

5 ideas to improve governance in the Effort Sharing Decision

Tips for a consistent 2030 climate legal framework

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1. Context

The European Commission will propose a review of the Effort Sharing Decision (ESD) mid-2016. The ESD covers more than half of EU's greenhouse gas emissions and is the EU's carbon budget for the transport, building and agriculture sectors, among other smaller sectors. This carbon budget needs to be embedded in a robust legal framework that ensures that the 2030 targets are delivered in the real world, and puts these sectors on a pathway to complete decarbonisation in line with the Paris climate agreement.

As a carbon budget, setting a cap on overall emissions for the sectors covered, the ESD will be a key driver for EU and national measures (for example, vehicle standards, energy efficiency) that help to achieve the targets. It will also drive major investments in clean technology and boost investment and growth.

It is critical that the 2030 ESD delivers real-world GHG reductions of at least 30%. The importance of providing adequate flexibility, while not introducing loopholes that undermine the environmental and economic benefits of the ESD, is discussed in this [Carbon Market Watch](#) briefing.ⁱ

However, it is equally important to transform the current ESD into an instrument that is "Paris proof". The review of the 2030 ESD provides a unique opportunity to lay the foundation of a climate governance regime that is robust enough to accommodate the increased ambition the Paris agreement requires. This briefing discusses five new ideas to improve ESD governance. It builds on a new report by Ecologicⁱⁱ and the various experiences in EU member states but also on existing EU legislation and practice.

2. Five ideas to improve governance in the ESD

2.1. Make the ESD "Paris proof"

The Paris agreement represents a milestone in the development of global climate governance with fundamental implications for the nature and quality of EU GHG governance – in particular the ESD. However, it also falls short of what's needed to limit global warming to below 2°C. With current commitments, we are moving towards 3°C warming. This is why the agreement includes a review of the ambition every five years. This means the EU's ambition for 2030 will likely need to be revised during the 2020-2030 period. In addition, we must not repeat the mistakes of the Emission Trading System, where a huge surplus was accumulated, in part because of the inflexibility of the system and its inability to respond to changing circumstances.

Paris-compatible climate governance requires a regime with an long-term perspective and a binding mechanism to ensure the EU adopts a sufficient increase in emission reduction ambition every five years to make a fair and proportionate contribution to getting to 'well below 2°C'. The ESD is a key pillar of the EU's GHG emission reduction regime but as currently designed, lacks both of these core governance features.

Therefore, the revised ESD must:

1. Create a governance regime with an explicit 2050 perspective
2. Contain a binding target review and adjustment mechanism every five years.

If the ESD itself does not contain these governance features, it is essential that they are enshrined elsewhere in EU climate law – potentially in an entirely new economy-wide instrument.

Furthermore, it is essential that the EU's target adjustment mechanism would enable the EU to upwardly adjust the EU's 2050 target in the case of a new, even more ambitious global agreement. Similarly, if overall ambition increases at the EU level, but the allocation of ESD allowances is not altered immediately, it is essential that the revised ESD should not become a victim of the same accumulating surplus that has eroded the operation of the ETS.

The target review and adjustment mechanism should therefore consist of two key elements:

1. It should be automatically triggered in case there is a global agreement to increase GHG mitigation ambition. In practice it means that the European Commission will be obliged to review the ESD target and present a legislative proposal to increase its ambition. Including a 'trigger clause' should be considered as the very minimum.
2. An increase in ambition, for example from -30% to -40% reduction compared to the base year of 2005, would also require changes to the national targets. This affects the burden sharing agreement between member states and could slow down the review process significantly. One solution is the inclusion of a pre-established formula to tighten the national targets automatically. This formula could be linked to the overall EU target, different levels of income per capita and cost effectiveness. In this case a review of the overall EU targets would automatically lead to modified national ESD targets based on that pre-agreed formula.

2.2. Effective compliance mechanisms

The Achilles heel of many EU initiatives is weak national compliance and ineffective enforcement at both EU and national level. The Volkswagen affair is just one florid example of how the rule of EU law has been fundamentally undermined by poor enforcement.

The current ESD legislation already includes a mechanism to deal with non-complying member states. If a member state does not meet its intermediate targets, the year after they will need to surrender 8% more than the not-surrendered allowances. That member state would also need to present a plan to get back on track. Ultimately the Commission could take a member state to the European Court of Justice. The effectiveness of these rules has not been tested. The main reasons are that the 2020 target (-10%) is unambitious (translating into almost all member states achieving their targets) and that member states can use cheap international offsets to meet the targets in case of need.

However, the situation will be different after 2020. The 2030 target is in principle more demanding and there will be no more access to cheap international credits. While the targets are achievable and cost-effective (for example, energy efficiency in vehicles, buildings) they will be beyond business as usual. The ESD framework should therefore be robust enough to ensure all member states undertake action, including those with climate sceptic governments.

The current compliance rules are not fit for the 2021-2030 framework. Let's take the example of a member state that is likely to miss its target for 2025 based on their ESD allocation. It is likely it will be able to carry forward 5% of its obligations – ie, it will do less this year, but more the year after, if similar rules are applied in the next ESD. If in 2026 a similar problem is faced, it could again do the same. It is only in 2030 that this member state would really be obliged to fully meet its target. In the worst case – if the exceedance is larger than 5% – a member state's excess emissions would be multiplied by 1.08 for the next year, as long as it is

not buying allowances from other member states. But as such that doesn't have serious consequences until 2030, when they would not be able to carry forward to future years.

However, the Commission can only assess compliance in 2031 when the monitoring data become available. It could then take the non-compliant member state to court. The average duration of direct proceedings against member states take more than 20 months. Appeals take at least 12 months on top of that. That means a final verdict and possible fines would be imposed only in 2034. That's almost half-way into a possible new-commitment period up to 2040.

Member states regularly breach EU legislation, including in the field of climate policy. For example, a number of member states face problems meeting the Renewable Energy Directive's targets. But they are not using – or apparently planning to use – existing intra-member state flexibilities. In part, that's because governments are just not convinced non-compliance in 2020 would be a very big problem. The Energy Efficiency Directive and the ESD are considered by legal experts to be even weaker when it comes to compliance mechanisms.ⁱⁱⁱ

The 2030 ESD is one of the two key pillars put in place to underpin the European low-carbon transition (the other being the ETS). If the EU wants to lead global climate action, its own efforts must be credible. A number of member states failing to comply with the 2030 ESD targets would set a very bad example – but even more so, a weak enforcement response by the Commission which undermines the deterrent effect, encourages free-riding and weakens any incentive to comply. It is therefore essential to strengthen ESD governance now, so that when the ambition is increased the EU has a climate instrument that can cope with this.

A strengthened compliance framework consists of 4 key elements:

1. The revised ESD or the EU's new Energy Union/2030 'governance instrument' should contain a robust national climate plan making obligations for 2030 and 2050. At present there is no obligation on member states to set out clearly their decarbonisation plans to meet the 2030 target. Although the monitoring and reporting regulation (MMR)^{iv} contains a 2050 economic decarbonisation planning process, it is weak and ineffective. The plans we propose play a key role in: signalling credible implementation intention; enabling the Commission to evaluate likely implementation barriers and to provide early assistance; and perhaps most importantly of all, providing strategic certainty to investors thus unlocking least-cost investment in the abatement process.
2. Reporting plays a separate and important role in governance. Keeping the actual annual reporting is essential to monitor and assess the progress of individual member states towards their annual targets. Biennial submissions of projections and measures maintain the transparency of the system. Both requirements need to be kept in the 2030 legislation – whether in the ESD itself or in the new governance instrument.
3. A strengthened compliance framework should also be complemented by a monetary penalty (which could replace the allowance surrendering increase of 8%). This is already the case in the EU Emissions Trading System (EU ETS) where fines are currently set at 100€/tonne. It is also how the car CO₂ legislation works. Non-compliance results in a fine of €95 per gram per car. In the ESD, the fines should be set at least the level of the average marginal cost of reducing emissions within the ESD. That means a member state would always prefer to take domestic action or explore intra-EU flexibilities. The fines could either kick in in 2030 but ideally already apply – possibly in a reduced manner – to intermediate targets.

4. The Commission's role in supervising non-compliant member states should be enhanced. Currently a non-compliant member state only needs to present a 'corrective action plan'. The Commission may issue an opinion on this plan. To strengthen this procedure the Commission should be authorised to take action against the member state in question, if the corrective action plan is inadequate. Procedures could be similar to those adopted as part of the European Semester.
5. Access to flexibilities that have the potential to weaken the target (loopholes) should be made even more conditional. Currently, the ESD incorporates several flexibilities to achieve the targets. One of them, the use of international credits from the Clean Development Mechanism (CDM) and the Joint Implementation (JI), will not be allowed in the upcoming proposal of the ESD. In the current ESD the use of this flexibility was conditional: if a member state did not surrender enough annual allocations, it would not have access to this 'flexibility' (loophole). That same concept should be expanded in the new ESD proposal. All existing and potential new loopholes should be made conditional. Only member states that fulfil their obligations year by year should have access to flexibilities the following year. Otherwise, member states that are clearly not on track to achieve their targets would start using all possible options, and only at the end of the period would the impossibility to achieve the EU targets be obvious. So the EU as a whole would have little margin to do something about it. However, the possibility to trade emission permits between EU member states should be excluded from the conditionality principle, the reason being that this doesn't undermine overall EU delivery but rather increases the cost-effectiveness of meeting the 2030 target.

2.3. National carbon budgets and Independent Expert Advisory Committees

In the UK, the Committee on Climate Change (CCC) is an independent, expert body created by law and tasked to advise the government on meeting its national carbon budgets adopted under the Climate Change Act 2008. Its legal role in setting the national carbon budget is set out in the legislation as is its role in advising on the development of the UK national carbon strategy. The CCC has proved to be a transparent and constructive partner to UK governance in supporting national climate governance and is widely considered to have improved the quality of the national debate on the optimal choices for delivering national decarbonisation.

Independence is key to ensuring the effectiveness of this type of committee. The UK was able to create a truly independent body. Other member states such as Finland or Denmark have similar systems and levels of rigour. However, in, for example, the case of Ireland, many members are appointed by state bodies, compromising its independence and the way it is perceived by other stakeholders⁵.

The revised ESD could introduce a new obligation requiring MS to establish national carbon budgets and national decarbonisation plans that would be part of national legislation. This would contribute to building national administrative capacity for and champions of robust climate governance at national level. These processes and bodies could also assist in improving the quality of national plan making to deliver ESD targets and clarify what those plans are – thus supporting a transparent low-carbon transition across Europe.

The national climate change committees, beyond giving recommendations to their own government about how to achieve its targets, could also have the role to supervise measures with an impact on the national ESD target thus supporting the quality of national debate but also encouraging national ownership of the choices made.

2.4. New legal form (and name)

There is wide discussion of the legal form that the future ESD should have. The type of instrument has powerful symbolism but also real legal impact. We believe that harnessing the symbolic or ‘messaging’ function of EU law requires that the revised ESD be adopted in a legislative format with a higher legal profile than a ‘Decision’. Although we acknowledge that EU decisions, directives and regulations are all equally binding in law, decisions are nevertheless more commonly used to enshrine technical rules, whereas regulations and directives are used to enshrine more systemic and significant legal regimes. The ETS, EED and RED are enshrined in directives. The ESD is a key pillar of EU climate law and its importance should be more clearly communicated by the legal form in which it is adopted. We therefore believe that the 2030 process should be used as an opportunity to enshrine the revised ESD as a regulation (or directive). Finally, the current name of the ESD does not reflect its transformative role. The Commission could consider the following possibilities: 1) Decarbonisation of non-traded sectors regulation/directive (DNT); 2) Carbon budgets for the non-traded sectors regulation/directive (CBNT); 3) Transition to climate neutrality for the non-traded sector regulation/directive (TCN).

2.5. Ensuring mutual policy reinforcement – a case for putting energy efficiency first

The 2030 ESD will be 2nd pillar of the EU’s climate governance. But even in a strengthened form, the ESD does not reduce emissions in itself. This requires and builds on measures, both at EU and at national level, especially in the field of efficiency, which will be indispensable for meeting the 2030 targets. Member states need – and count on – EU measures to set: minimum vehicle efficiency standards for cars, vans and trucks; energy performance and labelling requirements for buildings and products; as well as EU financing instruments. A number of studies and reports have demonstrated these EU instruments could make a major contribution to meeting member state targets. See for example [Ricardo Energy & Environment 2016](#) or [ECOFYS 2016](#), which shows that an extension of the Energy Efficiency Directive for 2030 would provide cost-effective energy savings potentials estimated at 40% by 2030 and would deliver around 50% GHG reductions.

The ESD should build on a fair and robust assessment of these potentials and recognise the important role for GHG reductions and achievement of the ESD targets in particular. At a minimum, in view of complying with the Paris Agreement commitments and achieving the ESD targets, the future ESD should commit the European Commission to regularly assessing progress in tapping cost-effective energy-saving potentials and reviewing car, van and truck CO₂ legislations, the Energy Performance of Buildings Directive (EPBD) and the eco-design legislations. This would be a first and important step in putting energy efficiency first, and increasing mutual reinforcement of climate and energy policies.

Further information

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ⁱ Carbon Market Watch, 2015. Flexibilities in the EU’s 2030 Effort Sharing Decision.

ⁱⁱ Ecologic, 2016. Proposals for reforming the EU Effort Sharing Decision.

ⁱⁱⁱ ClientEarth, 2015. Streamlining Climate and Energy Planning and Reporting.

^{iv} Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC

^v ClientEarth, 2015. European Lessons for Ireland’s Climate Law