



Round Table on “Carbon Bank”

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/automatism or legal/political feasibility or both**
- **Most feasible option (= AEA) still poses risk of lack of independence**