



Round Table on “Carbon Bank”

EU Carbon Bank: Institutional implications

(preliminary analysis; not a legal analysis)

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CEPS Carbon Market Forum Meeting on “The EU Emissions Trading System”

CDC Climate Research, 47 rue de la Victoire, Paris

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**