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Legal constraints to climate transition in the EU

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EU Action

- European Commission is taking action to reduce CO2 emissions since 1991
- European Climate Change Program (ECCP) seeks to meet Kyoto Protocol goals of reducing emission levels during 2008 – 2012 to 8% below 1990 levels
- EU wide by 2030 40% reductions below 1990

  by 2040 60% reductions below 1990

  by 2050 80% reductions below 1990

- EU ETS: by 2020 21% below 2005 levels

  by 2030 43% below 2005 levels

  by 2050 80-95% below 2005 levels

EU-wide targets 2020 and 2021 to 2030

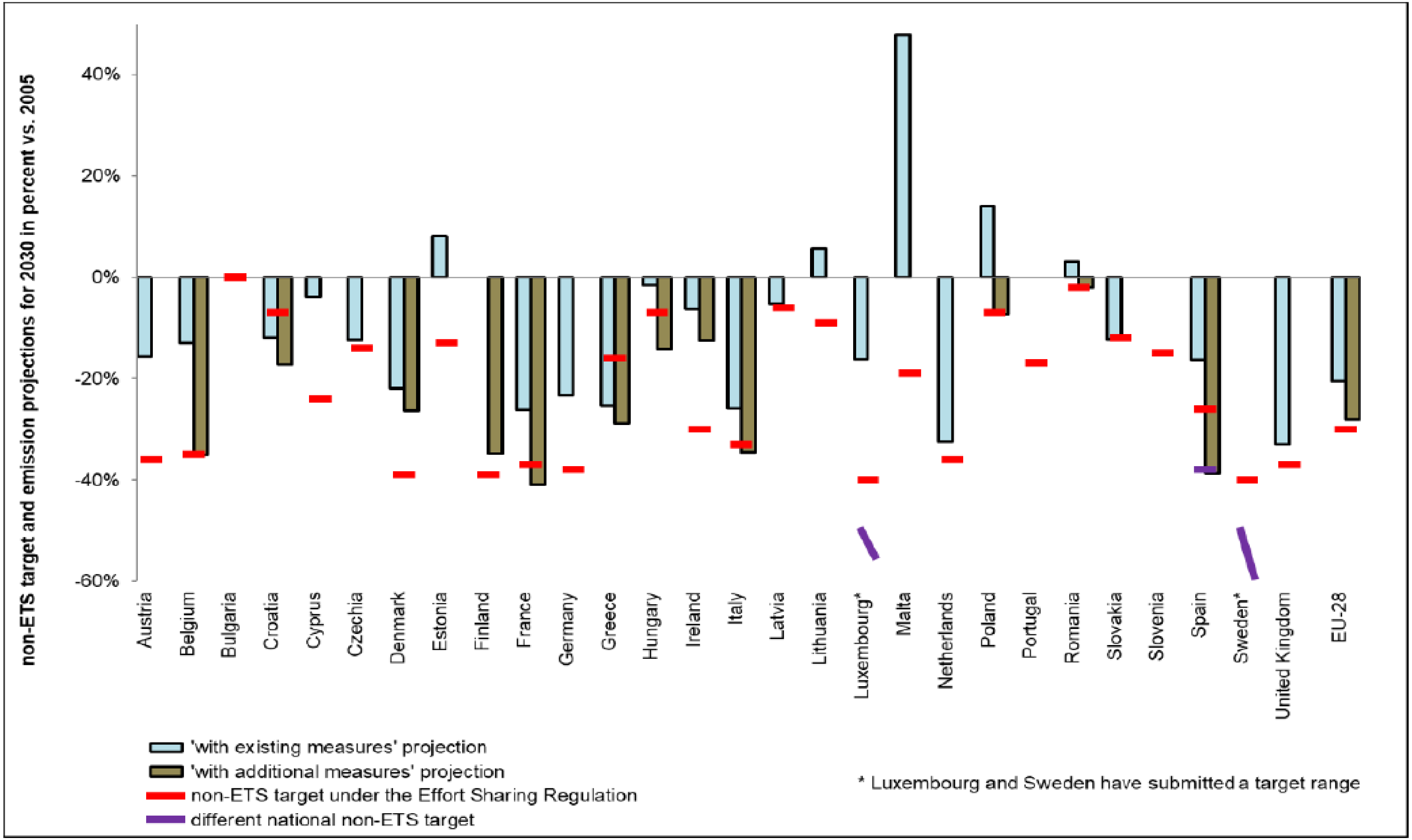
Energy efficiency	Emissions trading	Renewables
-20% below 1990	-20% below 1990	20% Renewables
-32.5% below 1990	-40% below 1990	32% Renewables

National targets (non-ETS sectors)

The Effort-sharing decision for 2020
-10% below 2005 levels (on average)
MS projections: -16% ☺
Ireland, Cyprus and Malta will fail by far
Belgium, Germany, Luxembourg, Austria and Finland will fail narrowly

Effort Sharing Regulation for 2030
-30% below 2005 levels (on average)
MS projections: -21% ☹ => strong Member State efforts are needed!

Regulation for Governance of the Energy Union and Climate Action => Member States must submit National Climate and Energy Plans (NCEPs)
2018 draft plans: -28% (final plans due end 2019)



2030 Effort Sharing targets and greenhouse gas emissions with existing and planned measures

MS are increasingly active e.g. Wrt. Carbon taxation

- **First wave** (early 1990s): Finland, Sweden, Denmark und Norway. Toronto Conference 1988: -20% CO2 emissions till 2005. Environmental tax reform and economic crisis
- **Second wave** (ca 2000): Latvia, Slovenia, Estonia and Croatia. EU accession, emission reductions and raising revenues for the state
- **Third wave** (ca 2010): Ireland, Portugal and France. Emission reduction, raising revenues for the state. Green coalition (Ireland), attracting green voters (Portugal and France)

EU law and national measures

Tension between EU and MS approaches

- Waterbed effect
- Repercussions of renewable energy

Member States need to introduce efficient and effective national measures to foster a domestic climate transition

But what can MS do?

Competences

- Member States created a special legal order that limited their sovereign rights (*Van Gend en Loos*)
- Domestic legal provisions cannot call into question Community law (*Costa v ENEL*)
- MS must fulfil their obligations under EU law and refrain from any measure jeopardizing the attainment of Union objectives (Article 4(3) TEU principle of sincere cooperation)
- Supremacy of EU law (Declaration 17 of the Lisbon Treaty)
- Environmental law is shared competence but Competition law not
- Failure to comply might eventually lead to a fine (260 TFEU)

How to take Climate friendly measures?

- Setting incentives often takes the form of subsidies or fiscal measures, which can be impairing the objective of internal market and undistorted competition

  => impairments/exceptions must be limited and short-lived

- Hierachy of priorities?
  - Internal maket;
  - Undistorted competition;
  - Environment and health;
  - Security of energy supply
- Have we found the right balance in practice?

State aid rules

- Article 107(1) TFEU declares incompatible with the common market “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition through favoring certain undertakings or the production of certain goods […] in so far as it affects trade between Member States”.
- 108(3) TFEU MS must notify all aid and only implement upon approval
- General Block Exemption Regulation declares specific categories of State aid compatible with the Treaty, provided that they fulfil clear conditions, and exempts these categories from the requirement of prior notification and approval to the Commission.
- Derogations Aid
  - 107(3)(b) promoting the execution of an important project of common European interest
  - 107(3)(c) aid facilitating the development of economic activities or of economic areas
- Environmental Protection and Energy Guidelines

EU law and carbon taxes

State aid rules

All these criteria must be satisfied => prohibition

1. Transfer of a benefit or an advantage (notion of aid)
2. Aid favoring a certain undertaking over others (selectivity principle)
3. Granted by the State or through State resources
4. It should be an Undertaking or … production
5. Distorts or threatens to distort competition
6. Community dimension: aid which is capable of affecting trade between Member States

Dutch NOx scheme

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- Performance Standard Rate (PSR) System (2005)
- Credit and trade system with an 'intended cap'
- No allocation but automatic creation of credits by reference to a statutory benchmark
- 250 large installations => selective!
- Financed through state resources => state could have been using auctioning instead… (???!!!)
- Commission does not take a MS measure 'as is' and evaluates it…
- Updated EEAD guideless exclude credit and trade systems
- System held to be State aid => abandoned

Swedish biofuel tax

- By 2030 Sweeden wants to reduce transport emissions (excl. Aviation) by 70% below 2010 levels
- Mandatory mixing of low blended biofuels into petrol and diesel
- Swedish CO2 tax levied on carbon content in fossil fuels and non-sustainable biofuels => sustainable highblended biofuel is not taxed
- EU Commission considered Swedish CO2 tax design to constitute *state aid* as it deems it to be selective, treating different fuels dissimilar
- Environmental and Energy Guidelines prohibits support of biofuels from food sources after 2020 (Recitals 112 and 113)

=> counter productive from a climate perspective

Swedish biofuel tax – the 2nd

- Downsides:
  - Costly and heavy administrative burden on handling biofuels for companies and authorities (annual monitoring and evaluation in 2020)
  - Transparency
  - Prevents MS to tax fossil fuels fiercely (avoiding overcompensting biofuels)
  - Risk of retroactive recovery
  - Time-barred aid => incentive effects?

Conclusion

- Difficult to assess tax rate reductions and exemptions from eco-taxes especially in the context of the wider system of climate and energy taxation in a Member State
- Carbon taxes are meaningful and efficient instrument but MS need flexibility to finetune measures to address new challenges
- Costs of state aid notification are tremendous!
  - Heavy administrative burden on handling for companies and authorities
  - Prevents MS to tax properly (and to raise revenue) to avoid overcompensting fuels that would be exempt
  - Risk of state aid recovery
  - Incentive compatibility of aid? => will decision makers follow?
- MS shy away from measures if they are considered State aid
- If we are serious about transition => perhaps we need to reconsider the hirachy of priorities