

## Commission Proposal for an EU Carbon Removal Certification Framework

### Is the proposed delegation of power in line with Article 290 of the Treaty on the Functioning of the EU?

#### 1 Introduction

In November 2022, the European Commission put forward a proposal for a regulation for a Carbon Removal Certification Framework (CRCF).<sup>1</sup> This proposal includes various provisions that would empower the Commission to adopt delegated acts. Delegated acts are intended to specify a number of provisions of the regulation.

Articles 8 and 15 of the proposal lay down the provisions granting the Commission power to adopt delegated acts. Article 8.2 empowers the Commission to adopt delegated acts to establish technical certification methodologies. Certification methodologies cover areas such as permanent carbon storage, carbon farming, and carbon storage in products. Annex I specifies the content of the certification methodologies further. Annex I does not contain an exhaustive list of issues to be regulated in certification methodologies. Article 15 empowers the Commission to adopt delegated acts to amend Annex II, which lists the minimum information that must be included in certificates.

The process for adopting delegated acts is regulated by Article 16. This provision sets rules regarding the scope and duration of the delegation, consultation requirements, and the possibility for the European Parliament and Council to revoke the delegation and object to delegated acts.

This note examines whether the proposed provisions on delegation are in line with Article 290 of the Treaty on the Functioning of the EU (TFEU). This Article governs the delegation of power to the Commission. According to this provision, delegated acts must not regulate the "essential elements" of a legislative act. The essential elements of an area must be "reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

#### 2 What are "essential elements" of EU legislation?

The European Court of Justice defines essential elements as "acts which are intended to give concrete shape to the fundamental guidelines of Community policy".<sup>2</sup> Essential elements include "political choices falling within the responsibility of the EU legislature" that require "the conflicting interests at issue to be weighed up on the basis of a number of assessments."<sup>3</sup> Accordingly, the modification of the material, geographical or temporal scope of a basic act (like the CRCF proposal) constitutes an essential element of that act.<sup>4</sup> Exceptions to this principle are only lawful if "the powers conferred on the Commission are so strictly circumscribed that its

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<sup>1</sup> See [https://climate.ec.europa.eu/document/fad4a049-ff98-476f-b626-b46c6afdded3\\_en](https://climate.ec.europa.eu/document/fad4a049-ff98-476f-b626-b46c6afdded3_en).

<sup>2</sup> EuGH, Rs. C-240/90, R. 37

<sup>3</sup> EuGH, Rs. C-355/10, R. 65, 76; *Gellermann*, in: Streinz, Art. 290 TFEU, R. 7.

<sup>4</sup> EuGH, Rs. C-403/05, R. 64 cont.; Legal Service, April 2011: Application of Articles 290 (delegated acts) and 291 (implementing acts) TFEU, 8970/1.

margin of discretion is either non-existent or extremely limited”.<sup>5</sup> According to the Legal Service, the power to alter the temporal scope of an act would certainly interfere with its essential elements, unless it is strictly circumscribed.<sup>6</sup> The impact on fundamental rights of persons is also relevant for this determination, especially if the interference is severe.<sup>7</sup>

Provisions that are intended to underpin the options chosen or that implement established principles like penalties are not essential elements.<sup>8</sup> Within these limits, co-legislature have discretion to determine whether an element is essential or not.

### 3 Are elements of the certification methodologies “essential elements”?

Annex I specifies the content of the certification methodologies, which include, among others, (1) rules on the duration of storage, (2) liability and (3) validity of removal credits (see Table 1 below for an overview of all items included in Annex I).

#### 3.1 Storage duration

The proposal for a regulation on the CRCF establishes requirements for the certification of carbon removals. To be certified, carbon removal activities must meet these requirements (Article 3 in conjunction with Articles 4 to 7). The duration of storage is one of the certification requirements. According to Annex I, rules on monitoring and mitigation of any risk of release of the stored carbon as well as rules on the monitoring period shall be defined and specified via delegated acts on the certification methodologies.

The proposal suggests that only activities that aim at “long-term” storage can be certified (Article 6.1). While this seems to be a straightforward requirement, it is ambiguous. First, the CRCF includes several removal activities that provide only for short-term storage, such as some carbon farming activities. Second, the proposal does not define the term “long-term storage”. It sets no fixed time span defining “long-term”. Third, the proposal does not specify the term “permanent”, another criterion relevant for the duration of storage. It only states that permanence means storage for “several centuries” but does not regulate what “several centuries” means.<sup>9</sup> Fourth, the proposal sets no legal obligation on operators to ensure long-term storage. According to Article 6.1, operators must “demonstrate that a carbon removal activity aims at ensuring the long-term storage of carbon.” The verb “to aim” indicates that the legislator does not establish a legal obligation, turning the criterion “long-term” into only an aspirational goal.

These ambiguities have significant implications.

- **Certification of removals regardless of storage duration?** It remains unclear in the proposal whether removals with any storage duration can be certified. This ambiguity undermines the integrity of EU climate policies. It can lead to a system where any removal – regardless of its storage duration - is turned into one removal unit. This could pave a way to

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<sup>5</sup> Legal Service, April 2011: Application of Articles 290 (delegated acts) and 291 (implementing acts) TFEU, 8970/1.

<sup>6</sup> Legal Service, April 2011: Application of Articles 290 (delegated acts) and 291 (implementing acts) TFEU, 8970/1

<sup>7</sup> EuGH, Rs. C-355/10, R. 77.

<sup>8</sup> EuGH, Rs. C-240/90, R. 37/39.

<sup>9</sup> Accordingly, permanent storage is defined as “a carbon removal activity that, under normal circumstances and using appropriate management practices, stores atmospheric or biogenic carbon for several centuries, including bioenergy with carbon capture and storage and direct air carbon capture and storage” (Art. 2.1(g), emphasis added).

a regime where even removals with short term storage could be used to comply with mitigation obligations.<sup>10</sup>

- ▶ **Certification requirements ambiguous:** The ambiguity obscures the requirements for certification. It is not clear to operators whether removal activities qualify for certification if they store carbon, for example, only for a couple of months or a few years.
- ▶ **Long-term and monitoring period are not compatible:** Article 6.2 of the proposal stipulates that for the purpose of long-term storage, operators must comply with monitoring, mitigation, and liability obligations. The same provision, however, also stipulates that monitoring, mitigation, and liability obligations must be met during the monitoring period. Recital 13 states that the monitoring period depends “on the expected duration of the storage and the different risks of reversal associated with the given carbon removal activity”. In turn, the length of the monitoring period is unclear. It could be “long-term” or it could depend on the expected duration of storage. The length of the monitoring period is crucial for the operator as it determines the duration of liability for reversals and monitoring/reporting obligations.
- ▶ **Permanent storage not clearly defined:** According to recital 13 of the proposal, activities that store carbon in geological formations can “be considered as providing permanent storage of carbon”. As the proposal defines permanence as several centuries, 200 years could be the minimum storage duration or more than 1000 years could be required. These differences have important implications for investment decisions.

Considering the fundamental importance of these provisions as well as severe implications of the ambiguous regulation of the duration of carbon storage, there is a strong argument that the duration of carbon storage is one of the regulation’s essential elements. Specifying the duration of storage in delegated acts would modify the material scope of the CRCF. The duration of storage also impacts fundamental rights of the operators. In turn, the specification of storage duration is an essential element of the CRCF proposal and must not be delegated to the Commission. The co-legislators must specify storage duration.

### 3.2 Liability mechanism

According to Annex I point (i), rules on appropriate liability mechanisms referred to in Article 6(2), point (b) shall be specified in certification methodologies that are laid down in delegated acts. The provisions on liability in the proposal itself are vague and patchy:

- ▶ **No preference for specific liability mechanisms:** Article 6.2 of the proposal only stipulates that operators must be “subject to appropriate liability mechanisms”. Recital 14 specifies this provision to some extent, stating that liability “mechanisms could include e.g., discounting of carbon removal units, collective buffers or accounts of carbon removal units, and up-front insurance mechanisms.” However, the recital has no legal force. Moreover, the language in recitals 13 and 14 suggests that liability mechanisms may not be compulsory

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<sup>10</sup> Meyer-Ohlendorf, Nils & Anne Siemons & Lambert Schneider & Hannes Boettcher, 2023: Certification of Carbon Dioxide Removals – Evaluation of the Commission Proposal. Interim Report. Climate Change 13/2023. German Environment Agency: Dessau-Roßlau. <https://www.ecologic.eu/19162>

(“appropriate liability mechanisms should be introduced to address cases of reversal”). As a result, the proposal does not give preference to specific liability systems.

- ▶ **No personal liability:** The proposal does not mention personal liability of operators as another option to ensure liability and omits to address cases where operators cease to fulfil their obligations, e.g. because they terminate a project or go bankrupt.
- ▶ **Liability for carbon farming not regulated:** Recital 14 of the proposal clarifies that liability mechanisms and relevant corrective measures laid down by the CCS and ETS Directives also apply to leakages from geological formations. The proposal contains no similar clarifying provisions for carbon farming.
- ▶ **Environmental Liability Directive does not close liability gap:** In principle, the Environmental Liability Directive (ELD) is applicable to carbon removal activities. Hence, the ELD could fill liability gaps. However, the ELD only applies to “environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators” (Article 4.5 of the ELD). Given the diffuse causal link between leakage from geological storage and climate damage, it is questionable whether the ELD would establish an additional layer of liability.
- ▶ **Legal consequence if no appropriate liability is in place:** The proposal stipulates that the removal activity cannot be certified if no appropriate liability system is in place. However, the proposal does not regulate the legal consequences if a liability system ceases to function after certification but before the end of the monitoring period. It is also unclear what the consequences are if the operator fails to fulfill the obligation to monitor and compensate for reversals.
- ▶ **No monitoring period for storage in geological formations and hence no monitoring and liability obligations:** The proposal considers storage in geological formations as permanent (recital 13). Presumably for this reason, activities that store carbon in geological formations are not subject to monitoring periods. This has important implications: according to Article 6.2, operators must monitor and mitigate risks of carbon releases only during the monitoring period; similarly, operators are liable for potential leakage only during the monitoring period. In consequence, it is not clear to what extent operators of activities storing carbon in geological formations are subject to monitoring, mitigation, and liability obligations.

In sum, the proposal does not regulate central aspects of liability, delegating them to the Commission. Considering the severe implications of these regulatory gaps as outlined above, these liability aspects can be considered essential elements of the proposed regulation. They determine, for example, to what extent and for which time spans operators would be liable for a reversal or to what extent this risk would be externalized to societies.

Accordingly, by defining rules on appropriate liability mechanisms through a delegated act, the Commission would modify the material and temporal scope of the CRCF.<sup>11</sup> Liability rules also

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<sup>11</sup> EuGH, Rs. C-403/05, R. 64 cont.; Legal Service, April 2011: Application of Articles 290 (delegated acts) and 291 (implementing acts) TFEU, 8970/1.

impact on the operator's fundamental rights. The delegation of power to the Commission to regulate issues of liability – as proposed – is not compatible with Article 290 TFEU. The co-legislators must fill the gaps.

### **3.3 Validity of removal units**

The proposal for the CRCF does not determine fixed periods of validity of removal units. It sets no explicit expiry dates. Instead, the validity of the certified carbon removals should “depend on the expected duration of the storage and the different risks of reversal associated with the given carbon removal activity” (recital 13).

Because removals generated by carbon farming or stored in products are temporary, their validity should be subject to an expiry date (recital 13). This expiry date matches with the end of the relevant monitoring period (ibid). After the end of the monitoring period, the carbon should be assumed to be released into the atmosphere (Article 6.3). Recital 13 states that the carbon should not be assumed to be released if the economic operator “proves the maintenance of the carbon storage through uninterrupted monitoring activities”. It is important to note that this exception is established by a legally non-binding recital. For this reason, it sets no legal requirement.

For the storage of carbon in geological formations, the proposal seems to assume no expiry date. According to recital 13, carbon storage in geological formations “provide[s] enough certainties on the very long-term duration of several centuries for the stored carbon and can be considered as providing permanent storage of carbon.”

The duration of validity of removal units is an essential consideration for operators. It determines for which period units in their portfolio are valid and hence tradable. The CRCF proposal does not delegate the power to the Commission to determine the validity of removal units explicitly but empowers the Commission to regulate the duration of storage (see section 3.1), hereby determining the validity of units indirectly. As the validity is critical for property rights of operators, there is a strong argument that the validity of credits is an essential element of the CRCF but the proposal fails to regulate this issue. It merely mentions the issue in a legally non-binding recital. In turn, the co-legislators must regulate the validity of credits, an essential element of the CRCF.

### **3.4 Minimum certification information and delegating conditions**

Adapting minimum certification information ensures compliance with the requirements stated in Articles 4 to 7. As with penalties, rules to ensure compliance amount to no more than implementation of the principles established. The conditions listed in Article 15 therefore meet the requirements stated in Article 290 TFEU. The ability to revoke and object as well as laying down the conditions in the legislative act, are permissible under Article 290 (2), a) and b), respectively.

**Table 1: Summary table of essential and non-essential elements of the CRCF proposal**

<b>Essential elements that the co-legislators must regulate and that must not be delegated</b>	
<b>Content</b>	<b>Assessment</b>
<b>Rules on storage duration and monitoring and mitigation</b> (Annex I point (h) referred to in Article 6(2), point (a) and Annex I point (a) referring to the monitoring period)	Incomplete and vague regulation of an area with significant implications for the integrity of EU climate policies and the certification process.
<b>Rules on appropriate liability mechanisms</b> (Annex I point (i) referred to in Article 6(2), point (b))	Incomplete and vague regulation of an area with significant implications for fundamental rights of operators and the certification process.
<b>Rules pertinent to the validity of credits</b> (recital 13 and – indirectly Article 6.3)	Incomplete and vague regulation of an area with significant implications for the basic rights of operators.
<b>Subject areas that might constitute an essential element of the CRCF but are sufficiently regulated by it</b>	
<b>Content</b>	<b>Assessment</b>
<p><b>Description of the carbon removal activity (a)</b> covered, including its monitoring period;</p> <p><b>Rules for identifying all carbon removal sinks and GHG emission sources (b)</b> referred to in Article 4(1);</p> <p><b>Rules for calculating the carbon removals under the baseline (c)</b> referred to in Article 4(1), point (a);</p> <p><b>Rules for calculating the total carbon removals (d)</b> referred to in Article 4(1), point (b);</p> <p><b>Rules for calculating the increase in direct and indirect greenhouse gas emissions (e)</b> referred to in Article 4(1), point (c);</p> <p><b>Rules to address uncertainties in the quantification of carbon removals (f)</b> referred to in Article 4(8);</p> <p><b>Rules to carry out the specific additionality tests (g)</b> referred to in Article 5(2);</p> <p><b>Rules on the minimum sustainability requirements (j)</b> referred to in Article 7(2);</p> <p><b>Rules on the monitoring and reporting of co-benefits (k)</b> referred to in Article 7(3).</p>	Many of these criteria constitute essential elements of the regulation as they have the potential to modify the CRCFs scope. However, they are adequately prescribed by the co-legislators. These items of the CRCF need further clarification, but the requirements provided by the regulation are sufficient to be filled through delegated acts. Therefore, the essential decisions are made by the co-legislators, not the Commission.

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Fax: +49 340-2103-2285  
[buergerservice@uba.de](mailto:buergerservice@uba.de)  
Internet: [www.umweltbundesamt.de](http://www.umweltbundesamt.de)  
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### Authors, Institutions

Dr. Nils Meyer-Ohlendorf, Ecologic Institut gGmbH  
Anne Siemons, Öko-Institut e.V.

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