Towards a Better Compliance Structure for the European Emission Reduction Policies until 2020

A legal Evaluation, a Direct Penalty Proposal and a Call for an Independent European Emission Abatement Agency

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Calling for annual cuts in emissions across Europe

EXECUTIVE SUMMARY

Introduction

Climate change is the single biggest environmental threat facing our planet. The United Nations' Intergovernmental Panel on Climate Change (IPCC) has warned that by the end of this century, temperatures could rise by up to 6.4 degrees centigrade, with dramatic impacts world wide.

Given the necessity for steep emission reductions, **there is an urgent** need for **binding annual emission cuts**. These short-term targets will ensure that emissions decline year-by-year across the EU and across sectors. Short-term targets as opposed to long- term objectives will also make today's politicians accountable and ensure that Europe leads the world in showing that climate change can be tackled.

How to ensure that Europe will achieve annual cuts?

A strong compliance structure based on ambitious reduction targets would initiate progressive emission abatement up to 2020. The two legislative proposals from the European Commission, the amended ETS Directive[1] and the Effort Sharing Decision[2], aiming at reducing the EU's greenhouse gas emissions by 2020 foresee **a linear annual emission reduction path**[3] .

But both proposals do not introduce **specific direct compliance and penalty provisions against Member States**. The limited enforcement and compliance provisions, **in the Effort Sharing Decision especially**, represent a significant risk to the achievement of the reduction targets. Under this proposal EU Member States are only required to report on emissions and progress to achieve their reduction targets.

The amended **ETS Directive** is committed to reduce loopholes for Member States and shows many improvements. This becomes evident e.g. with the EU wide cap, the enforced auctioning principle and the introduction of a single European registry. But important risks of non-compliance of Member States do remain in the new proposal and need to face at least stronger enforcement tools for the Commission against Member States. Member States are in charge of allocating the quantity of free allowances for each installation in their country and they have the power to execute penalties against their industry[4].

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[1] Directive of the European Parliament and the Council amending Directive 2003/87/EC so as to improve and extend EU greenhouse gas emission allowance trading system

[2] Decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020

[3] ETS Directive, Article 9 outlines that the Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period 2008-2012.
Effort Sharing Decision, Article 3 outlines that Member States shall annually limit greenhouse gas emissions in a linear manner towards their 2020 target. In introducing a specific borrowing mechanism in between the periods of around 2% per year from 2013 onwards, the European Union proposes a good balancing system for the annual cuts.

[4] According to the new ETS proposal the Member States needs to publish and submit to the Commission, by 30 September 2011, the list of installations covered by this Directive in its territory and any free allocation to each installation in its territory. By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be distributed for that year, calculated in accordance with Articles 10 and 10a. An installation which ceases to operate shall receive no further free allowances. This Article gives the executive responsibility to the Member States. Therefore a strong enforcement mechanism against a Member State in case of non fulfilment of this obligation is important. The same is necessary if Member States would for example not execute the penalties against its industry under the ETS scheme.

The existing infringement procedure, most commonly used in environmental matters takes in average several years until fines have to be paid by the respective Member State and is **insufficient to respond on a timely basis** if Member States miss their annual emission reduction targets. This could in the worst case mean that the infringement procedure would only become effective after 2020 for the period 2013-2020 which is the base for the current proposals on ETS and effort-sharing.

This could seriously endanger the chances of reaching the emission reduction targets. Timely and efficient national policies may not be installed in a reliable way so as to ensure the necessary rapid greenhouse gas emission reduction of at least 30% by 2020 and to pave the way to even greater efforts of at least 90% emission reductions by 2050 are made within Europe.

Strong compliance and penalty system are key

To guarantee that each Member State annually limits its greenhouse gas emissions in a linear manner, the European Commission should be given the strongest enforcement tools available.

The main proposed tool to give the European Commission real enforcement power is the introduction of a **direct penalty mechanism** enabling the Commission to directly issue levies against Member States which do not deliver on time. It is also in the interest of Member States that such a mechanism is established in order to be sure that each Member State lives up to its promise, thus ensuring a level playing field. Financial penalties will be directed against those countries that are underachieving or not reporting on time.

- ➔ **A swift penalty procedure**, as opposed to the current lengthy infringement procedure involving the European Court of Justice, is key to make emission cuts happen across the EU in the short- and long-term.
- ➔ This **penalty procedure should ensure** that the **annual targets** are met by Member States and are established on a linear reduction path as foreseen in both ETS Directive and Effort Sharing Decision.
- ➔ **Strong penalties** should be applied to **Member States not reaching the targets** for both ETS and Effort Sharing. The same penalties should be applied per tonne CO2 equivalent for underachieving in both the ETS Directive and Effort Sharing Decision. This would be equivalent to the 100 Euro/tonne of the national ETS fines.
- ➔ **Flexibility in between the periods** needs to be given **for the Effort Sharing Decision**. In this case, Member States should have the flexibility of at most 1% by borrowing from emissions of the next year. If Member States underachieve, the amount of emissions they underachieve by should be added to the target of the following year with a mandatory additional reduction restoration factor of 1.3. If Member States overachieve, then the target of the next year can certainly be reduced.

Reporting and processing of the data

Reporting and processing of the data needs to be **speeded up** to be able to assess whether or not reductions have been achieved each year.

The introduction of better compliance tools would also ensure that in view of attempts by Member States to water down the condition under the new ETS the overall and interim target objective will be swiftly enforced nonetheless.

- ➔ Member States should **report** on their emissions of year X in March of year X+1. The Commission **verifies** this before end of April of year X+1.
- ➔ If Member States do not hand in their **reports in time**, a meaningful penalty should be enforced immediately.
- ➔ Annual reporting should be placed at the **highest policy level** and trigger high-level policy debates by the **European Parliament and the European Council**

Regular revision of the targets in accordance with the latest scientific findings

- ➔ The targets for the ETS Directive and Effort-sharing Decision should be revised in accordance with the most recent IPCC findings so that the EU is in line with its international target of staying below two degrees.

A European Emission Abatement Agency

The implementing body would be a **European Emission Abatement Agency** responsible for **compiling emission data** from Member States and **monitoring the advancements** of the Member States towards their emission reduction targets. The Agency would:

- → manage a fund from monies and the direct penalty procedure
- → either the Agency or the European Commission would have the power to directly spell out sanctions against 'underachievers' and possibly to reward 'overachievers'.

Delegating regulatory powers to a dedicated new European Agency could increase the efficiency, flexibility and visibility of the European climate policies and strategies. The Agency could become the concentrated centrepiece on emission abatement.

This agency may be a complete new structure or a strengthened European Environment Agency (EEA) in Copenhagen could encompass these new tasks.

A penalty fund

The revenues from the penalties and its management should be administered in a specific **Penalty Fund administered by the Agency**. This fund could finance the change to sustainable energy in Europe especially for poor regions and also provide money for adaptation and mitigation including technology transfer in developing countries. This way Europe could both have an incentive for less affluent Member States who are afraid of missing their targets and be able to raise a part of the money which is so urgently needed on the international level.

How to implement this – a need for a new regulation

European law has many decades of **experience with direct penalty mechanisms**, especially in the field of the Common Agricultural Policy (CAP). They have **not yet been applied in environmental legislation**. It is high time to change this situation concerning the climate policy of Europe. The current ETS Directive proposal and the Effort Sharing Decision must be amended in a way as to establish the direct levy principle and to transfer power to the European Commission. The details and rules of this need to be fixed in an adequate **Commission Regulation**, in line with the Comitology procedure as laid down in the ETS Directive and linked to in the Effort Sharing Decision proposal. **The Effort Sharing Decision should have a similar provision which links it directly to this penalty mechanism**

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I. Introduction

"Because they regulate the actions of sovereign States, international treaties and pacts often suffer from a fundamental implementation problem owing in large part to the absence of an effective, legitimate and independent enforcer. In theory, sheer good faith (enshrined in the "pacta sunt servanda" principle) is the cornerstone of treaty-based international law. In practice, even though the supranational status of Community law and institutions (including a judiciary) partly alleviates the enforcement problem, sovereign States abide by treaties as long as they perceive it in their interest to do so."[5]

This comment from a recent publication by the European Central Bank serves as an excellent starting point into the evaluation of how a better compliance structure could be integrated in the current process for reducing the EU greenhouse gas emissions in the period 2013-2020. A strong compliance structure based on ambitious reduction targets would initiate strong deliveries towards progressive emission abatement up to 2020.

The current Directive on Emission Trading (ETS Directive), the recent draft proposals by the European Commission amending the ETS Directive and especially the Proposal for a Decision on the Effort-Sharing of the Member States (Effort Sharing Decision) for the non ETS greenhouse gas sectors [6] to reduce their greenhouse gas emissions by 2020 do not introduce specific direct compliance and penalty provisions for the European Commission against Member States.

This makes enforcement efforts of the European Commission against Member States less forceful. Timely and efficient national policies may not be installed in a reliable way so as to ensure the necessary rapid greenhouse gas emission reduction by 2020 and to pave the way to even greater efforts needed to enable the European Union to come to at least 90% emission reductions by 2050.

Therefore the European Commission should have the most powerful tools at hand to ensure that the foreseen annual emission reductions by Member States are met in time. Enforcing these short term targets as opposed to only enforcing long-term targets will also make today's politicians accountable and ensure that Europe can take up its global leader-ship role in tackling climate change.

According to the EU's obligation in the Kyoto Protocol, the fifteen old EU Member States need to reach an envisaged reduction of greenhouse gas emissions until 2012 by 8 percent. By 2005, the EU-15 only managed to reduce their emissions by 1,5 percent below 1990 levels. But a "linear target path" drawn from 1990 to 2010 in order to meet the Kyoto target shows that in 2005 emissions should have been 6 percent lower than they were in 1990, compared to the Kyoto base year. Many Member States, e.g. Spain, Austria, Luxembourg, Portugal, Italy and Ireland are still far away from meeting their Kyoto emissions targets.

[5] Roel M.W. J. Beetsma, Xavier Debrun, Implementing the Stability and Growth Pact Enforcement and Procedural Flexibility, ECP - WORKING PAPER SERIES NO. 433 , January 2005

[6] "Directive of the European Parliament and the Council amending Directive 2003/87/EC so as to improve and extend EU greenhouse gas emission allowance trading system" and the "Decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020".

Moreover, under the framework of the new proposed Effort Sharing Decision one needs to acknowledge that this decision is in a way at the same level of insecurity concerning clarity that Member States will follow their obligations than it is under the EU's obligations for the Kyoto Protocol. The Effort Sharing Decision gives enormous leeway to the Member States. This "liberty" will be more reigned in under the new ETS Proposal. Insofar, stronger penalty mechanisms are more in need under the Effort Sharing Decision than under ETS: Nonetheless, also under the new ETS Proposal there is still room for wrong manoeuvre by the Member States which calls for rapid enforcement actions by the European Commission.

There is a rule that imperfect enforcement arises often for a variety of reasons not directly expressed or tackled in the respective legislative act, such as enforcement budgets that limit auditing and inspection frequency or statutory limits on fines[7]. Therefore a strong enforcement tool would give the sufficient reaction capability for future risks of non compliance which may not be all recognised at the date of issuing of the ETS Directive respectively the Effort Sharing Decision.

This study aims at finding a way towards a better compliance tool for the European Commission for the whole framework, ETS Directive and Effort Sharing Decision. The study will not question the sense, necessity or usefulness of the ETS directive and the Effort Sharing Decision but rather try to propose concrete steps for improved efficiency and compliance. In view of the fact, that more experience is available concerning the established ETS mechanism, the study will rely on close investigation into that system in order to have a concise joint approach for a better compliance mechanism for both, ETS and Effort Sharing. Nonetheless, it is clear that for the coming years the Effort Sharing Decision will have more crucial points for negligence by Member States since the current new ETS Proposal suggest much more responsibility taken out of the hands of the Member States and into those of the European Commission.

The Effort Sharing Decision has no special compliance or penalty procedure foreseen. The ETS Directive already provides a meaningful compliance tool towards industry with fines of 100 Euro per tonne of CO2. But both proposals do not foresee a special direct compliance tool for the European Commission against non-behaving Member States.

This means the European Commission can only rely at present on the classic tool for infringement procedures against Member States before the European Court of Justice (ECJ). At the end of such infringement procedures in line with Articles 226 to 228 ECT it is possible that considerable penalties can be issued by the Commission to be paid by Member States.

In view of the duration of this procedure and in view of the paramount risks related to further climate change, there is a critical need to enable the European Commission to directly issue fines in case a Member State does not comply with its obligations in order to have a functioning emission reduction system with tangible results.

The following sections will review the main principles of the draft ETS Directive proposal and the Effort Sharing Decision before structuring basic conditions for a framework for a specific penalty system and the outline for a regulatory agency both applying to ETS and non-ETS emissions.

[7] Timothy N. Cason,, An Experimental Study of Transactions Costs, Liability Rules and Point-Nonpoint Source Trading in Environmental Markets, 2003,Research Project, Purdue University

The evaluation will propose installing a specific compliance tool both for the ETS Directive and the Effort Sharing Decision and to propose provisions to link both schemes under this new penalty authority of the European Commission. This tool set is based on the new and advanced rules of better European Governance and will rely on established practices from other sectors of European responsibilities- especially the direct levy system from the milk quota regime.

In view of efficiency and better governance, this paper calls for the urgent establishment of a European Emission Abatement Agency (EEAA). Some first key principles on this are given.

In view of the tight timing for the preparation of this study and the novelty of the direct penalty procedure proposed by it (within the Climate and Energy Policy of the European Union), as will be proposed for the first time with this paper, it should be underlined that this study can only be seen as a first detailed overview and that many of the different details and specifics will need further elaboration.

II. Overview on the current amendment proposals for the ETS Directive and the Effort Sharing Decision

1) Targets

For the "post-2012" period following the current Kyoto Protocol's duration, the European Community has made a "firm independent commitment "[8] to achieve at least a reduction of 20% of greenhouse gas emissions by 2020 compared to 1990. There is a commitment to change this to a 30% reduction target if an international agreement in climate change is reached.

The emission reductions under the ETS will now be clearly linked to efforts in reducing emissions not covered by ETS. The reduction efforts under the ETS Directive and the Effort Sharing Decision add up to a reduction of greenhouse gas emissions of 20% compared to 1990 levels. The Commission has included a "trigger" mechanism in the proposals which allows it but does not obligate it, to increase the EU target to 30% as soon as an international climate agreement is concluded.

Within the current Commission proposal to further develop the EU Emission Trading System (ETS), the Commission intends to strengthen the single, EU-wide carbon market to encompass more greenhouse gases than only CO2 and include, with an opt-out exception, all "major industrial emitters". It proposes to reduce year on year the number of emission allowances put on the market so that emissions covered by the ETS are reduced by 21% in 2020 compared to 2005.

It foresees a better success rate overall in implementing a larger reduction requirement using the EU ETS mechanism because it says it is cheaper to reduce emissions in the electricity sector than in most other non-ETS sectors. Therefore full auctioning will be introduced in the power sector from 2013 on. However, other sectors such as steel, cement and aluminium will still profit from free allocation according to the draft proposal.

[8] Proposal for a Decision of the European Parliament and of the Council on the effort of Member states to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 (in the following: Effort Sharing Decision) , Explanatory Memorandum, page 2

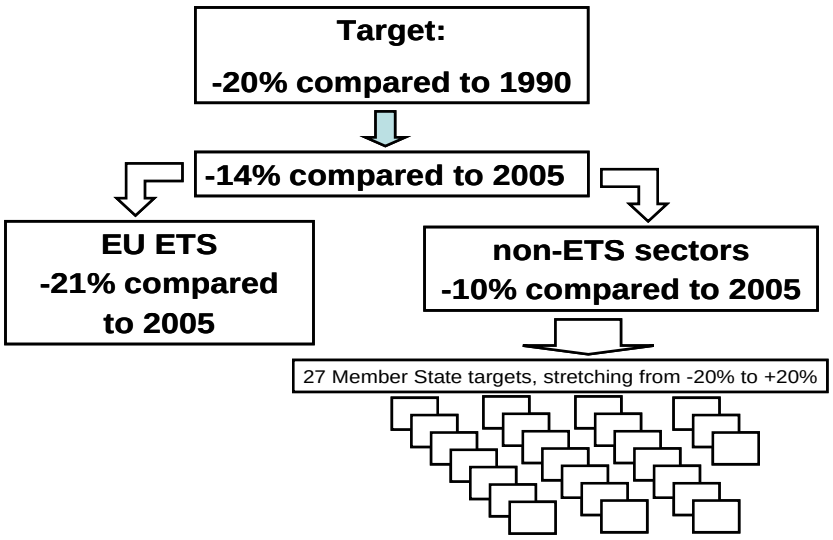
The new draft introduces, for the sake of further harmonisation, an EU-wide cap on ETS emissions as opposed to national caps. This is a positive development as well since National Allocation Plans, with their often random distribution of allowances by Member States, become superfluous. Now, all Member States will be obliged to reduce by 21% by 2020.

The reductions in sectors not covered by the ETS (e.g. transport and buildings) will be tackled through a new Effort Sharing Decision. The distribution of reduction targets under this Decision and amongst Member States is based on a GDP/capita model. The Commission is proposing a specific target for each Member State by which it must reduce or, in the case of some Member States, may increase its emissions up to 2020 for these non ETS sectors. These changes vary between -20% to +20% depending on the specific Member State. The sum of these national targets for non-ETS emissions is equivalent to -10% compared to 2005.

Even though the proposal says that some countries should be allowed to emit more than they did in 2005 in sectors not covered by the EU ETS the Commission claims that the proposal "will require some sort of reduction effort for all Member States"[9]

In order to move ahead towards this binding target the Effort Sharing Decision proposes additional policies and measures to be implemented by the Member States to further limit the emission of greenhouse gases[10] from sources not covered under the proposed ETS Directive and to specific levels detailed in the Annex to the Effort-Sharing-Decision.

The above explained is summarised in this target table envisaged by the Commission:



The Commission states five overall guiding principles:

- Respecting the targets. Without this, we will not look serious, to investors, to our negotiating partners, and most importantly, to our citizens.
- Fairness, recognising Member States' different capacities to invest and their different starting points.

[9] MEMO/08/34, page 3

[10] According to Article 2 Para 2 of the Effort Sharing Decision "greenhouse gas emissions means the emission of carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydro fluorocarbons (HFCs), per fluorocarbons (PFCs) and sulphur hexafluoride (SF6) from sources, expressed in terms of carbon dioxide equivalent, as determined pursuant to Directive 2003/87/EC.

- ❖ Competitiveness, designing a system able to minimise the costs to the European economy.
- ❖ The proposals had to be designed to promote a comprehensive international agreement to cut greenhouse emissions, including stepping up our own effort to 30% emissions cuts.
- ❖ Swift progress needed towards 2020 in order to reach to halve global emissions by 2050.[11]

2) Monitoring, Reporting Verification and Guidelines

The first step for any decision by the European Commission towards compliance evaluation in respect to the individual Member State is a system for monitoring, reporting, and verification together with a set of guidelines for monitoring and reporting which are effective but not onerous.

a) ETS Directive

The targets under the new ETS Directive will be binding targets. This means it is necessary to have efficient systems of monitoring and reporting by the Member States to the Commission. It is also necessary to have guidelines for Member States and industry.

The Commission can already under the current ETS evaluate current guidelines and amend if necessary. The Commission has recently adopted revised Monitoring and Reporting Guidelines (MRG) and will already apply them in the second trading period under the ETS. [11]

Towards a Single European Registry System

Article 30 paragraph 2 (g) of the current ETS directive already allows for the introduction of a single European Registry System. The Commission's Impact Assessment, accompanying the new draft ETS Directive underlined that although the current registry system consisting of 27 Member State registries and the Community Independent Transaction Log (CITL) did not give reasons for complaints on technical grounds, there is a need to harmonise the various national systems into one European system and one registry at EU level.

In this context, Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol clearly underlines the responsibility of the Community as a party to Kyoto:

"The Community and the Member States are all Parties to the UNFCCC and the Kyoto Protocol, and are each responsible thereunder for reporting, establishing and accounting for their assigned amounts and establishing and maintaining their eligibility to participate in the Kyoto Protocol's mechanisms."[12]

Accordingly, the proposed Article 19 ETS Directive has the following amendment:
(a) Paragraph 1 is replaced by the following:
"1. Allowances issued from 1 January 2013 onwards shall be held in the Community registry."

[11] José Manuel Durão Barroso, President of the European Commission, 20 20 by 2020: Europe's Climate Change Opportunity, Speech to the European Parliament , Brussels, 23 January 2008
[12] Recital 14 of Decision No 280/2004/EC of the European Parliament and of the Council of 11 February 2004

(b) The following paragraph 4 is added:
"4. The Regulation on a standardised and secured system of registries shall contain appropriate modalities for the Community registry to undertake transactions and other operations to implement arrangements referred to in Article 25(1b)."

From national to the European verification level

Up until now, the verification procedure has been allowed to be established under the discretion of the EU 27 Member States. The verification practices, according to the Commission's own evaluation, differ in Member States and can create distortion of a level playing field.

Ensuring equity and compatibility of application and results is paramount in enhancing the overall credibility of verification and the compliance with requirements.

The Commission proposes a regulation, to be adopted through comitology, to provide common requirements for verification, in order to guarantee a certain level of quality of the verification process, while further improvements should be enabled through amendments to Annexes IV and V of the Directive. Therefore the amended ETS proposal foresees under *Article 14* Monitoring and reporting of emissions: "1. *The Commission shall adopt a Regulation for the monitoring and reporting of emissions and, where relevant, activity data, from the activities listed in Annex I which shall be based on the principles for monitoring and reporting set out in Annex IV and shall specify the global warming potential of each greenhouse gas in the requirements for monitoring and reporting emissions for that gas.* "

The regulation will pass in line with the requirements of Article 23 and the comitology provisions.

b) Effort Sharing Decision

Registries and Central Administrator

In contrast to the ETS proposal, the Effort Sharing Decision leaves the duty for registry on accurate accounting in the hands of the Member States but links it to the Commission's Central Administrator, who is established under Article 20 of the ETS Directive.

c) Increased importance of Comitology for ETS and Effort Sharing

The proposed amended ETS Directive and the proposal for the new Effort Sharing Decision will further strengthen the existing Climate Change Committee in monitoring the Union's emissions. This Committee is composed of Member States' administrations, assisting the Commission in implementing its powers under the ETS Regime. The process of involvement of such a committee, which is a very widespread tool[13] in European administrative of the Commission's work, is generally summarised under the key word of Comitology and subject to specific Council decisions.[14]

[13] See Explanatory Memorandum for Proposal for a Directive amending Directive 2003/87 (COM (2008) 16 provisional, page 6

[14] The first decision on this issue dates form 1987: Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (87/373/EEC)

The Climate Change Committee and its tasks are specifically regulated in Article 8 of Council Decision 93/389/EEC of 24 June 1993 for a monitoring mechanism of Community CO2 and other greenhouse gas emissions.

1. The Committee is composed of the representatives of the Member States and chaired by the representative of the Commission.
2. The representative of the Commission submits to the committee a draft of the measures to be taken. The committee delivers its opinion on the draft within a time limit which the chairman lays down according to the urgency of the matter. The opinion is delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee are weighted in the manner set out in that Article. The chairman does not vote.
3. (a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

(b) If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.
If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 9 of the Decision introduces the application of the Climate Change Committee rules, as outlined in Decision 280/2004/EC also for the Effort Sharing Decision. So the Climate Change Committee will in future have important functions for both the ETS system and Effort Sharing.

Envisaged improvement on monitoring with comitology involvement

In order to improve the overall performance of the monitoring and reporting system across the EU, the ETS Directive proposal suggests a specific Commission Regulation which will be adopted through comitology and which will replace the current monitoring guidelines. In line with Council Decision 1999/468 EC[15] and regulated in the current ETS Directive under Article 23 (which will remain unchanged in the new ETS), a specific comitology mechanism in the European Union administrative tool set was introduced.

According to the Commission, experience with monitoring and reporting so far underlined "some degree of divergence of Member States' practices". In order to improve overall performance of the monitoring and reporting system across the EU, a regulation adopted through comitology should replace the current guidelines.[16]

Moreover, once an international agreement on climate change has been concluded, certain elements of the EU ETS will then again be adjusted through comitology. [17]

[15] COUNCIL DECISION of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission
[16] See Explanatory Memorandum, page 6
[17] See LEGISLATIVE FINANCIAL STATEMENT attached to Directive amending Directive 2003/87 (COM (2008) 16 provisional, page 51

d) Stricter Reporting and reduction scheme by Member States in ETS Directive and Effort-sharing Decision

The Commission has opened a path to a stricter reduction scheme and respective reporting to be followed by Member States, under ETS and in line with the Effort Sharing Decision. Both proposals, concerning the ETS and targets for the non ETS sector, foresee a **linear reduction path.** The figures must be **reported each year** by the Member States. The Commission sees this as a tool to "ensure a gradual move towards agreed 2020 targets".[18]

For example the Effort Sharing Decision requires, in Article 5, the Member States to submit annual reports on the annual emissions in line with Decision 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol.[19] The Commission will evaluate "whether progress is sufficient to fulfill the commitments under this Decision".[20]

3) Current Compliance Reality

The following will detail the instruments for the Member States and for the European Commission to ensure and enhance enforcement. There are two main layers of compliance under the current ETS scheme and the draft proposal: The enforcement and penalty schemes of the Member States and the corresponding enforcement tool of the European Commission against disobedient Member States.

a) First compliance layer: Member States' obligations, power to control and existing penalty systems

Annual cuts foreseen in the ETS Directive and in the Effort Sharing Decision

For emissions under both the ETS Directive and the Effort Sharing Decision, the Commission proposes the need for annual cuts in a linear manner.

In the ETS proposal, Article 9 outlines that the Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of the period 2008-2012. The quantity shall decrease by a linear factor of 1,74% compared to the average annual total quantity of allowances issued by Member States in accordance to the Commission's decisions on their national allocation plans for the period 2008-2012. The linear factor will be reviewed no later than 2025.

In the Effort Sharing Decision, Article 3, paragraph 2 outlines that Member States shall ensure that their total greenhouse gas emissions in 2013 do not exceed the average annual greenhouse gas emissions of that Member State during the years 2008, 2009 and 2010. This, in consequence, gives the option to look at the average from the previous three years.

[18] MEMO/08/34, Brussels, 23 January 2008, Questions and Answers on the Commission's proposal for effort sharing , page 6
[19] Official Journal L 49, 19.2.2004
[20] Article 5 paragraph 2 Effort Sharing Directive

Furthermore, "Member States shall annually limit those greenhouse gas emissions in a linear manner to ensure that those emissions do not exceed the maximum level for that Member State in 2020". In introducing a specific borrowing mechanism in between the periods of around 2% per year from 2013 onwards, the European Union proposes a balancing system for the annual cuts.

The **ETS Directive** is based on a mandatory obligation for all Member States to reduce especially CO2 emission and in future further greenhouse gas emissions by concrete reduction targets per tonne CO2 equivalent per Member State. The Member States are legally responsible towards the European Commission to fulfil this obligation. It is the Member States which have the direct responsibility on the EU supranational as on the international level since they have agreed to the ETS directive and since the cap and trade mechanism is based on the assumption that the States hold the right over the emission permits.[21] In having that right, they are also directly responsible to deliver their obligation to the European level, represented by the European Commission.

Regarding the **Effort sharing Decision** once the targets in the Annex are agreed on, the Member States will have no means to appeal against these targets later.[22] This will make effort sharing targets binding on Member States. The Effort Sharing Decision defines the emission reduction targets as laid down in Article 3 of this decision as being "obligations" for the Member States. This is explicitly expressed as such in Article 4 (1) of this Decision.

The Effort Sharing Decision states that "Member States shall annually limit" their greenhouse gas emissions in a linear manner. The formulation "shall limit those greenhouse gas emissions in a linear manner" is quite strong and could mean that the European Commission could enforce annual targets because they are legally binding.

Existing penalty system under the ETS Directive

Article 16 of the current ETS Directive states that Member States must lay down rules on penalties for non-compliance of national provisions by their industries. Member States shall take measures to ensure that those penalty rules are implemented. The penalty rules had to be submitted to the Commission by 31 December 2003. The current penalty for not reducing the requested amount of emissions is 100 Euro/tonne CO2 equivalent. This is a meaningful penalty that will be applied on a year by year basis and thus ensure that the annual cuts foreseen in the ETS Directive for industry can in principle be ensured

The penalty system and Member States' involvement is unchanged in the proposed ETS Directive. Only Paragraph 4 of the current ETS Directive is proposed to be changed so that the **penalties for non-compliance by industries remain "sufficiently high to ensure that the market functions properly"**. Therefore the Commission proposes to index the excess emissions penalty to the annual inflation rate of the Eurozone. This provision should, in view of the Commission, "ensure the deterrent effect of the current provision without having to review it frequently".[23]

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[21] One should certainly mention here the intensive discussion about the ethical and legal clarity and acceptability of such a right, see for example: Peter Barnes, Who owns the Sky, 2001, page 33 cons.; in general: Theodore Steinberg, Slide Mountain, The Folly of Owning Nature, 1995

[22] MEMO/08/34, Brussels, 23 January 2008, Questions and Answers on the Commission's Proposal for Effort Sharing , page 3: "Countries will not be able to appeal against the targets once they are set, but the codecision procedure ensures that there is some room for negotiation in the legislative process. The intention is for the targets to be finalised within the current term of parliament."

[23] See Explanatory Memorandum for Proposal for a Directive amending Directive 2003/87 (COM (2008) 16 provisional, page 6

Absence of any penalty system in the Effort sharing Decision

No specific direct compliance or penalty systems means are introduced in the Effort Sharing Decision than the potentially binding annual targets.

b) Second Compliance layer – European Commission over Member States

Both proposals do not foresee a direct specific compliance from the European Commission towards the Member States going beyond the classic infringement procedure. How the classic infringement procedure could play a role in ensuring that Member States fulfil their obligations will be examined later in chapter III.

The European Commission's supervision function towards the Member States

Article 211 ECT requests the Commission to ensure "that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". This backbone of the function of the Commission as guardian of the Treaty is certainly a cornerstone in the current EC Treaty." [24]

ETS Directive

The **ETS Directive** is committed to reduce loopholes for Member States and shows many improvements. The fines towards industry in the ETS directive will be effective tools to ensure that the foreseen annual cuts will be met by industry. But important risks of non-compliance of Member States do remain in the new proposal and need to face at least stronger enforcement tools for the Commission against Member States.

According to the new ETS proposal the Member States needs to publish and submit to the Commission, by 30 September 2011, the list of installations covered by this Directive in its territory and any free allocation to each installation in its territory. By 28 February of each year, the competent authorities shall issue the quantity of allowances that are to be distributed for that year, calculated in accordance with Articles 10 and 10a. An installation which ceases to operate shall receive no further free allowances.

This Article gives the executive responsibility to the Member States. Therefore a strong enforcement mechanism against a Member State in case of non fulfilment of these obligations is important. The same is necessary if Member States would for example not execute the penalties against its industry under the ETS scheme. This would also be important to ensure that in view of attempts by Member States to water down the condition under the new ETS the overall and interim target objective can be swiftly enforced nonetheless.

[24] The Lisbon Treaty deletes Article 211 ECT and introduces instead a new *'Article 9 D: "*1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.",
Official Journal, C 306, Volume 50, 17 December 2007

Effort Sharing Decision

The **Effort Sharing Decision** has no direct specific compliance tools from the European Commission towards Member States. The Commission, as guardian of the treaties, can only, in case it comes to the conclusion that the respective Member State does not fulfil its obligations, start infringement procedures in line with Article 226 to 228 ECT.

Under the Effort Sharing Decision Member States are in charge of all requirements that are essential to fulfil the objectives of the Decision. Especially the following obligations from Member States would need enforcement from the European Commission to make sure that they are met:

- It is each Member State that needs to ensure, that its total greenhouse gas emissions in 2013 from sources not covered under Directive 2003/87/EC do not exceed the average annual greenhouse gas emissions of that Member State during the years 2008 to 2010, as reported and verified pursuant to Directive 2003/87/EC and Decision 280/2004/EC.

- It is each Member State which shall further annually limit those greenhouse gas emissions.

- According to Article 4 Paragraph 4 each Member State is responsible that the use of credits by each Member State from project activities before the entry into force of a future international agreement on climate change pursuant shall not exceed 3% of that Member State's greenhouse gas emissions not covered under Directive 2003/87/EC in the year 2005.

- Each Member State shall, in their annual reports submitted under Article 3 of Decision 280/2004/EC, report their annual emissions resulting from the implementation of Article 3 and the use of credits in accordance with Article 4.

- Member State registries established under Article 6 of Decision 280/2004/EC shall ensure the accurate accounting of transactions under this Decision. This information shall be accessible to the public.

This substantial list of responsibilities of Member States without a specific direct compliance towards the European Commission clearly shows that there is a big gap in responsibility.

c) First Conclusions

Overall, one can conclude that both the ETS Directive and the Effort Sharing Decision are closely interlinked and present a joint framework for emission reduction policies. An improvement for better compliance mechanism and management structures on the European level will optimally need to cover both instruments.

The Effort Sharing Decision gives enormous leeway to the Member States. Nonetheless, also under the new ETS Proposal there is still enough room for wrong manoeuvre by the Member States which call for rapid enforcement actions by the European Commission. The Directive gives some executive responsibility to the Member States.

The major points of possible risk of non – compliance under the Effort Sharing Decision and also under the ETS Decision certainly need a close attention for good enforcement mechanisms in the hands of the European Commission.

But the comparison of the two draft proposals clearly shows that strong penalty mechanisms are definitely more in need under the Effort Sharing Decision. Here the call for strong and rapid enforcement tools for the European Commission is essential since otherwise it is very improbable that the targets under this Decision will be reached.

In order to be able to develop thoughts in this direction it is necessary to clearly outline in the following chapter the currently existing compliance reality in the European Commission hands and to underline the weak points.

III. The existing compliance tools of the European Union

The ETS Directive and the Effort Sharing Decision, as the Kyoto Protocol, are tools in countering climate change, which is recognised as a significant global threat. The urgency of the objective under the ETS framework makes it quite unique in the concert of environmental legislation. Only if the temperature increase on this planet is stopped at least at the magnitude decidedly needed according to scientific evidence, it can be ensured that all other environmental objectives in other regulations will be met.

Therefore the specific urgent imperative for the climate must require a fast enforcement system for all such legislation which is able to deliver fast the urgently needed results.

This chapter will look at the existing procedures of the European Commission to ensure that Member States fulfil their obligations, will examine if these procedures are sufficient for the current proposal for ETS and Effort Sharing and will make a proposal for a swifter penalty mechanism.

1) Enforcement and management powers for the European Commission

One could argue that in the most efficient supranational compliance system, the signatory parties would delegate "enforcement and management powers to independent institutions, and individuals would enjoy direct access to national and/or supranational legal bodies." [25]

Concerning the Commission being, in principle, such an institution and in view of the key questions to be extracted from this ideal picture, the following key points would be needed to respond to this efficiency ideal:

- Authority for decision
- Availability of and access to a dispute settlement body also for natural and legal persons
- Power of the independent institution
    - on capacity building,
    - monitoring and

[25] Jonas Tallberg, Paths to Compliance: Enforcement, management, and the European Union, International Organization 56, 2002, page 636

- sanctioning of non-complying industry and Members States

The current Commission's draft proposal for a ETS Directive strengthens all above key points with the exception of direct sanctioning of Member States by the European Commission.

There are two main layers of compliance under the current ETS scheme and the draft proposal: The enforcement and penalty schemes and obligations of the Member States and the corresponding enforcement tool of the European Commission against disobedient Member States.

2) The classic infringement procedure

The classic infringement procedure in line with Article 226 to Article 228 ECT follows a clear legal path[26]:

If the Commission considers that there may be an infringement issue, it sends a "Letter of Formal Notice" to the Member State concerned, requesting it to submit its observations usually within two months.

In the light of the reply or absence of a reply from the Member State concerned, the Commission may decide to address a "Reasoned Opinion" (final written warning) to the Member State as an urgent appeal to comply within a specified period, which usually means within two months.

If the Member State fails to comply with the Reasoned Opinion, the Commission may decide to bring the case before the European Court of Justice. When the Court of Justice determines that the Treaty has been infringed, the Member State needs to conform with this decision.

Only then can one arrive at the question of penalties to be paid by the Respective Member States. Article 228 of the Treaty bestows the Commission with power to act against a Member State that does not comply with a previous judgement of the European Court of Justice. The article gives the right to the Commission to again ask the Court to impose a financial penalty on the Member State concerned.

The European Commission has already started Article 226 ECT procedure against some Member States under the current ETS enforcement, on the grounds of missing national allocation plans or incomplete emission reports.[27]

Such penalty payment in line with Article 228 ECT to be decided against a Member State that does not comply with the specific ruling of the European Court after infringement procedure can amount to considerable sums, determined on basis of the method of calculation which the Commission has set out in its Communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article 228 ECT (OJ 1997 C 63, p. 2) which is now regulated by Commission Communication SEC(2005) 1658. [28]

[26] http://ec.europa.eu/community_law/infringements/infringements_en.htm

[27] See Commission takes legal action , Press Declaration IP/06/1763 12 December 2006

[28] The fines which may be decided in the case of Article 228 ECT can be quite substantial, see: Judgment in Case C-304/02 *Commission v France* of 12 July 2005: For non-compliance with a 1991 judgment, the ECJ ordered France to pay both a penalty payment of EUR 57 761 250 for each period of six months, from the 12

But the Commission needs to involve the European Court and submit its penalty bill. This means a double involvement of the Court, a long procedure before and after the first judgement of the Court.

"All in all, the period of time elapsing from the start of the breach by the member state until the setting of a penalty payment by the Court will hardly ever be shorter than 7 years. This is not exactly *rapid*."[29]

The possibility of imposing financial sanctions on a Member State that has failed to implement a judgment establishing an infringement was introduced by the Maastricht Treaty, amending former Article 171 ECT, now Article 228 of the ECT. Since introduction of this Article the Commission has published several Communications on the application of this Article 228 ECT: In 1996 the Commission published a first Communication on the application of this provision. In 1997 it published a second communication better detailing the method of calculating penalty payments. In 2001 it adopted an internal decision on the definition of the "duration coefficient" applied in this calculation. All criteria of these Communications of 1996 and 1997 have been in principle approved by the European Court.

The most recent new Communication replacing the previous Communications of 1996 and 1997, retains their main principles "but also reflects recent case law, particularly concerning the lump sum payment and the principle of proportionality".[30] It also updates the method of calculating sanctions and better reflects it to the fact of enlargement towards the EU -27 Member States.

Over the last decade this penalty system has become a settled and defined enforcement instrument. Albeit, the long time frame before such a penalty can be issued prevents the rapidity needed to ensure compliance with climate change legislation.

3) The possible impact of the classical infringement procedure

Regarding the **Effort Sharing Decision** the current infringement procedure of the European Union is clearly not sufficient to ensure that yearly emission cuts will be made. The infringement procedures can probably only be introduced towards the end of the period foreseen. That means that the Commission will first need to have enough evidence and a strong evaluation that the respective Member State did fail to properly enforce the necessary emission reductions.

Such a procedure would probably not start in the first years of the period 2013-2020 covered by the Effort Sharing Decision. Though the formulation "Member States shall" annually limit their emissions is really strong and could theoretically be enforced year by year, it is really improbable that the European Commission will start such a lengthy and time-consuming procedure year by year against a probably high number of Member States. Also, a Member State could easily fail in the first year but comply in the second year. Since the Commission introduced a special evaluation in 2016 this could be a moment where infringement

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July 2005 onwards and a lump sum of EUR 20 000 000; Communication from December 2005 under http://ec.europa.eu/community_law/docs/docs_infringements/sec_2005_1658_en.pdf

[29] Bert Van Roosebeke, State Liability for Breaches of European Law, 2007, page 188

[30] SEC(2005) 1658 Communication from the Commission Application of Article 228 of the EC Treaty, paragraph 3

procedures would probably start. But with the average duration of several years this procedure is too long until fines are to be paid. This means that tangible penalties under the classic infringement procedure in line with Article 226 to Article 228 ECT would most probably only become effective after 2020. This could mean missing the overall target of the Effort Sharing Decision to reduce non-ETS emissions until 2020.

Since currently and in future (in case that there will be a new international agreement on climate change) the EU has to fulfil its responsibilities laid down in the Kyoto protocol the following excurse will examine whether the compliance under the Kyoto Protocol (which might be similar under a future international agreement) could be meaningful towards reaching the obligations for Member States and industry under the ETS Directive and Effort Sharing Decision.

4) Excurse: Short outline on the Kyoto enforcement mechanisms

Even though "a strong and effective compliance mechanism is key to the success of the implementation of the (Kyoto) Protocol" there is not really a sharp weapon relating to and assuring this wisdom. There is no penalty system in the form of fines involved. Moreover, it can already be said that the compliance procedure for the period of 2008 to 2012 will only start after 2013.

Under the Kyoto Protocol, the compliance mechanism means a regulated enforcement mechanism which is managed by a specific compliance branch of the so-called Compliance Committee.

The enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments. [31] Decisions of this branch need a three-quarters majority and a "double majority" of both Annex I and non-Annex I Parties.[32] The enforcement branch is responsible for determining whether a Party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanisms.

Each single case of non-compliance requires a specific action. In case the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount, it must declare that that Party is in non-compliance and require the Party to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of 30%. It asks the Party to submit a compliance action plan and suspend the eligibility of the Party to make transfers under emissions trading until the Party is reinstated.

There is an intensive reporting procedure required and expert views from specific review teams, Parties and other official sources have to be taken into account.

[31] It consists of ten members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the so-called small island developing States, and two each from Annex I and non-Annex I Parties, see quote from UNFCC, An Introduction to the Kyoto Protocol Compliance Mechanism http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php

[32] See An Introduction to the Kyoto Protocol Compliance Mechanism

Any Party not complying with reporting requirements must develop a compliance action plan as well and Parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, the enforcement branch will make a public declaration that the Party is in non-compliance and will also make public the consequences to be applied.

If a Party's eligibility is withdrawn or suspended, it may request, either through an expert review team or directly to the enforcement branch, to have its eligibility restored if it believes it has rectified the problem and is again meeting the relevant criteria.

Annex I Parties have 100 days after the expert review of their final annual emissions inventory has finished to make up any shortfall in compliance. If, at the end of this period, a Party's emissions are still greater than its assigned amount, the enforcement branch will declare the Party to be in non-compliance still and this leads to further ineligibility.

This means that also under the Kyoto Protocol currently no timely, direct and efficient compliance mechanism exists that could help enforcing that Member States meet the annual emission reduction targets for Effort Sharing or ETS emissions.

5) Conclusions

The specific urgency for fighting climate change and reducing emission must require a management system which is much faster in delivering the urgently needed results than the classic system and enforcement tools from Article 226 ECT and Article 228 ECT and their time-consuming infringement and subsequent penalty procedure.

Neither of the two proposals currently have any effective compliance regime to rapidly penalise member states for failing to deliver on their obligations.

While the ETS Directive due to the penalty system towards industry has a strong tool that will be effective year by year, the Effort Sharing Decision will probably miss the foreseen year by year emission cuts and is therefore in danger of failing its long-term targets for 2020. Unless the Commission will get direct enforcing power on the Member States, avoiding the need for lengthy time-consuming infringement procedures, it is possible that emissions reductions will not materialise at a sufficient rate as has been seen by Member States failure to deliver on Kyoto Protocol obligations.

The ETS Directive and the Effort Sharing Decision for real success require a better set of compliance systems than the Commission has access to at present or which are proposed for the new proposals.

This study suggests the Commission should be able to issue penalties for failure to reach annual targets. Such an approach would complement the Kyoto Protocol, which currently has no timely, direct and efficient compliance mechanism in the form of direct fines issued against non-complying States.

IV) The call for an early enforcement instrument

Uneven implementations of the ETS rules and the objectives of the Effort Sharing Decision immediately threaten the further decrease of climate conditions on our planet. Therefore and in line with the below outlined precautionary principle, the level playing field doctrine and following the guidance of Article 5 Paragraph 1 ECT,[33] the European Institutions are obliged to introduce a direct penalty based compliance mechanism per se and this should be done during the current process of amendments to the current ETS Directive and for the introduction of the new Effort Sharing Decision.

1) Precautionary principle

The precautionary principle is not defined as such in the Treaty, but the Treaty introduced it in Article 174 Paragraph (2). According to the European Commission "*in practice*, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health* may be inconsistent with the high level of protection chosen for the Community." [34]

The Commission points in its Communication on the Precautionary Principle from 2000 that the Principle is an all-encompassing approach to be applied, "one cannot conclude from (the setting in Article 174 ECT) that the principle applies only to the environment". [35]

The precautionary principle applies on several levels: In accepting the scientific evidence of a very tight flexibility of manoeuvre in time to prevent degradation, as reported by the Intergovernmental Panel on Climate Change and accepted by the European Union, and considering the strong resistance of industry sectors and some Member States to act. In order to prevent the further imbalance of progress, the Community Directive must introduce a penalty system under the guidance of the European Commission where the Commission can issue direct levies. A failure to introduce such mechanism would violate the precautionary principle.

2) Loyalty Principle and "effet utile" - a guideline also binding for the European Commission

One could raise questions in view of the above analysis on the precautionary principle and the established experience of the European Commission with problematic enforcement practise in many Member States, with a slow overall enforcement and low success if the Commission is not obliged to propose a stronger system with a direct penalty mechanism.

Background for such an obligation could be main principles deriving from Article 10 ECT and European Court decisions.[36] The Loyalty Principle and the "*effet-utile*" Principle laid

[33] Article 5 Par. 1 reads as follows: " The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".
[34] Brussels, 02.02.2000, COM(2000) 1, COMMUNICATION FROM THE COMMISSION on the precautionary principle,
[35] Communication on the precautionary principle, page 10

down in Article 10 ECT certainly ask that Member States in transposing directives must select the national forms which are best suited to ensure the effectiveness of Community law ('*effet utile*'). The principle is not reserved as something to be observed only by Member States, but is a general European legal dogma. It secures the unity of the European legal order. It can be argued that especially the Principle of Loyalty provides for adequate responses to the challenge of most effective legislation and unity.[37]

Having outlined the urgency of the tasks for climate policies and the tight time framework for Europe to reach a success concerning its own commitment and reflecting on the clear enforcement under-achievement by many Member States, one could certainly argue that the Commission needs to apply the loyalty principle for its own revision and amendment process. This would lead to stronger and thus direct enforcement pressure tools for the European Commission.

3) International Treaty level

A further argument for penalty power for the European Commission emanates from the International Treaty level. The Community must comply with its obligations under the Kyoto Protocol, as laid down in the political agreements and legal decisions taken at the Seventh Conference of the Parties to the UNFCCC in Marrakech ("the Marrakech Accords"). The Kyoto Protocol to the UNFCCC was approved by Council Decision 2002/358/EC. If Member States do not comply swiftly and efficiently with their legal obligations under the ETS Directive and Effort Sharing Decision, Europe cannot comply with its direct obligation towards the Kyoto Protocol and signatory States.

It is the European Commission which is, in the Kyoto context in general, quite explicit on the needs for effective enforcement power: "Since the objectives of complying with the Community's commitments under the Kyoto Protocol, in particular the monitoring and reporting requirements laid down therein, cannot, by their very nature, be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may also adopt measures, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty."[38]

This is just not translated yet into penalty power rules. As a result the entire procedure remains relatively weak.

4) The path is already open towards a direct penalty right for the Commission

The current draft proposal for an amended ETS Directive and Effort Sharing Decision of the European Commission opens the path towards a direct penalty right for the European Commission. The proposal introduces numerous changes which basically all relate to one objective and that is to get the ball out of the Member States' court and on the turf of the European Commission.

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[36] See Article 10 Paragraph 1: *Article 10* -„Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

[37] See on this principle: Armin Hatje, Loyalität als Rechtsprinzip in der Europäischen Union, (2001).

[38] European Commission: EC and the United Nations Framework Convention on Climate Change, http://ec.europa.eu/environment/climat/gge.htm

Key examples are (also see Chapter II)

- An EU-wide emission cap
- the move from national to European verification level,
- the introduction of a Single European Registry, the enforcement of the Committee
- the enforced linking to other international climate treaties and policies
- opening towards a stricter regulation on the monitoring and reporting system across the EU
- the increase of strength and use of the Comitology mechanism by the European Commission which is based on Council Decision 1999/468 EC of June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, clearly regulated in the current ETS Directive under Article 23.

V A new direct penalty structure

The most important improvement for a reliable ETS and a strong Effort Sharing system would be to enable the Commission to issue penalties directly against Member States without the need to go into lengthy infringement procedures before the European Court of Justice. It is also in the interest of Member States that such a mechanism is established in order to be sure that each Member State lives up to its promise, thus ensuring a level playing field.

One approach to find a more efficient tool for this area of climate protection application in Member States could have been to introduce a Climate Protection and Management Chapter into the new Lisbon Treaty, giving clear new management tools to the European Commission to supervise, direct and enforce the overall objective of drastic GHG reduction, with emission trading as one instrument. Since such a step is not foreseen and since a specific Convention to introduce such a chapter is probably unrealistic to achieve in a short time, a compromise within the existing boundaries of the ECT needs to be found.

Against this background the following tries to rapidly introduce a direct penalty system within the existing set of legislative tools under current ECT and secondary legislation and Communications.

Penalties in form of fines are probably the most efficient tool to force Member States to fulfil the ETS targets and the objectives under the Effort Sharing Decision. As the European Court underlines - in the context of Article 228 ECT ruling "…the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist…"[39]

1) Comitology as the only stronger enforcement mechanism in the current proposals

The current applied assistance for stronger enforcement in the Directive is only the already mentioned Comitology mechanism which has its base in Article 202 ECT. These standing committees are always composed of officials from the Member States and the Commission. Under the ETS system this is established in Article 23 of the current ETS Directive.

[39] Case C-304/02, *Commission v France* of 12 July 2005, Paragraph 81

Originally this committee was installed by Article 8 of Council Decision 93/389/EEC.[40] It is the only established specific instrument to intensify enforcement in Member States by the help of representatives of Member States in this committee, to recommend and implement measures and mechanism to the Commission and the Council by way of preparing decisions in assisting the European Commission.

But this tool is insufficient. It may strengthen cooperation and information mechanisms. But the new ETS Directive and the Effort Sharing Decision must confer a penalty power to the European Commission.

In consequence, Council Decision 1999/468/EC could be applied as a procedure enabling the Commission to develop a mechanism on direct penalties, after passing Comitology procedure and in line with the experience from the Communications on the application of Article 228 ECT and the setting of the right penalty structure.

This approach could become the missing link to effectiveness of emission reductions until 2020 in Europe by clearing the way towards a reliable penalty system executed against the Member States by the European Commission, in cooperation with the Committee under Article 23 of the ETS.

2) The concept of "quota enforcement"

The idea of direct fine mechanisms in the field of market-related policies which are based on caps and quota system is not unusual in the European Treaties' set. One noteworthy example in many aspects is Article 53 ECSC Treaty that stipulates that the High Authority may " after consulting the Consultative Committee and the Council, authorize the institution, under conditions which it shall determine and under its control, of any financial mechanisms common to several enterprises which are deemed necessary for the accomplishment of the missions defined in Article 3 and compatible with the provisions of the present Treaty and particularly of Article 65."

The European Community is from its beginnings accustomed to facing market situations where excess production calls for quota and specific cap systems in trade. The European Union's common fisheries' policy (CFP), under which the European Commission sets maximum allowable catches, is another example in this respect.

[40] Council Decision 93/389/EEC was amended by Decision 99/296/EC for a monitoring mechanism of Community greenhouse gas emissions and is now replaced by Council Decision 280/2004/EEC.(see Recital 1 of Decision 280/2004/EEC: In order to take into account developments on the international level and on the grounds of clarity, it is appropriate for that Decision (*93/389/EEC*) to be replaced. The current ETS draft proposal forgot to adjust the current Article 23 ETS to this new legislative background, whereas the Effort Sharing Decision does adjust to the new specific Climate Committee.
Article 9 of Council Decision 280/2004/ETS reads as following: "Committee-
1. The Commission shall be assisted by a 'Climate Change Committee'.
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof.
The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
3. The Climate Change Committee shall adopt its Rules of Procedure."

The "Common Organisation of the Markets in Sugar" foresees seven different levies, all revenue titles under "Own Resources" in EU's budget and within the Common Agricultural Polices' framework.[41]

The emission quota is in that respect just another excess management tool, albeit with far bigger and dramatic consequences for the human survival on this planet. And as such it should rely on similar penalty mechanisms conveyed to the European Commission within the framework and limitations of rights and competencies given to it by the European Treaty and based on this by secondary legislation.

It is important to ensure for the introduction of a specific greenhouse gas emission penalty system that the principles of transparency, non-discrimination, and proportionality are respected in establishing the penalty structure and fund and when fixing the level of penalty-Decisions taken need to be based on objective and verifiable criteria and must be made public.

With a strong direct penalty mechanism under the ETS Directive and the Effort Sharing Decisions the tendency of some Member States to try the limits of reliability, to be unfair in this enforcement policy by slow application, weak enforcement or clear misinformation will drastically decrease. "Cheating will be effectively deterred in those situations where policy enforcers place a relatively high weight on the surplus of producers. In short, the ability to levy very large fines essentially means that quota enforcement can be made both perfect and costless."[42]

3) Example of a direct penalty system: The European Milk levy mechanism - a blueprint for design of a penalty framework

Europe possesses an important mechanism of Commission-controlled penalties to attain quota objectives in the milk levy scheme. This mechanism is based on Article 37 ECT,[43] thus set within the Treaty Title II (Agriculture). This excludes certainly a direct legal link to this mechanism when introducing a penalty system on ETS and Effort Sharing.

But the principle of the milk penalty system could serve as useful and established example which main elements could be applied for climate penalty structures. The cow milk levy scheme was introduced in 1984 and was designed to reduce the imbalance between supply and demand for milk and milk products. The mechanism works as follows:

Starting on 1 April of each year, and renewed in 2004 for eleven consecutive periods of twelve months, Member States collect a levy from farmers on quantities of cow's milk or other milk products marketed during the relevant twelve-month period in excess of the maximum reference quantities allocated to each Member State.

The levy is administered separately for two types of activity, one for deliveries to an undertaking approved by a Member State and the other for direct sales to the consumer. When the Member States exceed their national reference quantity, producers who contributed to the

[41] See Budget, Chapter 11

[42] Konstantinos Giannakas and Murray Fulton Tough Love: Optimal Enforcement of Output Quotas in the Presence of Cheating, Journal of Agricultural & Food Industrial Organization *Volume* 1 *Article* 2 (2003), page14

[43] "Article 37 Paragraph (2), 3rd sentence ECT: « The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make."

overrun pay the proportional levy. The revenue of individual levies is for 99 percent transferred to the European Agricultural Guidance and Guarantee Fund (EAGF). 1 percent is to be reserved by withholding in order to solve difficult cases. For the quota year 2004/2005 starting on 1 April 2004 the total quantity of milk quota is 137.34 million tonnes. The total quantity is split-up in 134.87 million tonnes for deliveries and 2.47 million tonnes for direct sales. In case of non-respect of the milk quota for the quota year 2004/2005 the levy for 100 kg of milk is set at EUR 33,7.[44]

The penalty system under the milk quota regulation has quite substantial consequences: In 1997 for example, the penalties on detected above-quota production of milk in Italy alone were higher than EURO 325 million. [45] By October 2005 the European Commission had issued EURO 364 million in fines after nine member states exceeded their milk quotas for the year up to 31 March 2004.[46]

The revenues from this system go as "Superlevy from milk producers" under Chapter 6 7 (revenue concerning EAGF and the European Agricultural Fund for Rural Development (EAFRD) and as sub chapter 6 7 0 3 into the European Union's budget.[47]

As outlined, this milk quota mechanism should be accepted as starting point to design a correct penalty system for the European Commission as efficient enhancement tool. The Commission has gathered experience with the design of current national penalty systems against national industry submitted to ETS. In amending Article 16 ETS the Commission calls in its current draft proposal for a system to ensure that the penalties for non-compliance remain "sufficiently high to ensure that the market functions properly" and to "ensure the deterrent effect of the current provision without having to review it frequently"[48].

This and the Commission's levy experience within the infringement procedure scheme and its method of calculation of penalty payment in case of disobedience of a Member State with a European Court's judgment as regulated by Commission Communication SEC(2005) 1658 are an excellent framework for the design of such a penalty system.

The amended draft ETS proposal and the ETS Direction should both at least introduce a specific chapter and article on direct enforcement and penalty mechanism against Member States. The concrete design could be left for a specific Penalty Regulation to be elaborated and decided by the European Commission- within the context of strong comitology- This Commission Regulation should be presented until 2010.

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[44] The Council has fixed the corresponding quantities for each Member State. Until the quota year 2003/2004 the rules were fixed by Regulation (EEC) No. 3950/92 (OJ L405 of 31.12.92). As from 1 April 2004 the rules are fixed by Regulation (EC) No. 1788/2003 (OJ L270/123 of 21.10.2003) lastly amended by Regulation (EC) No 2217/2004(OJ L375 of 22.12.2004).
For the quota years 2002/2003 and 2003/2004 the milk quota quantities were respectively 117.6 and 117.7 million tonnes for deliveries and 1.3 and 1.2 million tonnes for direct sales.
See: World Trade Organization, G/SCM/N/123/EEC, 26 August 2005, (05-3585), Committee on Subsidies and Countervailing Measures; SUBSIDIES, New and Full Notification, Pursuant to Article XVI:1, of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, EUROPEAN COMMUNITIES

[45] Konstantinos Giannakas and Murray Fulton, Tough Love, page 2

[46] The EU Member States - Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, the Netherlands, Spain and Austria - accounted for a combined overrun of one million tonnes

[47] See for example: European Union's budget for 2008, Parta — A. Introduction and Financing of the General Budget

[48] See Explanatory Memorandum for Proposal for a Directive amending Directive 2003/87 (COM (2008) 16 provisional, page 6

The European Commission would be the appropriate institution to directly organise the rules for such penalty system. The Council would be too close to the behaviour patterns of the Member States of non- or weak compliance. Since the mid-1990s and especially with the entering into force of the Maastricht Treaty in November 1993, democratic and administrative rules have changed as well in the same time as the decision power of the European Parliament increased. Especially in environmental matters, things changed quite substantially, from the historic mostly two-headed cooperation between Commission and Council towards the more democratic approach of co-decision, meaning to allow the European Parliament to adopt acts in conjunction with the Council. In parallel, it became evident that the Council rarely succeeded when having sole and fully implementing power, such as in the case of the implementation of the major annexes to Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora)[49]. In a way with the move of Europe towards more opening of administrative procedures and more democracy the former quasi-autarchic policy of the Council in some enforcement matters on the EU level "has come to an end"[50]. It is now quite a routine that the Council delegates quite extensive powers to the Commission.

Therefore the draft legislative proposal for an amended ETS directive and for an amended Effort Sharing Decision should contain major points for the introduction of such a direct penalty system, but may leave the fine-tuning to the European Commission via the instrument of a Regulation. This would correspond well to the other regulatory right of the Commission, as proposed in the ETS draft under Article 14 Monitoring and Reporting of Emissions.

4) Conditions to ensure yearly emission reduction with the help of a direct penalty system

Apart from the introduction of a new penalty system the following conditions need to be met urgently:

- ➔ **A swift penalty procedure**, as opposed to the current lengthy infringement procedure involving the European Court of Justice, is key to make emission cuts happen across the EU in the short- and long-term.
- ➔ This penalty procedure should ensure that the **annual targets** are met by Member States and are established on a linear reduction path as foreseen in both ETS Directive and Effort Sharing Decision.
- ➔ **Strong penalties** should be applied to **Member States not reaching the targets** for both ETS and Effort Sharing. The same penalties should be applied per tonne CO2 equivalent for underachieving in both the ETS Directive and Effort Sharing Decision. This would be equivalent to the 100 Euro/tonne of the national ETS fines.
- ➔ **Flexibility in between the periods** needs to be given **for the Effort Sharing Decision**. In this case, Member States should have the flexibility of at most 1% by borrowing from emissions of the next year as foreseen in the Commission's proposal. If Member States underachieve, the amount of emissions they underachieve by should be added to the target of the following year with a mandatory additional reduction

[49] Christoph Demmke, The secret life of comitology or the role of public officials in EC environmental policies with further examples of ailed power assumption by the Council, page 19
[50] Demmke, page 19

restoration factor of 1.3. If Member States overachieve, than the target of the next year can be reduced.

Reporting and processing of the data

Reporting and processing of the data needs to be **speeded up** to be able to assess whether or not reductions have been achieved each year.

- ➔ Member States should **report** on their emissions of year X in March of year X+1. The Commission **verifies** this before end of April of year X+1.
- ➔ If Member States do not hand in their **reports in time**, a meaningful penalty should be enforced immediately.
- ➔ Annual reporting should be placed at the highest policy level and trigger high-level policy debates by the European Parliament and the European Council

Regular revision of the targets in accordance with the latest scientific findings

- ➔ The targets for the ETS Directive and Effort-sharing Decision should be revised in accordance with the most recent IPCC findings so that the EU is in line with its target of staying below two degrees.

It has to be underlined that the levy mechanisms within the Common Agricultural Policy have one strategic advantage over this new direct penalty mechanism. If a Member State does not pay its penalty, the Commission is entitled to "deduct a sum equivalent to the unpaid levy from the monthly advances on the provision for expenditure" ….based on the financing and from the budget of the Common Agricultural Policy.[51] One possibility to deduct money regarding ETS and Effort sharing could be via management of the auctioning revenues from the ETS, but how this could work in detail still has to be examined more closely.

5) Some guidance for a Commission regulation

This paper can only present a very rough outline of those points that need to be regulated. The Regulation would be a Commission Regulation establishing a levy in the European Emission Trading and Effort Sharing sector of the European Union.

The Regulation will be based explicitly on the new ETS Directive and the Effort Sharing Decision and their relevant articles which will foresee the establishment of such direct penalty system and the right of the Commission to elaborate such a Regulation through Comitology procedure. It should clearly define that Member States are held liable to the European Commission for the non achievement of their obligations and it should indicate the fund where the payment must be transferred.

The main purpose of the Regulation will primarily be to reduce the imbalance between the objectives of the EU to reduce emissions until 2020 and the underachievement of Member States to curve down emissions and to fulfil their obligations in timely and accurately fashion.

[51] See for example Article 3 Paragraph 2 page 1 of Council Regulation No. 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector

The regulation will set a time period for its first validity time-frame for the enforcement right, which will be in parallel to the timelines designed in the ETS Directive and the Effort Sharing Decision. The regulation should define that the levy should be set at a dissuasive level and be payable by the Member States as soon as the national reference quantity is exceeded. The penalty needs to be set with a concrete amount per tonne of CO2.

VI. A European Emission Abatement Agency – a necessary step towards better governance and acceptance of emission reduction policies

It is also time to use the current amendment process to introduce a European Emission Abatement Agency (EEAA) which could possibly also have regulatory powers. The European regulatory agency is an appropriate instrument for "implementing a particular Community policy"[52]. The clear tasks related to the overwhelming climate change risks calls for a concentration on this topic under the roof of an Agency at the European level.

The draft proposal for an amended ETS and the draft proposal for an Effort Sharing Decision clearly move towards a more harmonised system approach and for more direct power for the European Commission. Key points for verification are the proposed introduction of an EU Central Registry and the move from a national to a European verification level.

EU 27 and the European institutions clearly recognise the overall urgency of the issue, the complexity of emission trading and of reduction strategies. Various factors intertwine and next to the strict application mandate soft mechanisms such as better information, intelligent design advice, energy efficiency programmes and encouragement policies for industries and sectors inside and outside ETS must be considered. Perhaps no other environmental sector has such direct implication for the broad public in Europe and worldwide. The population in EU 27 Member States is now kept alienated from the emission abatement scheme. And as much as a harmonisation of the mechanisms towards a European level primary involvement is necessary this also distances the population and national parliaments and non governmental organisations even further from a system whose success or failure may be of paramount consequence for the living conditions of this population.

Even the strictest system of comitology with regular involvement of the European Parliament is inadequate to achieve the necessary degree of centralisation and openness in this respect. It helps to more closely interlink the administrative level in Europe with the administrative level in the Member States. National administrators do get more engaged in direct European policy issues in participating in such committees. But that is not enough in view of the described magnitude of the endeavour to achieve climate balance on a highly fragile level.

Delegating regulatory powers to a dedicated European Agency such as the European Environment Agency (EEA) could increase the efficiency, flexibility and visibility of the European Climate policies and strategies which are cornerstone conditions for a better Governance approach in supranational and international contexts.[53]

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[52] COM(2005)59 final, Draft for an inter-institutional agreement on the operating framework for the European regulatory agencies in particular as regards the power to adopt individual decisions which are legally binding on third parties

[53] See: Stefan Griller, Andreas Aurator, NEWGOV, New Modes of Governance, Priority 7, September 2007 Meroni revisited,

The Agency could become the concentrated centrepiece on emission abatement. Its focus could go beyond the ETS Directive and the Effort Sharing Decision's scope. That both are difficult instruments which require clear control on the supranational level to eventually produce tangible effects are a very important reason in favour of establishing such an agency. To assure success, the agency needs to have the role of an enforcement watchdog.

The Agency should cooperate with existing structures at Community level to enable the Commission to ensure full application of Community legislation on the environment in the field of emission abatement.

The establishment of such an agency would come in parallel to the new proposed Agency for the Cooperation of Energy Regulators under the current draft proposal for amending Directive 2003/54/EC concerning common rules for the internal market in electricity.

Concerning the new proposed Agency for the Cooperation of Energy Regulators the "Commission has concluded that the tasks required could be best fulfilled by a separate entity, independent and outside the Commission. Both the European Council in the spring of 2007 as well as recent European Parliament resolutions endorsed this conclusion." [54] What is now broadly recognised[55] here as being necessary in the field of a better Regulatory Power over the energy market should be as important for the effective enforcement and progress on climate protection.

In order to be really instrumental, the European Emission Abatement Agency needs to have a "problem-solving capacity". [56] A regulatory agency adopts individual decisions which are legally binding on third parties, according to a description in the Commission's draft for an inter-institutional agreement on the operating framework for the European regulatory agencies in particular as regards the power.[57]

A number of different factors must be taken into account in order to establish an efficient and effective European Emission Abatement Agency.

The Agency must have

- A clear set of tasks and objectives
- A sound financial structure to be efficient. The revenues from future auctioning should at least in part be attributed to the Agencies' budget and
- The power to use financial means from the auctioning process under ETS as well as those from the direct penalty procedure to promote the objectives of climate abatement policies in Europe and internationally

The Agency also could have

- Control and enforcement power over the Member States
- The power to impose penalties on Member States.

[54] Brussels, xxx COM(2007) yyy final 2007/aaaa (COD) Unofficial version Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/54/EC concerning common rules for the internal market in electricity (presented by the Commission), Explanatory Memorandum, page 10

[55] See debate in Mini Hearing in ITRE EP Committee, 24 January 2007 on ACER Agency , concerning 3rd Energy market package Electricity/Gas

[56] Stefan Griller, Andreas Aurator, NEWGOV, page 3

[57] Draft -Interinstitutional Agreement on the operating framework for the European regulatory agencies Brussels, 25.02.2005, COM(2005)59 final

- ❖ The power to sanction MS if the reporting is not done in time (in March of the year X+1)

However, if the agency does not have this last set of powers, then the Commission would need to act directly on these (direct enforcement and penalty power in case of not reporting or reducing on time).

As a regulatory Agency, EEAA must be independent from other European Union bodies. It must be managed autonomously and have its own staff with the full legal capacity to act in its own name. As all regulatory agencies in the EU, EEAA needs to be linked to other EU Institutions, through the members of the Management Board. The European Union must exercise the usual financial control over the Agency. The normal regulations in the EU concerning the rights and obligations of the administrators working in EEAA should certainly apply.

The Agency could especially have a solid set of powers to enforce clear and timely reporting of the Member States, to access information data from the Member States and to prepare the penalty decisions of the European Commission against Member States.

The question of whether the Agency can legally have its own power to issue penalties directly against Member States must be carefully screened in view of the key ruling by the European Court of Justice on June 13 in 1958, *Meroni v. High Authorities.*[58] In this case, the ECJ made it clear that a true conferral of powers to Agencies is lawful and developed a set of criteria under which conditions such delegation is legally correct. A delegation of powers must be based on clearly defined executive powers. The delegation of power needs to be based on precise rules "as to exclude any arbitrary decisions and to render it possible to review the data used"[59] There are classic safeguards to secure the Commission's position and role as a guardian of the Treaty and to secure that no excess of power has been delegated.

The Commission should develop further binding guidelines to further specify and lay down the role of the Agency as proposed for the new Regulatory agency by the European Commission recently. [60] Within such a clear framework the direct penalty right should be feasible.

The agency could follow a similar "carrot-and-stick" approach as laid down in the Kyoto Compliance System, but with the advantage over Kyoto, that this European Agency would also rely on a direct penalty mechanism. Under Kyoto, the Compliance Committee has two departments: a facilitative branch and an enforcement branch. Where the enforcement part of the EEAA will be responsible to examine and evaluate if a Member State is violating the ETS Directive rules respectively not following the objectives under the Effort Sharing Decision, the facilitating department of the EEAA would give advice to Member States and help to better implement the Directive's and the Decision's tasks and objectives. The facilitating department could, in working closely with the Member States, science and NGOs, be the first to detect facts which could lead Member States into violating of the rules. Thus it could help Member States early enough to avoid penalties.

[58] Case 9/56, Meroni & Co. Industrie Metallurgiche SpA v High Authority of the European Coal and Steel Community
[59] Case 9/56, p 150
[60] Directive Proposal amending Directive 2003/54/EC, Explanatory memorandum , page 13

The amended ETS Directive should provide with the basic condition that in the future part of the auctioning by the Member States should be paid in to the European Union's budget – in line with the usual GDP related ratio per Member State - in order to strengthen and support the work of the EEAA.

One resource efficient way would be to confer these tasks and powers to the EEA, the already existing European Environment Agency that is already in charge of monitoring and reporting on Member States' emission performances.

VII. A Penalty Fund

The ETS directive and the Effort Sharing Decision should foresee principles for the establishment of a specific fund for the future penalty payments to be administered by the EEAA. Detailed rules need to be set up by the European Commission after comitology procedure.

There would be one common Fund for penalties from ETS and the Effort Sharing Decision. Fines of for example 100 Euro/t CO2 both from ETS and Effort Sharing Decision would have to be paid into this fund.

The revenues from the fines could finance both the change to sustainable energy in Europe especially for poor regions and money for adaptation and mitigation including technology transfer in developing countries. This way Europe could both have an incentive for less affluent Member States who are afraid to miss their targets and be able to raise a part of the money which is so urgently needed on the international level.

VIII. Conclusion

European Climate Policy needs much stronger instruments in the hands of the European Commission. The European Commission must take more responsibility to ensure that Member States will deliver and will honour their commitment to drastically curve down climate-endangering emissions, at least to the amount agreed upon since the European Council of last March 2007.

The ETS Directive and the Effort Sharing Decision and the international obligations of the EU to reduce their emissions under a future UN agreement have an exceptionally strong and tight time axis involved for reaching the goals of emission reduction. They mirror the urgency to act facing the danger- not only for Europe but in effect worldwide - that human living conditions in many parts of the world can no longer be assured unless we succeed to stop further increase of the average temperature.

A task and danger of this global and mankind-threatening size requires in the view of established legal concepts such as the Precautionary Principle, the "effet-utile" Doctrine and the obligations for Europe from international treaties' law to go beyond the classic infringement tools provided for the European Commission by the European Treaty (ECT). These established infringement and subsequent penalty procedures take several years and are incompetent to respond on a timely basis to laxity or non – enforcement of Member States. It is also in the interest of Member States to convey such a mechanism in order to be sure that each Member States lives up to its promise, thus ensuring an overall level playing field.

This study for the first time proposes to transfer the longstanding European experience from other quota mechanisms especially in the field of the Common Agricultural Policy and to adapt them to the needs of a penalty system under the ETS Directive and the Effort Sharing Decision. The main proposed tool to supply the European Commission with real enforcement power is the introduction of a direct penalty mechanism enabling the Commission to directly issue levies against Member States which do not deliver in time.

European law has experience with direct penalty mechanisms since many decades. They have not yet been applied in environmental legislation. It is high time to change this status for the climate policy of Europe.

The current ETS Directive proposal and the Effort Sharing Decision must be amended in a way as to establish the direct levy principle and to convey the power to the European Commission to fix the details and rules in an adequate Commission Regulation, in line with the Comitology procedure as laid down in the ETS Directive and linked to in the Effort Sharing Decision proposal. The revenues from the penalties and its management should be steered by a specific Penalty Fund.

A further stepping-stone in addition to the introduction of a direct penalty mechanism for the European Commission is the establishment of an independent European Emission Abatement Agency (EEAA). The European Environment Agency (EEA) in Copenhagen could encompass these new tasks and integrate the Agency under its roof.

It certainly is time to act.

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