Commission Proposal for an Effort Sharing Regulation: Comments

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With contributions from

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21 September 2016

On 20 July 2016 the European Commission published its legislative proposal for an Effort Sharing Regulation (ESR). This proposal is meant to reform the Effort Sharing Decision (ESD). Based on a previous Ecologic report[1], this note provides comments on the Commission's proposal for further discussion.

1. Positive elements

The proposal is a useful basis for further discussions. It contains a number of positive elements:

- **Target distribution:** Proposed distribution of national targets is balanced. It takes due account of agreed distribution criteria.
- **Long-term perspective of ESR review:** The proposed review takes account of the Paris Agreement (PA) and its long term goals. This is an important improvement compared to the previous review system which did not consider long-term climate goals.
- **Reduces legacy effects:** The starting point is based on real emissions and not the 2020 target which is insufficiently ambitious. Existing surpluses cannot be used for compliance in 2021-30.
- **Keeps a number of positive ESD elements:** The proposal keeps a number of positive ESD elements, such as annual emission budgets for Member States, corrective action or clear rules for banking and borrowing of AEAs.
- **Corrective action:** The proposal determines an explicit role of the European Environment Agency (EEA) in evaluating corrective action plans. This strengthens corrective action.
- **No flexibility for extreme meteorological conditions:** The proposal deletes the ESD flexibility for extreme weather conditions which helps simplify the system.
- **Delegated acts:** Article 12 contains clear rules for the adoption of delegated acts.

2. Elements that should be improved

The proposal contains a number of provisions that would benefit from further improvement:

- **No long-term target:** The proposed ESR would not adequately fulfil one of its main functions, i.e. help ensure the implementation of the PA and its long-term goal of holding "the increase of global average temperature well below 2°C". Unlike the PA, the proposal has no long-term objective. The ESR contains no long term target. Not even the preamble of the ESR makes reference to the EU ambition of an 80-95 % reduction of GHG by 2050. Only the so-called context mentions these long-term reductions.[2] There is no mentioning of achieving climate neutrality after 2050 – in contrast to Art. 4.1 PA or the G7 2015 Declaration. In this sense the proposal implements what the European Council requested but not necessarily what the PA requires.
- **ESR does not address the EU's unrealistic reduction path towards 2050:** The EEA has shown that the EU is not on a realistic reduction trajectory towards 2050.[3] According to the EEA, annual reductions of 3.3 % are required after 2030 if the EU intends to reduce

[1] Nils Meyer-Ohlendorf (2016): Proposals for Reforming the EU Effort Sharing Decision, http://ecologic.eu/sites/files/publication/2016/21_04_2016_ecologic_esd_reform_paper-1_0.pdf.

[2] It should be noted that comprehensive scientific analysis of how much developed countries need to reduce their emissions to be in line with global efforts to stay "well below 2°C" or 1.5°C has yet to be carried out. It is probable that the EU's current reduction pathway will need to be re-adjusted towards the higher end of the current 2050 range, i.e. reductions of - 95% by 2050.

[3] EEA (2015): Trends and projections in Europe 2015 — Tracking progress towards Europe's climate and en energy targets.

emissions by 80 % in 2050. If the EU aims to reduce emission by 95 % in 2050, annual reductions of 4.6 % would be necessary. As the EU has achieved average annual reductions of 1 % since 1990, such a reduction path appears unrealistic. The proposal does not address this fundamental problem, which could have been done by proposing long-term targets, a more robust review and target adjustment system and a mechanism for unilateral target adjustment.[4]

- **Review too late:** Although the ESR review's long-term perspective is positive, the proposed review has some weaknesses. It should begin in 2019, rather than 2024. To take account of the long-term perspective of the PA and the needs of drastic emission reductions, the review should be strengthened through independent advice (see below).
- **No ratchet up or target adjustment mechanism:** According to Article 4.3 of the PA, "each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition [...]". Although this provision does not contain a stringent obligation for Parties to scale up their efforts ("will" represent a progression, instead of "shall"), the spirit of this provision requires a constant increase in the level of ambition and reductions. The ESR proposal, however, does not address explicitly how the EU would continuously increase its ambition. The proposal does not contain a mechanism for unilateral target adjustment by Member States either. As a possible option for continuous target increasing, the Commission could be required to propose scaled up targets every five years. The Commission proposal could be informed by or based on a preparatory report from an independent body or – alternatively – the EEA.
- **A better name:** "Effort Sharing Regulation" - the name of the new instrument - is as obscure as the name of the old instrument. The full official name is even more obscure: "Proposal for a Regulation of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 for a resilient Energy Union and to meet commitments under the Paris Agreement and amending Regulation No 525/2013 of the European Parliament and the Council on a mechanism for monitoring and reporting greenhouse gas emissions and other information relevant to climate change". The name is important; it is the single most significant communication aspect of any legal instrument. The name should clarify the content of the piece of legislation and it should have a positive connotation. The proposed name fails this test. "Climate Protection Regulation" would be simple and would carry a positive meaning.[5]
- **LULUCF-Flexibility:** The proposed LULUCF flexibility should be deleted. Allowing forestry offsets into the ESR could reduce the mitigation effort significantly. It could lead to a 23 % increase of EU's greenhouse gas emissions in the period 2021-2030.[6] Furthermore, LULUCF emissions and removals have potentially large annual fluctuations and suffer from data uncertainties. LULUCF cannot ensure permanent removal of emissions. These characteristics make LULUCF unfit for inclusion in the ESR that has and should have an annual compliance cycle. Last but not least, with up to 280 mio. net removals, the ESR proposes a fairly large amount of removals which has no benefit for climate protection

[4] Nils Meyer-Ohlendorf (2016): Proposals for Reforming the EU Effort Sharing Decision, http://ecologic.eu/sites/files/publication/2016/21_04_2016_ecologic_esd_reform_paper-1_0.pdf.
[5] Any name can be inspired by the positive example of the "US Clean Air Act" – which has a catchy and positive name.
[6] Contribution by Carbon Market Watch to ESD Consultations.

and could delay action in other sectors. In addition, the ESR proposes that the Commission may include other LULUCF sectors through delegated acts (Article 7.2) which could further reduce ambition. Accounting rules for managed forest lands are less reliable than for other LULUCF categories which could affect the ESR's climate integrity.

- **European Project mechanism is the better alternative than the link to Article 24a ETS Directive:** Article 5.6 of the proposal maintains the existing link to the ETS via Article 24a ETS Directive. This link should be deleted. The mechanism links the traded and non-traded sectors, which complicates an already complex system further and makes the system more unpredictable. From a market perspective, the expected number of credits becomes less clear, and calculation for allowances and price levels of the EU ETS becomes more difficult. A transparent and simple system that allows for proper accounting should clearly separate between the ETS and the ESR. In view of the excessive surplus in the EU-ETS, it is unlikely that Art. 24a would be operationalised in the coming years, making it an unviable option for projects in the non-ETS sector. An intra-ESR European Project Mechanism is an option that addresses these shortcomings, while ensuring private involvement in mitigation action, providing more planning certainty and respecting the split between the traded and non-traded sectors.
- **Link between ETS and ESR:** Following the request by the European Council, the ESR links the ETS and the ESR (Article 6). The proposed Article 6 contains a ceiling and clearly defines eligible Member States in an Annex. Although the ESR proposal is narrow in scope, it is problematic. This link is a problem because it creates loopholes and complicates the EU climate regime. It does not help reduce the existing ETS surplus.
- **Starting year:** The proposal makes it possible that some Member States receive a 2021 starting point above their 2020 target. This could be easily remedied by introducing the 2020 target as an upper limit, i.e. the 2021 allocation may not be higher than the allocation for 2020. As an even more ambitious alternative, the trajectory should not be drawn from 2020 – but from 2017.
- **Proposal seems to weaken the existing compliance regime:** The proposal contains a compliance check every five years (in 2027 and 2032) – based on Member States' annual emission allocations. In other words, Member States continue to be obliged to stay within annual emission budgets but compliance would be checked only every five years, or only twice during the "commitment period". If the compliance check shows that a Member State exceeds its annual allocation for a specific year, a correction factor of 1.08 applies and the Member State is temporarily prohibited from transferring AEAs to another Member State. This system is weaker than the ESD compliance system which checks compliance annually. The proposed compliance check would also benefit from clarifying its relationship to the ESR review (Article 14). The proposed review is also set to occur every five years but in 2024 and every five years afterwards (rather than in 2027 and 2032). It should also be clarified whether infringement procedures remain possible if a Member State exceeds its annual emission allocation and violates its obligation under Article 4.2. Non-complying Member States could argue that the compliance check is *lex specialis*, thereby barring infringement procedures.
- **Increase in annual allocation through adjustment:** According to Article 10.2, the amount set out in Annex 4 may be added to the 2021 allocation of the listed Member States in Central and Eastern Europe. This bonus delays the emission reductions in these countries.