market and the security of supply of the Member States as well as to promote energy efficiency and to develop new and renewable forms of energy; However, since energy policy is a matter of shared competence between the Union and the Member States, it is necessary to examine whether the objective of the proposed action can be better achieved at Community level and whether the intensity of the action undertaken does not go beyond what is necessary to achieve the objectives which that action is intended to attain;
- ⑫ - however, the lack of an impact assessment of the proposal for a Directive of the European Parliament and of the Council of 18 May 2022, COM(2022) 222 final, makes it impossible to evaluate the proportionality of the proposed measures with regard to the objectives defined, the deadlines set and the technological choices made; No indication is given as to the contribution of renewable energy sources to the reduction of greenhouse gas (GHG) emissions and therefore as to the contribution of these measures to the objectives of the Green Pact for Europe, even though the investment efforts required of the Member States are considerable and raise questions as to the realistic nature of the implementation of the Commission's proposals; the Commission has therefore not sufficiently demonstrated the added value and proportionality of the European measures it is proposing with regard to the objectives of the energy and climate change transition ;

- ⑬ - the strengthening of the target for the share of renewable energy in the EU's final consumption to a high level and the envisaged obligation for solar installations on built structures tend to call into question the right, guaranteed by Article 194(2) of the Treaty on the Functioning of the European Union (TFEU), of a Member State to determine its choice between different energy sources and the general structure of its energy supply; these measures do not take sufficient account of national specificities, with regard to the composition of the energy mix and the current degree of decarbonisation of energy production in the various Member States; they imply an excessive constraint in the determination of the energy mix and take insufficient account of all decarbonised energies, such as nuclear energy or low-carbon hydrogen, as well as of the capacities for innovation in this sector; they tend to restrict the conditions for the exercise of Member States' sovereignty in the field of energy and are therefore not in conformity, as such, with the principles of subsidiarity and proportionality ;
- ⑭ - the European Commission justifies its intervention on the basis of Articles 192(1) and 194(2) TFEU, without referring to Article 192(2)(c), which provides for a unanimous Council decision to take measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply in the field of the environment; Consequently, the legal basis chosen by the Commission and the decision to use the ordinary legislative procedure do not authorise it to propose that the European Union take such measures which significantly affect Member States' choices between different energy sources and the general structure of their energy supply;
- ⑮ - the obligation to install photovoltaic panels on public and commercial buildings as well as on new residential buildings fails to respect the principle of technological neutrality, which was nonetheless recalled by the European Council on 19 December 2019 with regard to devices used to contribute to the decarbonisation of the economy; this measure amounts to expressly ruling out other renewable or low-carbon technological solutions; It thus substitutes an obligation of means for an obligation of results in terms of GHG emissions, initially provided for in the context of the recast of the directive on the energy performance of buildings; moreover, it risks leading to a situation of dependence of the EU on non-European production, given the deadlines imposed for its implementation;
- ⑯ The Senate therefore considers that the above-mentioned proposal for a Directive of the European Parliament and of the Council COM(2022) 222 final does not respect the principles of subsidiarity and proportionality.