EU Carbon Bank: Institutional implications
(preliminary analysis; not a legal analysis)

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Setting up an IRA or Carbon Bank

1. Changing the ETS Directive

• Council and EP could amend ETSD allowing for creating if independent Agency (Carbon Bank) (Art. 290 TEU “flexible delegation”)

• Do Member states accept independent cap setting?

• Does Agency (Carbon Bank) require discretionary’ powers such as independent decision-making?
• Under EU law *(Meroni* doctrine) such powers cannot be delegated….

• … but Agency could make recommendations that would be ‘ratified’ by the Commission or Council + EP

• **How independent / political is such an Agency?**

• Legislature (Council/EP) cannot delegate more authority than they have: **Does the legislature have the power to create an Agency (Carbon Bank)?**
2. Via intergovernmental agreement

- Member states intergovernmental agreement, e.g. incorporated in Luxembourg (e.g. European Financial Stability Facility)

- Member states are shareholders; back-office support by EIB,

- Facilitates functioning of the (EU) ETS = satisfies loyalty clause of Art 4(3) TEU for extra arrangements of member states

- How independent / political is such an Agency?
3. Changing the Treaty

• Art. 48 TEU

• Requires consent by all Member states

• Plus ratification (including possibly referendum)

• Governing provisions in Treaty

• High level of independence
How likely are any of the three options?

- Member states consensus
- European Commission acceptance
- EP approval
Objective:

“Carbon Bank” or “Supply Side Mechanism”? 
“Automatic economic adjustment” (AEA) mechanism

- e.g.

- Periodic adjustment of EUA supply according to economic cycle

- Agency calculates supply based on ex ante rules and procedures

- Commission (e.g. Climate Change Committee) or Council + EP take final decision
AEA (cont’d)

• EU Agencies
  - ‘ordinary agencies’
  - ‘pre-decision agencies’ (= non-binding opinions)
  - ‘decision-making agencies’

• Examples: OHIM, EASA, ECHA (= undertake specific pre-defined technical or managerial tasks – *Meroni* doctrine)

• ACER (Ljubliana)
Established by EU law

Mandate: “complement & coordinate work of National Reg. Agencies”, e.g. Framework Guidelines for network codes, taking individual decisions on terms of conditions for access and operational security for cross-border infrastructure if NRAs cannot agree, give advice on various energy-related issues

Stretching ‘Meroni doctrine’: Cannot include discretionary powers

How political is Commission / Council + EP?
Outlook

• High level of consensus (unanimity) required for any solution … except in Eurozone!

• Different EU institutions are likely to oppose ‘change in institutional balance’

• All solutions risks either lack of independence/automatisms or legal/political feasibility or both

• Most feasible option (= AEA) still poses risk of lack of independence