

Proposals for Reforming the EU Effort Sharing Decision

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I. List of Abbreviations

AEAs	Annual Emission Allocation
CER	Certified Emission Reductions
EEA	European Environment Agency
EED	Energy Efficiency Directive
EPM	European Project Mechanism
ERUs	Emission Reduction Units
ESD	Effort Sharing Decision
et al.	et alia
ETS	Emissions Trading System
EU	European Union
FI	Flexibility Instruments
INDC	Intended Nationally Determined Contribution
GDP	Gross domestic product
GHG	Greenhouse Gas(es)
GIS	Green Investment Scheme
JI	Joint Implementation
MS	Member States
NDC	Nationally determined contribution
PA	Paris Agreement
para.	paragraph
R&D	Research & Development
RED	Renewable Energy Directive
UK	United Kingdom
WAM	with additional measures
WEM	with existing measures

2. Summary

With the European Council's conclusions of October 2014, the debate on the reform of the Effort Sharing Decision (ESD) has begun. The adoption of the Paris Agreement (PA) sets a new and critical benchmark for ESD reform. The European Commission is expected to present a legislative proposal for a new Effort Sharing instrument – not necessarily a decision – in the summer of 2016. To contribute to its ultimate objective of decarbonising large parts of Europe's economy, the new ESD should include the following **reform elements**:

- **Long-term target for 2050 and beyond:** In light of the long-term objectives of the PA and the EU's ambition to maintain its leadership in climate policies, the new ESD must contain a long-term target for 2050 and even beyond. In principle terms, a legally binding long-term ESD target would translate into EU law what the EU has already accepted with the adoption of the legally binding PA. It would be a litmus test whether the EU is seriously committed to achieving the objectives of the PA – or not. A long-term target would be crucial for providing investor certainty.

According to estimates by the European Commission, an ESD long-term target would require reductions of around 70% (compared to 2005) – if the EU were to reduce emissions by 80% in 2050. If the EU adopts a higher long-term target in the range of 90-95%, the ESD target must be adjusted accordingly. To help meet the PA's objective of carbon neutrality in the second half of the century, the new ESD should also contain the objective of climate neutrality after 2050. For a credible and verifiable reduction pathway, the ESD should set an interim target for 2040, which has not been quantified yet. In combination with the annual reductions in the ETS, the ESD targets would add up to an EU economy-wide target for the reduction and, ultimately, elimination of greenhouse gas emissions in the EU.

- **Comprehensive Review, including target adjustment:** To help ensure achievement of the long-term targets of the PA and the Paris decision, the new ESD should contain a comprehensive review clause (Article 14). This review should be mandatory and empower (possibly even require) the Commission to propose target adjustments and additional measures, if necessary. The review should be broader than the current reporting requirements. It should explicitly evaluate the adequacy of the ESD in supporting the achievement of the long-term goals of the PA. The review should also address the effects of the ESD on long-term competitiveness and innovation, rather than only ESD implementation and short-term competition. Following the first review in 2019 under the facilitative dialogue, the review under the global stocktake should take place in 2023 and every 5 years thereafter.

To support transparent and credible decision making, the review should be based on a comprehensive (published) report on the implementation of the ESD and the adequacy of targets by the European Environment Agency (EEA) or another independent body. The report may include proposals for target adjustment, if deemed appropriate. The new review procedure should require the Commission to provide explicit reasons if it intends to deviate from the report and its proposals for target adjustment. As an alternative, the ESD review

could include elements of the supervision of financial market, where the European Securities and Markets Authority (ESMA) has very significant influence.

- **Flexibility:** The 2030 ESD should include a new article on flexibility instruments (Article 4). The new Article would maintain the existing flexibility instruments borrowing, banking, and AEA transfers between Member States. In addition, it would provide for an opportunity to introduce auctioning of AEAs and a one-off ETS link. The new Article would mandate the Commission to adopt delegated acts that determine the technical details of each mechanism. In addition to these flexibilities, the new Article 5 establishes a project mechanism, the so-called European Project Mechanism (EPM). Similar to the other flexibilities, the Commission would be mandated to set the technical details of the EPM through delegated acts. The new EPM article would set the basic design elements, including public tendering, private involvement, environmental integrity of verification methodologies and a discount factor. Because of the high levels of existing flexibility and limited experience with the flexibilities under the current ESD, the new ESD contains no obligation for Member States to participate in the EPM.
- **International off-sets:** The European Council adopted a domestic GHG reduction target of at least 40% by 2030. For this reason, Member States may not use international offsets for meeting their ESD targets. The current provision on international off-sets (Article 5) should thus be deleted.
- **Credits from Article 24a ETS Directive:** With the establishment of the EPM and / or the one-off link between the ETS and the ESD, linking the ETS and ESD is obsolete. The respective provision in the ESD (Article 5.7) should be deleted.
- **Planning and Reporting:** Subject to on-going discussions on EU climate and energy governance, the ESD reporting requirements should be included in the new reporting regime. The respective ESD reporting requirements in Article 6 would refer to the pertinent reporting rules. Integrating ESD reporting requirements into the new reporting system would be an important contribution to streamlining the EU's current climate reporting obligations. Equally, requirements for long term planning for the decarbonisation Europe's economies should be part of the new planning regime.
- **LULUCF:** To ensure environmental integrity of the ESD, LULUCF should be kept completely separate from the ESD. The current ESD provision on LULUCF (Article 9) should be deleted.
- **Delegated acts:** The current Article 13 regulates committee procedures, i.e. comitology. The new Article 13 must take account of the legal changes introduced by the Lisbon Treaty in 2009. Under the TFEU, the EU legislator can make use of two different means of delegating powers to the European Commission: "delegated acts" (Article 290) and "implementing acts" (Article 291). In case of delegated acts (Article 290), the Commission may amend or supplement certain non-essential elements of a legislative act. To adapt to changing circumstances swiftly and to avoid lengthy legislative procedures, the Commission should be entitled to amend and supplement non-essential elements of the ESD through delegated acts. Delegated acts would not only save time but would also reduce the risk of unpicking the ESD during the legislative process.
- **Legal form:** To enhance its political weight, the new instrument should become a regulation.

- **New Name:** In light of these changes proposed, the ESD should have a new name that adequately reflects its purpose – to set a frame for the decarbonisation of the sectors not covered by the ETS. “Regulation on the framework for the decarbonisation of the sectors not covered by the ETS” is a possible name. As an alternative, the new instrument’s name could build on the PA’s aim of climate neutrality, e.g. “Regulation on the framework for ensuring climate neutrality of the sectors not covered by the ETS”.

In addition to these elements of reform, **the new ESD should maintain the best elements of the 2020 ESD, including:**

- **Annual and linear reductions – in principle:** The current ESD determines that Member States reduce emissions annually and along a linear trajectory. The new ESD should maintain this system. The AEA trajectory from 2021 to 2030 must be also linear. This trajectory not only determines the total volume of national AEA budgets but is also the basis for the ESD’s annual compliance cycle. Both elements are critical for the credibility and robustness of the ESD and should be maintained. Actual emissions in 2016-2018 should be the starting point for the commitment period 2020-2030. Because the 2016-18 projections in some Member States are higher than their 2020 target, the 2021 AEA should be capped by the 2020 target.
- **Corrective action:** The current compliance regime of the ESD consists largely of an abatement factor, suspension of using flexibility instruments, a corrective action plan and an assessment of this plan by the Commission. Although the ESD compliance regime has not been tested until now, it should be maintained in principle. The current system strikes a good balance between ownership by Member States and independent assessment of corrective action plans by the Commission. The abatement factor makes the system credible. To strengthen the compliance regime, the factor could be increased if deemed appropriate.

3. Introduction

In October 2014, the **European Council** agreed on the framework for the EU climate and energy policy for the decade after 2020. As a key element of this framework, the European Council adopted a domestic greenhouse gas reduction target of at least 40% by 2030 compared to 1990 levels. This EU target was divided into two sub-targets: sectors covered by the ETS must reduce their emissions by 43% compared to 2005 levels, other sectors by 30%.¹ The European Council also **agreed to continue the Effort Sharing Decision (ESD) after 2020** – albeit with significant reform. The European Council specified reform of the ESD² in some detail. The reform of the ESD includes enhanced flexibility³ and a new target system, where all Member States will be required to reduce or to stabilize emissions. Other essential design elements of the current ESD will stay in force after 2020, notably the existing mechanism of setting national targets will continue.⁴

It is important to note that the **ESD only creates a framework** for the sectors not covered by the ETS. The ESD framework consists in particular of national targets, reporting requirements, compliance rules and flexibilities options. The ESD remains silent on how Member States should reduce emissions. The ESD is complemented by a number of ancillary rules, which contain a number of important details: the Registry Regulation (389/2013), the Monitoring and Reporting Regulation (MMR, 525/2013) and Decision on the Effort of Member States (162/2013).⁵ In consequence, ESD reform may not focus exclusively on the ESD but must also take account of these ancillary rules.

With the conclusions of October 2014, the **political debate on ESD reform** has begun. The European Commission conducted a stakeholder consultation on ESD reform from 26 March 2015 to 18 June 2015. Numerous stakeholders contributed to the consultations. Contributions were submitted by several Member State governments⁶, NGOs⁷, but also a larger number of trade associations⁸, academic or research organisations⁹, citizens, different enterprises¹⁰, as well as local and regional governments¹¹. The contributions of stakeholders will feed into an impact assessment by the European Commission, which will probably be published together with the legislative proposal on ESD reform. It is expected that the Commission will present this proposal in summer 2016.

¹ As another important decision, the European Council also agreed on a target of at least 27% for renewable energy and energy savings by 2030. The Council also agreed on an EU ETS reform, which includes a linear reduction path (LRP) of annually 2.2%.

² This paper abbreviates the new Effort Sharing Decision with the acronym „ESD“ for reasons of simplicity, although the reformed ESD may not be a decision but a regulation or directive (see below pages 52-54).

³ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.12.

⁴ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.10.: “the methodology to set the national reduction targets for the non-ETS sectors, with all the elements as applied in the Effort Sharing Decision for 2020, will be continued until 2030, with efforts distributed on the basis of relative GDP per capita”. In addition, the European Council stated that “targets for the Member States with a GDP per capita above the EU average will be relatively adjusted to reflect cost-effectiveness in a fair and balanced manner” (para. 11).

⁵ For a good overview, see Carbon Market Watch (2014): Tackling 60% of the EU’S Climate Problem: The legislative framework of the Effort Sharing Decision, May 2014.

⁶ Sweden, Italy, France, Austria, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Slovenia, UK, Belgium.

⁷ Including, for example, Climate Action Network, Ecolise, Coalition for Energy Savings, Carbon Market Watch, Client Earth, European Environmental Bureau, WWF European Policy Office.

⁸ Including Nordenergi, European Association of Crafts and SMEs, EEF, COGEN Europe, CEMBUREAU, EURELECTRIC, BDEW, IETA

⁹ Sandbag, Centre for European Policy Studies, Öko-Institut e.V.

¹⁰ Including Vattenfall, SNCF, Statkraft, IBERDROLA, Fortum Corporation.

¹¹ Including Government of Catalonia, Regional government of upper Austria.

The reform debate will have to take account of the **Paris Agreement (PA)**. The PA strengthens considerably the case for an ambitious and robust 2030 ESD. A legally binding commitment to hold “the increase of global average temperature well below 2°C above pre-industrial levels”, a commitment to pursue national policies that aim to hold climate change and an ambitious review mechanism are at the heart of the PA. The PA also obliges Parties to aim for peaking emissions as soon as possible and to climate-neutrality in the second half of this century. Further, the PA commits Parties “to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels”. The decision adopting the PA notes furthermore “that much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to below 2°C above pre-industrial levels by reducing emissions to 40 gigatonnes”. To contribute to these steep reductions, the EU must ensure that its policies reduce emissions in line with considerably steeper pathways. With about 60% of the overall EU emissions, the non-ETS sector will have to play a critical role.

The devil is in the detail. For this reason, it is the **purpose of this paper** to bring the ESD reform discussion to the level of technical detail. Using the current ESD as a general starting point, the paper proposes specific wording of a new ESD in legal language. The paper focuses on the ESD and contains no specific reform proposals for the registry regulation, the MMR or other ancillary rules complementing the current ESD – but acknowledges that corresponding changes would be required. Before presenting concrete wording for reforming the ESD, the paper discusses criteria that guide the reform proposals. Concerning the reform of ESD flexibility, two previous Ecologic Institute papers inform each reform proposal.¹²

4. Criteria for reforming the ESD

The **European Council** set the frame for reforming the ESD in October 2014. The European Council took the following decisions relevant for ESD reform:

- **Continuation of the ESD in principle:** The European Council of October 2014 agreed to continue the ESD for the period 2021-2030. Although the European Council did not explicitly state that the ESD should continue, its continuation is the clear ambition of Heads of States. The European Council stated, for example, that “the methodology to set the national reduction targets for the non-ETS sectors, with all the elements as applied in the Effort Sharing Decision for 2020, will be continued until 2030 [...]”¹³ Next to the agreement on the continuation of the ESD in principle terms, the European Council called for specific reforms of the ESD. For this reason the current ESD is the starting point for reform; no fundamental structural changes were foreseen by the European Council at this point.

¹² Nils Meyer-Ohlendorf (2015): An Effective Governance System for 2030 EU Climate and Energy Policy: Design and Requirements, Discussion Paper, Ecologic Institute, Berlin, Nils Meyer-Ohlendorf: AEA Auctioning .

¹³ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.10.

- **Targets:** Concerning the non-ETS target, the European Council agreed on an overall target for the EU and on a formula to break down the target to the Member State level. The European Council decided that the existing methodology of the 2020 ESD to set the national reduction targets will continue until 2030. As an important change from the current system, no Member State will be allowed to increase emissions compared to their 2005 levels; national targets will span from 0% to -40% compared to 2005.
- **Flexibility:** The European Council agreed that “the availability and use of *existing flexibility instruments (FI) within the non-ETS sectors will be significantly enhanced*”.¹⁴ Flexibility instruments are supposed to “ensure cost-effectiveness of the collective EU effort and convergence of emissions per capita by 2030”.¹⁵ Importantly, the European Council called for enhancement of existing FI, i.e. the current framework is the starting point of reform. The European Council only called for a new FI for Member States with national reduction targets significantly above EU average and low potential for cost-effective reductions.
- **Use of international credits:** The European Council adopted a domestic reduction target of at least 40%. For this reason, Member States may not use international offsets for meeting their domestic ESD targets. Member States may use international offsets only if they make mitigation efforts over and above their domestic target (= 40% domestic plus x % international offsets).

However, it is important to emphasise that the political framing for reform adopted by the European Council must now be viewed in light of the more recent and **additional legal obligations and commitments stemming from the PA:**

- **Long-term climate goals require much steeper reductions:** The new ESD will be an indispensable tool to achieve the long-term objectives of the PA and the EU aspiration of 80-95 % for 2050. To meet these long-term targets, Member States will have to increase their reduction efforts drastically. According to the EEA, reaching the 2030 reduction target of -40% requires average annual reductions of about 1.4 % (compared to the average annual reduction of about 1% achieved between 1990 and 2015).¹⁶ To reach reductions of -80% by 2050, in contrast, requires annual reductions of 3.3 % between 2030 and 2050; to achieve a 95% decrease in 2050 requires annual reductions as high as 4.6%.¹⁷ Reductions of -80 % are probably not a sufficient contribution of the EU to keep global temperature increases “well below 2°C”. Underlining the size of the challenge, it is noteworthy that the EU is currently not even on track to meet its interim target for 2030.¹⁸

¹⁴ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.12.

¹⁵ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.12. It is noteworthy that cost-effectiveness and convergence of per capita emissions are potentially conflicting objectives. Cost-effectiveness builds on the assumption that emission reductions in some Member States are cheaper than in others, i.e. some Member States reduce more than others if mitigation efforts are largely based on cost-effectiveness.

¹⁶ EEA (2015): Trends and projections in Europe 2015 — Tracking progress towards Europe's climate and energy targets.

¹⁷ EEA (2015): Trends and projections in Europe 2015 — Tracking progress towards Europe's climate and energy targets.

¹⁸ EEA (2015): Trends and projections in Europe 2015 — Tracking progress towards Europe's climate and energy targets: “According to current Member State projections, a reduction of EU GHG emissions by 27% (on the basis of existing mitigation measures) up to 30% (accounting for planned national measures) could be achieved by 2030, compared to 1990 levels. These projected levels are not sufficient to meet the 40% target by 2030, however the projections do not take into account new policy proposals, still being discussed in the EU to enable the achievement of this 2030 target.”

- **Gradual and constant increase of ambition:** Article 4.3 of the PA stipulates that “each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting common but differentiated responsibilities and respective capacities[...]”. According to Article 4.4 of the PA, “developed country Parties should continue taking the lead by undertaking economy-wide *absolute emission reduction targets*”. In combination, these provisions argue strongly for (1) an ambitious EU long-term reduction target and (2) for credible reduction pathways. With the exception of the ETS, EU law does not have such a frame. These provisions also make a convincing case for continued EU leadership in climate policies – both before and after 2030.
- **Timing:** In strict legal terms, the PA will only require action after entry into force. The PA will enter into force after ratification by 55 countries, representing 55% of global emission. Full ratification is expected between 2017 and 2019. This could argue against using the PA as a driver for an ambitious 2030 ESD now. However, as the 2030 ESD is essential for the implementation of the PA, EU is effectively bound to reform the ESD in a way that helps bring about the required drastic emission cuts. In addition, Article 4.16 of the PA requires Parties that reduce emissions jointly to notify the secretariat of “the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions”. For these reasons, ESD reform must be guided by the PA, despite the fact that the PA has not yet entered into force while ESD reform is under way.

In addition to these requirements, there are **additional considerations** that have to shape ESD reform:

- **Environmental integrity:** ESD must ensure the environmental integrity of mitigation policies in the non-ETS sectors. Established principles of environmental integrity include transparent accounting rules that ensure permanent, measurable, verifiable and additional reductions. In particular, accounting rules must help avoid double counting of emission reductions.
- **Simple and transparent:** For the implementation, effectiveness and political communication, a simple and transparent system is essential.
- **Effective compliance:** Related to the previous criteria, the new ESD must include an effective compliance system. An overly complex ESD could negatively affect compliance.
- **Maximise involvement of private investors:** In times of shrinking public budgets, investments necessary for successful climate change policy must also come from private investors. The new ESD should encourage private investment in climate protection.
- **Co-benefits:** The new ESD should contribute to innovation, modernisation of infrastructure, employment and growth.
- **Cost-effective effort:** It is one of the purpose of the ESD to help reduce emissions in a cost-effective manner. For this reason, the ESD will include flexibility mechanisms that serve the ultimate goal of cost-effectiveness.
- **Already high levels of flexibility in the 2020 ESD:** The current ESD contains numerous flexibility options – borrowing, banking and AEA transfer between Member States. Carbon

Market Watch rightly pointed out that “the need for intra-EU flexibilities can be significantly reduced simply by implementing additional mitigation policies both before and after 2020”.¹⁹

¹⁹ Carbon Market Watch, contribution to the ESD Consultations. Carbon Market Watch calculated that through early action, Member States can reduce the mitigation efforts needed after 2020 by around 1,000 Mt CO₂-eq by implementing the planned additional measures of their own WAM projections. Similarly, new EU-wide policies for the post-2020 period have the potential to significantly reduce emissions from the transport, agriculture and buildings sector.

5. Reforming Article 1 (Subject Matter)

Current text	Amendments (bold) ²⁰
<p>This Decision lays down the minimum contribution of Member States to meeting the greenhouse gas emission reduction commitment of the Community for the period from 2013 to 2020 for greenhouse gas emissions covered by this Decision, and rules on making these contributions and for the evaluation thereof.</p> <p>This Decision also lays down provisions for assessing and implementing a stricter Community reduction commitment exceeding 20 %, to be applied upon the approval by the Community of an international agreement on climate change leading to emissions reductions exceeding those required pursuant to Article 3, as reflected in the 30 % reduction commitment as endorsed by the European Council of March 2007.</p>	<p>This Regulation lays down the minimum contribution of Member States to meeting the greenhouse gas emission reduction commitment of the Community Union for the period from 2021 to 2030 for greenhouse gas emissions covered by this Decision, and rules on making these contributions and for the evaluation thereof. This Regulation requires the EU to reduce the greenhouse gas emissions covered by at least 30 % compared to 2005 in 2030.</p> <p>This Decision also lays down provisions for assessing and implementing a stricter Community reduction commitment exceeding 20 %, to be applied upon the approval by the Community of an international agreement on climate change leading to emissions reductions exceeding those required pursuant to Article 3, as reflected in the 30 % reduction commitment as endorsed by the European Council of March 2007.</p>

Justification

Article 1.1 should continue to define the subject matter and scope of the ESD and requires changes to the years of commitment. For reasons of clarity, it should also codify the 2030 EU reduction target for the sectors not covered by the ETS. In line with the conclusions of the European Council of October 2014, the provisions sets a reduction target of „at least“- 30 %, which underlines the possibility of increasing the target. Article 1.2 is obsolete and should be deleted. It refers to the previously envisaged possibility of adjusting the EU reduction commitment for 2020 in case of the adoption of an international agreement (on the issue of adjusting targets in light of the PA review mechanism see below, Article 3.3).

²⁰ Amendments are marked in bold, unless they contain entirely new provision.

5.1. New Article 1, paragraph 2 (long term commitment)

It is the ultimate objective of this Regulation to contribute to reducing the greenhouse gas emissions of the EU by 95 % in 2050 and to achieve climate neutrality in the second half of the century. To achieve these objectives, Member States shall continue reducing the greenhouse gas emissions covered by this Regulation annually in a linear manner beyond 2030, leading to a reduction of $-x\%$ ²¹ compared to 2005 levels by 2050 and $-y\%$ by 2040 compared to 2005.²²

Justification

The binding nature of the PA and current climate science make a strong case for a long-term (mid-century) commitment in the new ESD, which is supported by an interim target for 2040:

- The PA sets a number of long-term objectives, including the commitment to climate neutrality in the second half of this century. For the implementation of these long-term objectives, it is essential that the EU (and any other Party) adopts legally binding targets that are consistent with Article 2 and 4.1 of the PA. These targets should not only cover the non-ETS emissions but also – for reasons of clarity and credibility – an economy-wide target.
- Article 4.4 of the PA requires developed country Parties to undertake “economy-wide absolute emission reduction targets”.
- The EU has to increase its reduction efforts drastically to meet its long-term targets (s. above).
- Long-term target would improve strategic investor confidence.
- The current ESD has not been a driver for decarbonisation, largely because of the insufficient level of ambition and the absence of a binding EU long-term target.²³ For this reason, it is essential that the new ESD remedies this shortcoming.
- Although the European Council clearly stated its intention to reform the ESD for the period 2021-2030, the PA changes the basis on which the previous ESD as well as the European Council's conclusions for 2030 were adopted.
- In its communication of 2 March 2016, the European Commission stated that “the EU, alongside the other parties, is invited to communicate, by 2020, their mid-century, long-term low greenhouse gas emission development strategies”. To be able to communicate a meaningful greenhouse gas emission development strategy in 2020, the EU must have agreed on a long-term target before then. Given the political agenda until 2020 and its timeframes,

²¹ For the quantification of targets see discussion in the justification section below.

²² There are no reliable estimates on the 2040 ESD interim target yet.

²³ Nils Meyer-Ohlendorf et al.: The Next EU Climate and Energy Package – EU Climate Policies after 2020, <http://ecologic.eu/11045>.

ESD reform is an important and timely opportunity to adopt a legally binding reduction target for 2050 – for the emissions covered by the ESD and the EU economy as a whole.

The level of the ESD target obviously depends on the overall EU target. In the event that the EU adopts an overall reduction target of -80 % (compared to 1990), the Commission estimated that the ESD sectors would have to reduce their emissions by nearly -70% by 2050 (compared to 2005), while the emissions from the ETS sectors would be reduced by around - 90% (compared to 2005).²⁴ The ESD target would increase proportionally in the event the EU accepts a target of, for example, -90 or 95 %. The Commission did not calculate ESD reduction contributions for EU targets above 80%. There are equally no estimates for the 2040 interim target. For an adequate contribution to keeping temperature increases “well below 2°C”, the EU should commit to reductions of -95 % in 2050 for the economy as a whole.

For the period after 2050, the new ESD helps implement Article 4.1 of the PA, requiring Parties to aim for climate-neutrality in the second half of this century. Alternatively, the new Article 1.2 could directly incorporate the wording of Article 4.1 of the PA. In this case, the provision would require Member States to aim for achieving “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century”. As an additional alternative, the new Article 1.2 could call for the elimination of greenhouse gas emissions from fossil fuels in the second half of the century, as proposed by the European Parliament’s Committee on the Environment, Public Health and Food Safety in 2009.²⁵

6. Reforming Article 2 (Definitions)

Current text	Amendments (bold)
<p>For the purposes of this Decision, the following definitions shall apply:</p> <ol style="list-style-type: none"> 1. ‘Greenhouse gas emissions’ means the emission of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF₆) from the categories listed in Annex I, expressed in terms of tonnes of carbon dioxide equivalent, as determined pursuant to Decision No 	<p>For the purposes of this Regulation, the following definitions shall apply:</p> <ol style="list-style-type: none"> 1. ‘Greenhouse gas emissions’ means the emission of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF₆) from the categories listed in Annex I, expressed in terms of tonnes of carbon dioxide equivalent, as determined pursuant to Regulation (EU)

²⁴ http://ec.europa.eu/clima/policies/strategies/2050/faq_en.htm.

²⁵ Report on the 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 (COM(2008)0017 – C6 0041/2008 – 2008/0014(COD)).

<p>280/2004/EC, excluding greenhouse gases emissions covered under Directive 2003/87/EC.</p> <p>2. 'Annual emission allocation' means the annual maximum allowed greenhouse gas emissions in the years 2013 to 2020 as specified in Article 3(2).</p>	<p>No 280/2004/EC²⁶, excluding greenhouse gases emissions covered under Directive 2009/29/EC Regulation (EU) No 525/2013Decision²⁷.</p> <p>2. 'Annual emission allocation' means the annual maximum allowed greenhouse gas emissions in the years 2021 to 2030 as specified in Article 3(2).</p>
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Justification

At this point, Article 2.1 should not be amended significantly. There is no discussion whether the ESD should cover additional GHGs. Thus, this part should remain unaltered. It will, however, be necessary to update the references to the now repealed Directive 2003/87/EC, replacing it by Directive 2009/29/EC.

Article 2.2 only requires changes in the years of commitment. The annual compliance cycle implied in this provision should be maintained (see below).

7. Reforming Article 3 ESD (Emission levels)

Article 3: Emission levels for the period from 2013 to 2020 - new: Emission levels for the period from 2021 to 2030

7.1. Article 3.1 (national reduction targets)

Current text	Amendments (bold)
Each Member State shall, by 2020, limit its greenhouse gas emissions at least by the percentage set for that Member State in Annex II to this Decision in relation to its emissions in	Each Member State shall, by 2030 , limit its greenhouse gas emissions at least by the percentage set for that Member State in Annex II to this Regulation in relation to its emissions in

²⁶ Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC.

²⁷ Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, COM/2015/0337 final/2 - 2015/0148 (COD).

2005.	2005.
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Justification

Paragraph 1 sets individual reduction targets for MS. This is the backbone of the ESD. As the European Council decided to continue the existing methodology of national target setting and signalled no changes in the architecture of the ESD, Article 3.1 should not be amended, with the obvious exception of the target year – 2030 instead of 2020. Annex II will obviously be revised as it specifies the current Member State greenhouse gas emission limits under Article 3. Annex II will take into account the 2030 reduction target of 30%. It will also reflect that under the revised ESD no Member State will be allowed to increase emissions; national targets will span from 0% to -40% compared to 2005.

7.2. Article 3.2, subparagraph 1 (linear reduction trajectory)

Current text	Amendments (bold)
Subject to paragraphs 3, 4 and 5 of this Article and Article 5, each Member State with a negative limit under Annex II shall ensure, including by making use of the flexibilities provided for in this Decision, that its greenhouse gas emissions in 2013 do not exceed its average annual greenhouse gas emissions during 2008, 2009 and 2010, as reported and verified pursuant to Directive 2003/87/EC and Decision No 280/2004/EC.	Subject to paragraphs 3, 4 and 5 of this Article 4 and Article 5, each Member State shall ensure, including by making use of the flexibilities provided for in this Regulation, that its greenhouse gas emissions in 2021 do not exceed a level defined by a linear trajectory, starting in 2020, based on its average annual greenhouse gas emissions during 2016, 2017 and 2018 , as reported and verified pursuant to Directive 2009/29/EC Directive 2003/87/EC and Regulation (EU) No 525/2013 Decision No 280/2004/EC. ²⁸ In case this results in a starting point higher than the 2020 target, the 2020 target is the actual starting point for the calculation of the linear trajectory.

Justification

²⁸ Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC.

For 2020, the rules for setting the AEA trajectories are differentiated between reduction and growth limitation targets. This specific distinction is no longer needed for the target range of 0% to -40%.

The trajectory (and thus the respective AEA budget) is determined by the starting and end points. The end point is defined by the respective 2030 target but there are at least two options for the starting point - the 2020 target or average emissions in 2016-2018. For a realistic trajectory towards the target, an actual historic data point is best suited. Choosing an average value (over a number of years) avoids the potential bias caused by factors influencing the emission data from one single year (such as a warmer than average winter or a wet summer). Therefore, choosing the average value over the period 2016-2018 – the last three inventory years – is the most sensible option. Because the 2016-18 projections in some Member States are higher than their 2020 target, the 2021 AEA should be capped by the 2020 target, in order avoid rewarding present inaction through a higher emission budget from 2021 onwards.²⁹

7.3. Article 3.2, subparagraph 2 (linear trajectory for Member States with a positive limit)

Current text	Amendments
<p>Subject to paragraphs 3, 4 and 5 of this Article and Article 5, each Member State with a positive limit under Annex II shall ensure, including by making use of the flexibilities provided for in this Decision, that its greenhouse gas emissions in 2013 do not exceed a level defined by a linear trajectory, starting in 2009, on its average annual greenhouse gas emissions during 2008, 2009 and 2010, as reported and verified pursuant to Directive 2003/87/EC and Decision No 280/2004/EC, ending in 2020 on the limit for that Member State as specified in Annex II.</p>	<p>Delete</p>

Justification

This provision should be deleted because Member States will not be allowed to increase emissions after 2020 – as decided by the European Council in its October 2014 conclusions. Only one single rule for determining the AEA trajectory should be applied, which is formulated in the subparagraph above.

²⁹ Graichen, Jakob (2016): EU effort sharing for the 2021-2030 period - Setting GHG emission targets for EU Member States, 2016.

7.4. Article 3.2, subparagraph 3 (annual and linear reductions)

Current text	Amendments (bold)
Subject to paragraphs 3, 4 and 5 of this Article and Article 5, each Member State shall annually limit its greenhouse gas emissions in a linear manner, including by making use of the flexibilities provided for in this Decision, in order to ensure that its emissions do not exceed its limit in 2020 as specified in Annex II.	Subject to paragraphs 3, 4 and 5 of this Article 4 and Article 5, each Member State shall annually limit its greenhouse gas emissions in a linear manner, including by making use of the flexibilities provided for in this Regulation , in order to ensure that its emissions do not exceed its limit in 2030 as specified in Annex II.

Justification

This subparagraph is another essential provision of the ESD. It determines that Member States reduce emissions annually and in a linear manner. In other words, Member States reduce emissions along an annual linear trajectory – although the ESD provides for flexibility in achieving these reductions. The AEA trajectory from 2021 to 2030 must be also linear. This trajectory not only determines the total volume of national AEA budgets but is also the basis for the ESD’s annual compliance cycle. Article 7 of the ESD stipulates that a number of corrective actions apply if Member States exceed their “annual emission allocation specified pursuant to Article 3(2), taking into account the flexibilities used pursuant to Articles 3”. Both elements are critical for the credibility and robustness of the ESD. For these reasons, the provision should not be amended, with the exception of the target year.

7.5. Article 3.2, subparagraph 4 (determination of AEA)

Current text	Amendments (bold)
When the relevant reviewed and verified emission data are available, measures shall be adopted within six months to determine the annual emission allocations for the period from 2013 to 2020 in terms of tonnes of carbon	When the relevant reviewed and verified emission data are available, measures shall be adopted within six months to determine the annual emission allocations for the period from 2021 to 2030 in terms of tonnes of carbon

dioxide equivalent.	dioxide equivalent.
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Justification

This provision is essential as it describes the timeline for the calculation of national AEA values. Given that the emission data for the years 2016-2018 is required for this calculation, the fully verified data will probably only become available in early 2020 (provisional figures would be available 6-9 months earlier). The provision should thus not be amended, with the exception of the years mentioned.

7.6. Article 3.2, subparagraph 5 (delegated acts)

Current text	Amendments (bold)
Those measures, designed to amend non-essential elements of this Decision by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 13(2).	Those measures, designed to amend non-essential elements of this Regulation shall be adopted in accordance with Article 13 .

Justification

For efficient and swift implementation, the ESD should use delegated acts (Article 290 TFEU), as discussed below in the section on reforming Article 13.

7.7. New Article 3.3 (unilateral target adjustment)

In view of the purpose and long-term mitigation objectives of the Paris Agreement (Article 2 (a)), 4.1) and its requirement for parties to regularly update their mitigation efforts, including economy-wide absolute emission reduction targets, towards these goals, and to progress beyond each previous effort and reflect their highest possible ambition (Article 4.3), Member States may adopt higher national target at any time. Member States shall notify the European Commission of the higher target. Upon notification, the new national target shall become part of Annex II. In accordance with Article 13, the Commission shall adopt a delegated act amending Annex II. In this event, the Commission shall submit a legislative proposal to the European Parliament and to the Council amending this Regulation in accordance with Article 13 on the basis of the new national target.

Justification

Member States are free to set national targets that exceed their EU obligations. There are no rules in international or EU law that would prevent Member States from increasing their level of ambition unilaterally. On the contrary, the PA stipulates that a “Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition” (Article 4.11). The PA also determines that NDCs will increase over time. (Article 4.3) Against this backdrop, the new ESD should allow Member States to increase their own target at any time.

For smooth implementation of the unilateral target adjustment, the Commission adopts a delegated act that amends Annex II. Other Member States should not be allowed to impede this process.

8. Introducing a new Article 4: Flexibility Instruments (integrating parts of the old Article 3 ESD)

8.1. Article 4.1, formerly Article 3 paragraph 3, subparagraph I (Borrowing)

Current text	Amendments (bold)
During the period from 2013 to 2019, a Member State may carry forward from the following year a quantity of up to 5 % of its annual emission allocation. If the greenhouse gas emissions of a Member State are below its annual emission allocation, taking into account the use of flexibilities pursuant to this paragraph and paragraphs 4 and 5, it may carry over the part of its annual emission allocation of a given year that exceeds its greenhouse gas emissions in that year to the subsequent years, until 2020.	During the period from 2021 to 2029 , a Member State may carry forward from the following year a quantity of up to 5 % of its annual emission allocation. If the greenhouse gas emissions of a Member State are below its annual emission allocation, taking into account the use of flexibilities pursuant to this paragraph and paragraphs 4 and 5, it may carry over the part of its annual emission allocation of a given year that exceeds its greenhouse gas emissions in that year to the subsequent years, until 2030 .

Justification

The European Council agreed that “the availability and use of existing flexibility instruments (FI) within the non-ETS sectors will be significantly enhanced.” Importantly, the European Council called for an enhancement of existing FI, i.e. the current framework is the starting point of reform. There is

consensus in the EU that the existing flexibilities will continue after 2020. For these reasons, **borrowing and banking – as stipulated in paragraph 3 – should stay in force after 2020**. For clarity reasons, we propose to include banking and borrowing separately in a new Article 4. The current Article 3 is convoluted and not easily accessible.

While the principle of **borrowing (“carry forward”)** should continue, it should not be unlimited. Unlimited borrowing does not ensure that achieving the overall target remains realistic. The ESD assumes a linear reduction path because steep reductions within a short period of time are unlikely to occur, except under extraordinary circumstances (e.g. economic recession). For this reason, the 5% threshold should be maintained unless experience until 2020 demonstrates that a higher threshold does not jeopardise achieving the target.

CAN-Europe recommended to reduce the threshold from 5% to 2% of 2005 emissions levels, arguing that the annual reduction path “with existing measures” (WEM) is about 2.2% and 1.9% “with additional measures” (WAM).³⁰ A threshold higher than 2% would enable countries to delay mitigation action and thereby increase the risk of non-compliance problems towards the end of the ESD period. While the argument is convincing, it is not in line with the political reality as expressed by the European Council’s call to enhance flexibility significantly in October 2014.

There is also a proposal to allow higher than 5% borrowing at the beginning of the next ESD “commitment period”, while the 5% threshold would be maintained for the later years of the commitment period.³¹ This proposal addresses the compliance problem to some extent because it reduces the risk towards the end of the period but also complicates the system and increases the risks of non-compliance. For this reason it should not become law.

There is also agreement among Member States that **banking (“carry over”) between years should continue after 2020**. Banking is an essential flexibility option for Member States. However, the new banking provision must not allow carry-over of unused AEAs between commitment periods. The current ESD does not include a carry-over of an AEA surplus after 2020 and the relevant decisions of the European Council do not propose an amendment to that end.

8.2. Article 4.2, formerly Article 3 paragraph 3 subparagraph 2 (extreme weather)

Current text	Amendments (bold)
A Member State may request an increased carry forward rate in excess of 5 % in 2013 and 2014 in	In 2021 and 2022 , a Member State may request an increased carry forward rate in excess of 5 %

³⁰ CAN-Europe contribution to the ESD consultations.

³¹ Graichen, Jakob, Hannes Böttcher and Verena Graichen (2015): Enhanced flexibilities for the EU’s 2030 Effort Sharing Decision, Report prepared for Carbon Market Watch, Öko-Institut e.V., June 2015

the event of extreme meteorological conditions which have led to substantially increased greenhouse gas emissions in those years compared to years with normal meteorological conditions. To this end, the Member State shall submit a report to the Commission substantiating this request. Within three months, the Commission shall decide whether an increased carry forward can be granted.	in 2013 and 2014 in the event of extreme meteorological conditions which have led to substantially increased greenhouse gas emissions in those years compared to years with normal meteorological conditions. To this end, the Member State shall submit a report to the Commission substantiating this request. Within three months, the Commission shall decide whether an increased carry forward can be granted.
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Justification

Similar to the current rules, the extreme weather exception should be maintained for 2021 and 2022, the first two years of the new ESD. It seems fair and economically sensible to provide Member States with a certain degree of flexibility in case of extreme weather conditions, which are not foreseeable and beyond their control. It is also reasonable to restrict this type of flexibility to the first two years of the commitment period because at this point in time there still remains time to address compliance challenges.³² As this proposal would maintain the logic of the current system, it is in line with the overall ESD reform purpose to leave the current system intact.

8.3. Article 4.3, formerly Article 3 Paragraph 4 (Transfer of AEA between Member States)

Current text	Amendments (bold)
A Member State may transfer up to 5 % of its annual emission allocation for a given year to other Member States. A receiving Member State may use this quantity for the implementation of its obligation under this Article for the given year or any subsequent years until 2020. A Member State cannot transfer any part of its annual emission allocation if, at the time of transfer, that Member State is not in compliance with the	A Member State may transfer up to 5 % of its annual emission allocation for a given year to other Member States. A receiving Member State may use this quantity for the implementation of its obligation under this Article for the given year or any subsequent years until 2030 . A Member State cannot transfer any part of its annual emission allocation if, at the time of transfer, that Member State is not in compliance with the

³² Pallemarts, Marc (2010): The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy.

requirements of this Decision.	requirements of this Regulation .
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Justification

This rule provides additional flexibility to Member States in planning and managing their ESD compliance. In line with the October 2014 conclusions of the European Council, **this rule should be maintained**. The 5% maximum for transferring non-surplus AEAs helps ensure that the ESD target remains achievable. The ESD assumes that Member States reduce emissions along a linear path, taking account of empirical evidence that emissions fall steeply in short periods of time only in exceptional circumstances. A higher threshold than 5% should only be considered if experience with the implementation of the ESD shows that a higher threshold does not impede compliance and if larger emission reductions can be achieved faster than is currently the case.

However, the ESD and the Registry Regulation No 389/2013 specify only the technical details of AEA transfers between various ESD accounts, but contain no rules on a number of relevant **AEA transaction issues, such as auctioning of AEAs, payment for AEAs or use of revenues of AEA selling**. Recital 10 of the ESD only states that “transfers may be carried out in a manner that is mutually convenient, including by means of auctioning, the use of market intermediaries acting on an agency basis, or by way of bilateral arrangements”. The ESD also states that the transparency of such transfers should be ensured by way of a notification to the Commission and the registration of each transfer in the registries of both Member States involved. Articles 82-85 of Registry Regulation No 389/2013 “only” contain rules on the transfer, banking, borrowing and restrictions of the use of AEAs.

Against this backdrop, there are **various ways how a new ESD framework could organise the modalities of transferring AEAs**. Member States can transfer against payment or in exchange for technology. Other agreements are possible, including AEA transfers in return for private investments in specific emission reduction projects or a Green Investment Scheme (GIS) that would require the selling Member State to invest the revenues of the sales into mitigation actions.³³ To ensure that revenues or other forms of compensation help reduce greenhouse gas emissions, the future ESD could include more details on the transaction modalities. Selling Member States could, for example, be required to reinvest revenues in mitigation action. However, such conditionality has its downsides. If revenues must be earmarked to mitigation efforts, there is a need for ex-post verification. This would automatically lead to additional bureaucracy. Conditionality would also limit incentives for Member States to engage in AEA trading and could restrict the budgetary rights of parliaments.

³³ Carbon Market Watch (2014b): Tackling 60% of the EU's Climate Problem, The Legislative Framework of the Effort Sharing Decision, http://carbonmarketwatch.org/wp-content/uploads/2014/06/Report-Legislative-Framework-of-the-ESD-Carbon-Market-Watch_WEB.pdf.

8.4. Optional: New Article 4.4 (AEA Auctioning)

Member States may set up one central platform to auction AEAs. Member States shall make available x %³⁴ of their AEAs for auctioning. Member States are not obliged to place bids. A Regulation adopted by the European Commission shall set detailed provisions for the auctioning by Member States of AEAs. This Regulation shall be adopted in accordance with the procedure referred to in Article 13.

It shall be for Member States to determine the use to be made of revenues generated from the auctioning of AEAs. Those revenues should be used to tackle climate change in the EU and third countries, inter alia, to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, especially developing countries, to fund research and development for mitigation and adaptation, and to reduce emissions through low-emission transport.

Member States shall inform the Commission of actions taken pursuant to this paragraph.

Justification

Auctioning AEAs is **another option** to organize modalities of AEA transactions. This option has received support from a number of Member States, notably the Netherlands and Belgium. Various stakeholders expressed support of auctioning of AEAs during the consultations on ESD reform. CAN-Europe, for example, stated that a centralised auctioning platform would help reduce transaction costs and introduce more transparency.³⁵ CAN Europe calculated that – assuming that 30 million AEAs would be auctioned every year, the total revenues during the 2021-2030 period could surpass €9 billion (assuming an AEA price rising from €20/AEA in 2021 to €40/AEA by 2030). CAN Europe also called for earmarking all auctioning revenues for climate measures.

Auctioning could be designed in various ways; and there are several proposals on AEA auctioning. All proposals include a permanent platform on which Member States could bid and sell AEAs. All proposals draw on the ETS. For this reason it is very likely that a permanent AEA auctioning mechanism would mimic the **EUA auctions regularly held under the EU ETS** – although with the crucial differences that a) volumes would be significantly lower and b) only Member States would be entitled to participate in the auctioning. Given the technical nature of designing the details of AEA auctioning, the Commission should be mandated to propose / adopt a regulation on AEA auctioning. This system would mimic Article 3 d of the ETS Directive, which grants the Commission the right to adopt the auctioning regulation.

Earmarking of auctioning revenues is likely to be a contested issue. Earmarking revenues is a good way to support climate policies but it is possible that various Member State will not support earmarking of funds. The ETS Directive points to a possible compromise in this respect. For this

³⁴ It is generally expected that about 1-2 % of AEAs are made available for auctioning.

³⁵ CAN Europe contribution to the ESD Consultation.

reason, we propose to include the wording of Article 3 d paragraph 4 of the ETS directive in the new ESD.

Because there is **no experience with the flexibilities** under the current ESD, it is not fully established to what extent this additional flexibility is required for cost-effective and efficient implementation of the new ESD. It is also unclear how AEA auctioning would interact with other flexibility mechanisms. Because of these uncertainties, it is not yet clear whether the introduction of AEA auctioning would actually be beneficial and acceptable for Member States. The co-legislators have to take the decision whether to introduce AEA auctioning.

8.5. New Article 4.5 (ETS one-off)

Member States listed in Annex y may use ETS allowances to meet their national non-ETS reduction target as set out in Annex x in the period between 2021 and 2030. The total amount of ETS allowances may not exceed x% of the 2021 annual emission allocation. The EUAs in question will be deducted from the amount of EUAs to be auctioned on behalf of the Member State in question.

Any Member State eligible for this transfer option may use it only once. To do so, it must submit a request for a conversion of EUAs with the specific amount to the European Commission. Once a request has been approved, the respective amount of EUAs will be converted into AEA and transferred to the respective national account of the Member State in question. As a consequence the Member State's amount of EUAs to be auctioned as determined under Article 10(2) of Directive 2003/87 will be reduced by the equivalent volume of EUAs that have been converted to AEA. The European Commission will adjust the auctioning schedules accordingly and communicate the respective changes in due time.

Any request by a Member State to make use of this flexibility option during the period 2021 to 2030 may be submitted no later than 30 June 2022.

The European Commission adopts amendments to the Registry Regulation No 389/2013 establishing the framework for this single use of ETS allowances before 2020. The amendments shall be adopted in accordance with the procedure referred to in Article 13. The amendments will ensure predictability and environmental integrity of the mechanism. The amendments will also introduce a discount factor, which requires Member States to surrender at least four ETS allowances to cover one ton of non-ETS emissions.

Justification

The European Council called for a new FI through a **“limited, one-off, reduction of the ETS allowances”**.³⁶ In practical terms, such intervention means that eligible Member States could use ETS allowances to meet their ESD targets. An obvious attraction of this mechanism is that it would contribute to reducing the current surplus of emission allowances in the EU ETS. This mechanism will require amendments to the Auctioning and the Registry Regulation.

Only Member States meeting certain requirements will be eligible. To benefit from this FI, national reduction targets of a Member State and their cost-effective reduction potential have to be significantly above the EU average. In addition, Member States may also use this FI if they “did not have free allocation for industrial installations in 2013”.³⁷ The European Council also agreed that this FI should preserve predictability and environmental integrity. In short, the Conclusions provide a frame for the new FI but leave important design questions unanswered. It is clear that the FI will be a single, one-off intervention, but the meaning of “limited”, “predictable” or “safeguarding the environmental integrity of the EU’s climate policy” is less clear. The eligibility criteria for Member States also require further refinement. Because of these uncertainties, eligible Member States should be listed in an Annex.

Given the ambiguity of the European Council’s Conclusions, it is not yet fully clear which Member States would qualify for this FI. It is also unclear to what extent the FI would increase the amount of admissible AEAs. Depending on the quantification of the terms “limited” and “significantly above the EU average”, the number of eligible Member States and the amount of AEAs admissible under the new ESD would vary considerably. It will be subject of the coming negotiations to determine the meaning of these terms. The Öko-Institut calculated the effects of a one-off ETS transfer, using two scenarios – a restrictive and a broad scenario:³⁸

³⁶ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.12.

³⁷ European Council (2014): European Council Conclusions, 23/24 October 2014. EUCO 169/14, para. 2.12.

³⁸ Graichen, Jakob (2015): Flexibility under the Effort Sharing Decision in the period 2021 to 2030, Discussion Paper, Öko-Institut e.V., February 2015.

	2030 target	cost-effective potential		New Flex (restrictive)			New Flex (broad)		
		(min)	(max)	above 33% and cost-eff (max)	5% of 2021 AEA [Million]	20% of 2021 AEA [Million]	above 30% and cost-eff (min)	5% of 2021 AEA [Million]	20% of 2021 AEA [Million]
Austria	33.3%	27.0%	32.0%	X	2.5	10.2	X	2.5	10.2
Belgium	31.3%	24.0%	32.0%				X	3.7	14.7
Denmark	36.8%	31.0%	33.0%	X	1.5	6.0	X	1.5	6.0
Finland	34.5%	30.0%	33.0%	X	1.5	5.9	X	1.5	5.9
France	35.6%	34.0%	38.0%				X	17.1	68.5
Germany	39.5%	41.0%	47.0%						
Ireland	30.0%	21.0%	25.0%				X	2.1	8.5
Italy	33.5%	31.0%	35.0%				X	14.2	56.6
Luxembourg	32.5%	20.0%	27.0%				X	0.5	2.0
Malta	19.5%	27.0%	29.0%	X	0.1	0.2	X	0.1	0.2
Netherlands	33.6%	28.0%	32.0%	X	5.1	20.5	X	5.1	20.5
Sweden	35.6%	29.0%	33.0%	X	1.8	7.1	X	1.8	7.1
United Kingdom	35.8%	35.0%	39.0%				X	15.5	62.0
Total					12.5	49.9		65.6	262.2

Notes:

- Calculation based on 50% cost-effectiveness (min) and GDP/cap split. Starting point is the with existing measures projection for the years 2016-18 in line with the starting point rule as applied for ESD I.
- Cyprus, Slovenia and Spain have targets above their cost-effective potential but below 30% and are not included here. According to our calculations the Irish target is 29.99%. Ireland is included in the broad application because of the uncertainties in the 2030 target calculations.

Accordingly, six Member States would be eligible for the FI in a restrictive design, while 12 would meet the requirements in the broad scenario. Under the broad scenario, the FI would increase the admissible AEA amount under the ESD by 262 million, provided up to 20% of the AEA for 2021 fall within the scope of this FI. The FI would enlarge the amount of AEAs by 65 million if only up to 5% of the AEA for 2021 fall under the FI. In the restrictive scenario, AEAs would grow by 49,9 million in case up to 20% of 2021 AEAs are eligible; AEA would only increase by 12,5 million if only 5% are below the ceiling. In short, a maximum of up to 10% of the AEAs for 2021 could fall under the FI in the broad scenario. It is noteworthy that this FI is a single event that will occur only once in the coming commitment period. For this reason, the overall impact of this FI on total allocated ETS allowances for the period 2021- 2030 ranges only between a small 0,08% -1,69%.³⁹

Regardless of its limited scope, **this FI is potentially problematic.**

- This FI allows the inflow of credits that were generated in the traded sectors into the non-traded sector. This makes a complex system even more complicated.
- Corresponding to the volume of eligible ETS allowances, this flexibility will reduce the incentives for emission reductions in the non-ETS sectors. In general terms, the current price of ETS allowances is lower than the carbon price required to reduce emissions in the transport and agriculture sectors. It is of course the rationale of any FI to allow reductions where they are cheapest, but this should not impede reductions in sectors that are in equal need of impulses to decarbonise and should not contribute to locking in carbon-intensive infrastructure.⁴⁰
- The interaction between this FI and the ETS Market Stability Reserve (MSR) needs to be clarified.

³⁹ Own calculation on the basis of two scenarios: 1) the reduction factor remains at 1,74%, in which case a total of 15,503,616,880 EAU would be available between 2021 and 2030; 2) the reduction factor is scaled up to 2,2%, in which case 16,059,987,810 EAU would be allocated.

⁴⁰ Refer also to text box "Cost-effectiveness – an ambivalent concept?", page 12 above.

- Whereas the ETS has an instrument to deal with oversupply in the market, the ESD is not equipped with a comparable mechanism.

To address these concerns, this **FI should be as limited in scope and volume as possible**. To limit its scope, eligibility criteria for Member States should be restricted and the amount of ETS allowances that could be used for compliance should be small, as calculated by the Öko-Institut in the restrictive scenario.

To ensure environmental integrity, the FI should also introduce a discount factor, meaning that Member States would have to surrender more than one ETS allowance to cover one ton of non-ETS emissions. Öko-Institut proposed a discounting factor of at least four, i.e. four EUAs would equal one AEA.⁴¹ A discounting factor would facilitate reducing the ETS surplus and help ensure the environmental integrity of the FI. The discount factor would also be consistent with the EU position on international mechanisms where the EU calls for net atmospheric benefits of international offsets.

Member States should also not be allowed to request such a transfer after 30 June 2022. Later requests could have a disproportionate effect on both the balance of AEA and EUA supply and demand.

8.6. Article 4.6, formerly Article 4.5 (Surplus transfer)

Current text	Amendments (bold)
A Member State may transfer the part of its annual emission allocation that exceeds its greenhouse gas emissions for that year, taking into account the use of flexibilities pursuant to paragraphs 3 and 4, to other Member States. A receiving Member State may use this quantity for the implementation of its obligations under this Article for the same year or any subsequent years until 2020. A Member State cannot transfer any part of its annual emission allocation if, at the time of transfer, it is not in compliance with the requirements of this Decision.	A Member State may transfer the part of its annual emission allocation that exceeds its greenhouse gas emissions for that year, taking into account the use of flexibilities pursuant to paragraphs 3 and 4, to other Member States. A receiving Member State may use this quantity for the implementation of its obligations under this Article for the same year or any subsequent years until 2030 . A Member State cannot transfer any part of its annual emission allocation if, at the time of transfer, it is not in compliance with the requirements of this Regulation .

Justification

⁴¹ Graichen, Jakob, Hannes Böttcher and Verena Graichen (2015): Enhanced flexibilities for the EU's 2030 Effort Sharing Decision, Report prepared for Carbon Market Watch, Öko-Institut e.V., June 2015.

This provision to allow transfers of AEAs that are not immediately required for compliance is an essential element of the existing flexibility in the ESD as it rewards early action. It carries low risks for the Member State transferring its allocation, as its compliance (at least for the year in question) is already ensured. Thus the main need for change in this paragraph is the year, i.e. the provision should extend to 2030.

8.7. Article 4.7, formerly Article 4.6 (transfer modalities)

Current text	Amendments (bold)
<p>In order to facilitate the transfers referred to in paragraphs 4 and 5 and increase their transparency, measures indicating the modalities for such transfers shall be adopted.</p> <p>Those measures, designed to amend non-essential elements of this Decision by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 13(2).</p>	<p>In order to facilitate the transfers referred to in paragraphs 3 and increase their transparency, the European Commission may adopt delegated acts regulating the modalities for such transfers following the procedure as laid down in Article 13.</p> <p>Delete subparagraph</p>

Justification

See above, paragraph 4.3

9. Deleting Article 4 (Energy Efficiency)

Current text	Amendments
<p>Article 4</p> <p>Energy efficiency</p> <p>1.</p> <p>By 2012, the Commission shall assess and report</p>	<p>Delete</p>

<p>on the progress of the Community and its Member States towards the objective to reduce energy consumption by 20 % by 2020 compared to projections for 2020, as outlined in the Action Plan for Energy Efficiency which was set out in the Commission Communication of 19 October 2006.</p> <p>2.</p> <p>If appropriate, in particular in order to assist Member States in their contributions towards meeting the Community's greenhouse gas emission reduction commitments, the Commission shall, by 31 December 2012, propose strengthened or new measures to accelerate energy efficiency improvements.</p>	
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Justification

The EED contains adequate reporting requirements on energy efficiency in Article 24. In all likelihood, a revised EED or other instrument will contain similar reporting obligations. The ESD should not duplicate this obligation.

10. Deleting Article 5 (international offsets and 24a credits)

Current text	Amendments
<p>1.</p> <p>Member States may use the following greenhouse gas emission reduction credits to implement their obligations under Article 3:</p> <p>(a) Certified Emission Reductions (CERs) and Emission Reduction Units (ERUs), as set out in Directive 2003/87/EC, issued in respect of emission reductions until 31 December 2012 which were eligible for use in the Community</p>	<p>Delete</p>

<p>scheme during the period from 2008 to 2012;</p> <p>(b) CERs and ERUs issued in respect of emission reductions from 1 January 2013 from projects which were registered before 2013 and which were eligible for use in the Community scheme during the period from 2008 to 2012;</p> <p>[...]</p> <p>7.</p> <p>Member States shall, in addition, be able to use credits from Community-level projects issued pursuant to Article 24a of Directive 2003/87/EC towards their emission reduction commitments, without any quantitative limit whatsoever.</p>	
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Justification

Article 5 of the current ESD should be deleted:

- The European Council adopted a domestic reduction target of at least 40%. For this reason, Member States may not use international offsets for meeting their ESD targets. Member States may use international offsets only if they increase this domestic target (= 40% domestic plus x % int. offsets). Because the ESD will, in all likelihood, “only” aim to contribute to achieving the domestic EU target, international offsets will not play a role in the new ESD.
- With the establishment of the EPM and / or the one-off link between the ETS and the ESD, the mechanism under the current Article 5.7 (linking the ETS and ESD) is obsolete. In addition, the mechanism is potentially problematic:
 - **Complexity:** The mechanism would link the traded and non-traded sectors, which complicates an already complex system further and makes the system more uncertain and unpredictable. From a market perspective, the expected number of credits becomes less clear, and calculations for allowances and price levels of the EU ETS become more difficult. A transparent and simple system that allows for proper accounting should clearly attribute AEAs to the ESD sector, not EUAs.⁴²
 - **Price:** The FI establishes a new source of allowances that may decrease the price for ETS allowances (further).
 - **Double-counting:** Projects under Article 24a ETS Directive also bear the risk of rewarding emission reductions both under JI and/or the ETS.⁴³

⁴² Hoozgaard, Jelmer and Moritz von Unger (2010): Climate Focus Background Paper - Article 24a EU ETS, Offsetting under Article 24a EU ETS and European Country Approaches: a Roundtable.

⁴³ Hoozgaard, Jelmer and Moritz von Unger (2010): Climate Focus Background Paper - Article 24a EU ETS, Offsetting under Article 24a EU ETS

11. New Article 5 (European Project Mechanism)

A European Project Mechanism (EPM) is hereby established. It is the objective of the EPM to reduce emissions in a cost-effective manner and to engage private investors in EU efforts to reduce greenhouse gas emissions. The EPM will work on the basis of public tendering. Participation in the EPM is strictly voluntarily. Projects facilitated by the EPM must guarantee high levels of environmental integrity. The EPM shall ensure high levels of transparency, in particular by disclosing information related to the tendering process and project implementation.

The European Commission adopts a Regulation establishing the legal framework for the EPM. The Regulation shall be adopted in accordance with the procedure referred to in Article 13. The Regulation will determine criteria for project verification by accredited, independent third-party auditor. The Regulation will also introduce a discount factor, which requires Member States to issue only X%⁴⁴ of the emission reductions achieved in the form of marketable AEAs. Only Member State in compliance with the requirements of this Regulation can use the EPM. The EPM may not include projects covered by the ETS.

Justification

The current **ESD has no specific project-based mechanism** that allows Member States to receive AEAs through financing mitigation projects in other Member States or at home. At present, the ESD only allows Member States to use credits from Union-level projects issued pursuant to Article 24a of Directive 2003/87/EC towards their emission reduction commitments (Article 5.7 ESD). Next to this mechanism, the current ESD permits the use of international credits generated through projects. However, international offsets from CDM cannot be used in the new regime because the European Council agreed on a domestic reduction target that does not allow for the use of international offsets from reductions in developing countries. JI offsets from projects within Member States with emission reductions before 2013 or that are registered before 2013 (see 5.1 lit a, b ESD) may be used as these can be counted as domestic action.

The EPM is an **additional option** for enhancing flexibility under the ESD. The EPM would directly facilitate the engagement of private investors in EU efforts to reduce emissions cost-effectively. It should be a decentralised and non-bureaucratic procedure that enables and facilitates mitigation projects without engaging directly in Annual Emission Allowances (AEA) trading. To avoid a centralised structure, Member States should approve projects, while the EPM should serve as an information facilitator and ensure that Member States apply criteria that are in line with the ESD. The

and European Country Approaches: a Roundtable.

⁴⁴ To ensure high levels of environmental integrity, France only issues emission reduction units (ERUs) corresponding to 90% of the calculated reduction achieved by a JI project. The EPM could adopt a similar approach, i.e. the host country would keep 10% of the generated AEAs.

EPM would work on the basis of public tendering. Both the buying and/or the selling Member State can issue calls for tender. Project developers would receive monetary payment from the buying Member State. Project developers would not receive AEAs as payment because this option would require a fundamental change in the ESD, which only allows Member States to hold AEAs. This option is also less attractive for project developers because AEAs can only be sold on a small market of 28 Member States.

The EPM is one flexibility instrument **in addition to the flexibilities already existing or proposed**. Because of the high levels of existing flexibility and limited experience with the flexibilities under current ESD, the new ESD may not introduce an obligation on Member States to participate in the EPM.

12. Reforming Article 6 (Reporting, evaluation of progress, amendments and review)

Paragraph 1

Current Text	Amendments
<p>1. Member States shall, in their reports submitted pursuant to Article 3 of Decision No 280/2004/EC, include the following:</p> <p>(a) their annual greenhouse gas emissions resulting from the implementation of Article 3;</p> <p>(b) the use, geographical distribution and types of, as well as the qualitative criteria applied to, credits used in accordance with Article 5;</p> <p>(c) projected progress towards meeting their obligations under this Decision, including information on national policies and measures and national projections;</p> <p>(d) information on planned additional national policies and measures envisaged with a view to limiting greenhouse gas emissions beyond their commitments under this Decision and in view of the implementation of an international agreement on climate change, as referred to in Article 8.</p>	<p>Pertinent reporting requirements of the MMR and / or other new rules apply respectively.</p>

Paragraph 2 - delete

Paragraph 3

Current Text	
<p>3.</p> <p>The Commission shall, in its reports submitted pursuant to Article 5(1) and (2) of Decision No 280/2004/EC, evaluate whether the progress made by Member States is sufficient for them to fulfil their obligations under this Decision.</p> <p>The evaluation shall take into account progress in Community policies and measures and information from Member States in accordance with Article 3 and Article 5 of Decision No 280/2004/EC.</p> <p>Every two years, starting with the greenhouse gas emissions reported for 2013, the evaluation shall also include the projected progress of the Community towards meeting its reduction commitment and of Member States towards fulfilling their obligations under this Decision.</p>	<p>Delete</p>

Paragraph 4

Current text	
<p>4.</p> <p>In the report referred to in paragraph 3, the Commission shall assess the overall implementation of this Decision, including the use and quality of CDM credits and the need for further common and coordinated policies and measures at Community level in the sectors</p>	<p>Delete</p>

covered by this Decision in order to assist Member States in meeting their commitments under this Decision, and shall make proposals as appropriate.	
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Paragraph 5

Current text	
<p>5.</p> <p>In order to implement this Decision, the Commission shall, where appropriate, make proposals to amend Decision No 280/2004/EC and adopt amendments to Commission Decision 2005/166/EC(1)</p> <p>Commission Decision 2005/166/EC of 10 February 2005 laying down rules implementing Decision No 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (OJ L 55, 1.3.2005, p. 57). with a view to the amending acts applying from 1 January 2013, to ensure in particular:</p> <p>(a) faster, efficient, transparent and cost-effective monitoring, reporting and verification of greenhouse gas emissions;</p> <p>(b) the development of national projections of greenhouse gas emissions beyond 2020.</p>	<p>Delete</p>

Justification

Reporting (and planning) are central issues in the 2030 governance discussions. The ESD reporting requirements should be included in the new reporting regime. At this point in time, a draft for a revised ESD should simply refer to the MMR and the pertinent rules of the new reporting scheme. Integrating ESD reporting requirements into the new reporting system would be an important contribution to streamlining the current reporting obligations. For the requirements on a new and

robust reporting and planning regime, please refer to a number of publications, including two Ecologic papers.⁴⁵

13. Reforming Article 7 (Corrective action)

13.1. Article 7.1 (abatement factor and corrective action plan)

Current text	Amendments (bold)
<p>1.</p> <p>If the greenhouse gas emissions of a Member State exceed the annual emission allocation specified pursuant to Article 3(2), taking into account the flexibilities used pursuant to Articles 3 and 5, the following measures shall apply:</p> <p>(a) a deduction from the Member State’s emission allocation of the following year equal to the amount in tonnes of carbon dioxide equivalent of those excess emissions, multiplied by an abatement factor of 1,08;</p> <p>(b) the development of a corrective action plan in accordance with paragraph 2 of this Article; and</p> <p>(c) the temporary suspension of the eligibility to transfer part of the Member State’s emission allocation and JI/CDM rights to another Member State until the Member State is in compliance with Article 3(2).</p>	<p>1.</p> <p>If the greenhouse gas emissions of a Member State exceed the annual emission allocation specified pursuant to Article 3(2), taking into account the flexibilities used pursuant to Articles 4 and 5, the following measures shall apply:</p> <p>(a) a deduction from the Member State’s emission allocation of the following year equal to the amount in tonnes of carbon dioxide equivalent of those excess emissions, multiplied by an abatement factor of 1,08;</p> <p>(b) the development of a corrective action plan in accordance with paragraph 2 of this Article; and</p> <p>(c) the temporary suspension of the eligibility to transfer part of the Member State’s emission allocation and JI/CDM rights to another Member State use the flexibility instruments under Articles 4 and 5 until the Member State is in compliance with Article 3(2).</p>

Justification

Article 7 of the ESD stipulates that a number of corrective actions apply to Member States that exceed their “annual emission allocation specified pursuant to Article 3(2), taking into account the flexibilities

⁴⁵ Meyer-Ohlendorf, Nils (2015): An Effective Governance System for 2030 EU Climate and Energy Policy: Design and Requirements, Discussion Paper, Ecologic Institute, Berlin; Umpfenbach, Katharina (2015): Streamlining planning and reporting requirements in the EU Energy Union framework. An opportunity for building consistent and transparent strategies, Ecologic Institute, Berlin.

used pursuant to Articles 3 and 5” (or the new Article 4, see above). The compliance cycle is not only regulated by Article 7 of the ESD, but also draws on specifications in the Registry Regulation and the MMR.⁴⁶ This compliance mechanism is critical for the credibility and robustness of the ESD. Annual reporting and international review of the GHG inventories is also required under the UNFCCC. Furthermore, annual reporting is also necessary to estimate the expected supply and demand for AEA transfers. Annual compliance also follows the ETS cycle. For these reasons, the provision should not be amended, with the exception of deleting reference to international offsets that will be obsolete after 2020.

Due to limited experience with the current ESD regime and no case of non-compliance to date, we propose to maintain the abatement factor of 1,08. Maintaining this factor is in line with the overall approach of ESD reform to change the current regime only where necessary or requested by the European Council. However, a higher abatement factor should be considered if insufficient compliance would call for a more stringent regime. Temporary suspension from the flexibility instruments should also be maintained. The compliance regime could be complemented by an excess emissions penalty equal to the monetary fine set in the EU ETS (€100/tCO₂). This penalty could apply automatically in case of incompliance – similar to the current regime for CO₂ emission values for new cars.

In addition to this specific ESD compliance regime, the Commission can launch infringement procedures against Member States that are not in compliance with the ESD. This option will and should continue after 2020.

13.2. Article 7.2 (assessing the corrective action plan)

Current text	Amendments
<p>2. A Member State covered by paragraph 1 shall, within three months, submit to the Commission an assessment and a corrective action plan that includes:</p> <p>(a) action that the Member State will implement in order to meet its specific obligations under Article 3(2), giving priority to domestic policies and measures and the implementation of Community action;</p> <p>(b) a timetable for implementing such action, which enables the assessment of annual progress</p>	<p>None - keep existing text</p>

⁴⁶ Carbon Market Watch (2014): Tackling 60% of the EU’s Climate Problem: The legislative framework of the Effort Sharing Decision, May 2014.

<p>in the implementation.</p> <p>The Commission may issue an opinion on the corrective action plan of the Member State in question.</p> <p>Before issuing that opinion, the Commission may submit the corrective action plan to the Climate Change Committee, referred to in Article 13(1), for comments.</p>	
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Justification

This provision should be maintained. It provides for a fairly robust and credible mechanism to follow up non-compliance. It makes sense to give Member States time and discretion to decide how and when to address non-compliance. It is also reasonable to give the Commission a mandate to assess Member State plans. There are options to give the Commission a stronger mandate, including a Commission mandate to reject the action plan and to demand specific corrective measures. In light of the overall EU sceptical thinking and limited appetite of Member States to strengthen Commission surveillance and supervision, a stronger Commission mandate, however, seems unrealistic at this point.

14. Deleting Article 8 (adjustment of the ESD in light of an international agreement)

Current text	Amendment
Adjustments applicable upon the approval by the Community of an international agreement on climate change [...]	Delete

Justification

Article 8 stipulates the process of adjusting EU rules in case an international agreement requires higher reduction targets. The provision is obsolete and should be deleted (see above, Article 1). The new review and target adjustment mechanisms ensure that the new ESD takes account of international climate negotiations.

15. Deleting Article 9 (LULUCF)

Current text	Amendment
<p>Article 9</p> <p>Procedure in relation to land use, land use change and forestry in the event of no international agreement on climate change</p> <p>In the event that no international agreement on climate change is approved by the Community by 31 December 2010, Member States may specify their intentions for the inclusion of land use, land use change and forestry in the Community reduction commitment taking into account methodologies within the work carried out in the context of UNFCCC. Taking into account such specification by Member States, the Commission shall, by 30 June 2011, assess modalities for the inclusion of emissions and removals from activities related to land use, land use change and forestry in the Community reduction commitment, ensuring permanence and the environmental integrity of the contribution of land use, land use change and forestry as well as accurate monitoring and accounting, and make a proposal, as appropriate, with the aim of the proposed act entering into force from 2013 onwards. The Commission's assessment shall consider if the distribution of individual Member States' efforts should be adjusted accordingly</p>	<p>Delete</p>

Justification

The existing Article is outdated but the issue itself is not. Inclusion of LULUCF in the ESD would be a major change to the current ESD, with significant implications. Discussions on whether or not to integrate LULUCF in the ESD targets are ongoing. We propose to keep LULUCF outside of the ESD and to delete Article 9:

- Since the LULUCF sector is both a source of emissions and a sink, its removals function could reduce the overall mitigation effort in the ESD's other sectors. Importantly, allowing forestry offsets into the ESD could cut the ESD mitigation effort in half. This could lead to a 23% increase of EU's greenhouse gas emissions in the 2021-2030.⁴⁷
- Including LULUCF in ESD leads to significant complexity in allocating targets between MS with a GDP/capita above EU average since the potential for sinks varies between the MS.⁴⁸
- The LULUCF emissions and removals have potentially large annual fluctuations and suffer from data uncertainties. LULUCF cannot ensure permanent removal of emissions. These characteristics make LULUCF unfit for inclusion in the ESD that has and should have an annual compliance cycle.⁴⁹
- Inclusion of LULUCF in the ESD could result in mitigation being the sole or the primary focus of the LULUCF sectors. This could lead to a situation where other environmental services provided by the LULUCF, such as biodiversity, soil protection, or water quality, are not sufficiently recognised and safeguarded.

16. Reforming Article 10 (Changes in the scope of Directive 2003/87/EC and application of Article 24a thereof)

Current text	Replace by
<p>The maximum quantity of emissions for each Member State under Article 3 of this Decision shall be adjusted in accordance with the quantity of:</p> <p>(a) allowances for greenhouse gas emissions issued pursuant to Article 11 of Directive 2003/87/EC that results from a change in the coverage of sources under that Directive following the final approval by the Commission of the national allocation plans for the period from 2008 to 2012 pursuant to Directive 2003/87/EC;</p> <p>(b) allowances or credits issued pursuant to</p>	<p>The maximum quantity of emissions for each Member State under Article 3 of this Regulation shall be adjusted in accordance with the quantity of:</p> <p>(a) allowances for greenhouse gas emissions issued pursuant to Article 11 of Directive 2003/87/EC that results from a change in the coverage of sources under that Directive following the final approval by the Commission of the national allocation plans for the period from 2008 to 2012 pursuant to Directive 2003/87/EC;</p> <p>(b) allowances or credits issued pursuant to</p>

⁴⁷ Contribution by Carbon Market Watch to ESD Consultations.

⁴⁸ Nesbit, M, Paquel, K, Illés, A, Maréchal, A, Allen, B (2015): Designing a LULUCF pillar that works for forests and climate. Report and recommendations, Institute for European Environmental Policy, London.

⁴⁹ Contribution by Carbon Market Watch to ESD Consultations.

<p>Articles 24 and 24a of Directive 2003/87/EC in respect of emission reductions in a Member State covered by this Decision;</p> <p>(c) allowances for greenhouse gas emissions from installations excluded from the Community scheme in accordance with Article 27 of Directive 2003/87/EC for the time that they are excluded.</p> <p>The Commission shall publish the figures resulting from that adjustment.</p>	<p>Articles 24 and 24a of Directive 2003/87/EC in respect of emission reductions in a Member State covered by this Regulation;</p> <p>(c) allowances for greenhouse gas emissions from installations excluded from the Community scheme in accordance with Article 27 of Directive 2003/87/EC for the time that they are excluded.</p> <p>d) allowances assigned to Member States according to Article 4.5.</p> <p>The Commission shall publish the figures resulting from that adjustment.</p>
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Justification

With the exception of Article 24a and the allowances assigned according to Article 4.5, the adjustments should be maintained. The reference to Article 24a of the ETS Directive should be deleted (see above, new Article 5).

17. Reforming Article 11 (Registries and Central Administrator)

Current text	Replace by
<p>1. The Community and its Member States' registries established pursuant to Article 6 of Decision No 280/2004/EC shall ensure the accurate accounting of transactions under this Decision. This information shall be accessible to the public.</p> <p>2. The Central Administrator designated under Article 20 of Directive 2003/87/EC shall, through its independent transaction log, conduct an automated check on each transaction under this Decision and, where necessary, block transactions to ensure there are no irregularities.</p>	<p>1. The Community and its Member States' registries established pursuant to Article 10 of Regulation (EU) No 525/2013 No 280/2004/EC shall ensure the accurate accounting of transactions under this Regulation. This information shall be accessible to the public.</p> <p>2. The Central Administrator designated under Article 20 of Directive 2003/87/EC shall, through its independent transaction log, conduct an automated check on each transaction under this Regulation and, where necessary, block transactions to ensure there are no irregularities.</p>

<p>This information shall be accessible to the public.</p> <p>3. The Commission shall adopt measures necessary to implement paragraphs 1 and 2.</p> <p>Those measures designed to amend non-essential elements of this Decision by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 13(2).</p>	<p>This information shall be accessible to the public.</p> <p>3. The Commission shall adopt measures necessary to implement paragraphs 1 and 2.</p> <p>Those measures designed to amend non-essential elements of this Regulation by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 13.</p>
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Justification

The current registry rules should be maintained and only updated.

18. Reforming Article 12 (Amendments to Regulation (EC) No 994/2008)

Current text	Amendments
<p>In order to implement this Decision, the Commission shall adopt amendments to Commission Regulation (EC) No 994/2008 of 8 October 2008 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council(1).</p>	<p>Delete</p>

Justification

Article 13 gives the Commission a broad mandate to adopt delegated acts (see below). For this reason, there seems to be a strong argument to delete the provision.

19. Reforming Article 13 (delegated acts)

Current text	New provision ⁵⁰
<p>Committee procedure</p> <p>1. The Commission shall be assisted by the Climate Change Committee established by Article 9 of Decision No 280/2004/EC.</p> <p>2. Where reference is made to this paragraph, Articles 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.</p>	<p>Replace by a new Article on delegated acts:</p> <p>1. The power to adopt the delegated acts referred to in this Regulation shall be conferred on the Commission for a period of xy years following [include date]. The Commission shall make a report in respect of the delegated powers not later than 6 months before the end of the xy year period. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it.</p> <p>2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.</p> <p>3. The delegation of powers referred to in this Regulation may be revoked at any time by the European Parliament or by the Council.</p> <p>4. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of powers shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.</p> <p>5. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the</p>

⁵⁰ Taken from Regulation (EU) No 438/2010. This regulation amends regulation (EC) No 998/2003 on the animal health requirements applicable to the non-commercial movement of pet animals. These amendments seem to contain patient wording for the implementation of Article 290.

	<p>European Union.</p> <p>6. The European Parliament or the Council may object to a delegated act within a period of two months from the date of notification.</p> <p>At the initiative of the European Parliament or the Council this period shall be extended by two months.</p> <p>7. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.</p> <p>The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.</p> <p>8. If the European Parliament or the Council objects to a delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.’;</p> <p>10. The Commission shall be assisted by the Climate Change Committee established by Article 9 of Decision No 280/2004/EC.</p>
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Justification

The TFEU reformed comitology significantly. Under the TFEU, the EU legislator can delegate two types of powers to the European Commission: "delegated acts" (Article 290) and "implementing acts" (Article 291). While Article 291 basically continues the old Article 202 TEC (before the Amsterdam Treaty, Article 145 TEC), Article 290 introduces a new system of delegated acts. In principle, the

competence to adopt delegated acts gives the Commission broader powers than the right to issue implementing acts. Main differences between delegated and implementing acts are⁵¹:

- **Delegated acts give broader powers to the Commission:** In case of delegated acts (Article 290), the Commission may *amend or supplement* certain non-essential elements of a legislative act.⁵² In this instance, the Commission can act as a quasi-legislator, entitled to change non-essential elements of existing laws. In case of an implementing act (Article 291 TFEU), in contrast, the Commission may “only” adopt acts that *execute* the basic legislative act. Regulation 182/2011 (New Comitology Regulation) implements Article 291 TFEU; this Regulation replaces Decision 1999/468 (old Comitology Decision).
- **Substantive requirements:** Because the quasi-legislative powers assigned to the Commission under Article 290 TFEU are broader than those under Article 291, the provision clearly determines the requirements for conferring delegated powers to the Commission. Accordingly, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative acts. Essential elements of legislation may not be the subject of a delegated act. Article 291 TFEU, in contrast, contains less restrictive requirements. Accordingly, legislation may confer implementing powers on the Commission (or the Council), provided “uniform conditions for implementing legally binding Union acts are needed”⁵³. Legislation must stipulate in advance the rules “concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers” (Article 291.3).
- **Procedural differences:** In terms of procedure, there are significant differences between the delegation of legislative powers and the granting of implementing powers.⁵⁴ According to Article 290, procedural requirements for delegated acts can include (a) that the European Parliament or the Council may revoke the delegation and (b) that the “delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act”.

Against this background, there is a strong argument to continue the current regime in principle but to clarify that the new ESD empowers the Commission to adopt delegated acts in accordance with Article 290 TFEU:

- **Flexibility and ability to adjust quickly:** There are and will be a number of elements in the ESD that are likely to be adjusted because of changing circumstances. Examples for such elements include reporting, evaluation and review issues, currently stipulated in Article 6, or

⁵¹ It should be noted that it is not always easy to differentiate between delegated and implementing acts. According to the legal service, there are cases in which it is not possible to determine, “in a non-arbitrary way, that it is essential to choose Article 290 as the legal basis rather than 291 TFEU”. Because of these uncertainties, “it is for the legislature to establish on a case-by-case basis, in the light of the provisions concerned, whether the measures in question come under the scope of Article 290 TFEU or Article 291 TFEU”.

⁵² Legal service: “As already pointed out by the Legal Service in relation to the regulatory procedure with scrutiny, the term “*amend*” has a precise meaning. It means to make changes to a text by deleting, replacing or adding non-essential elements. [...] The meaning of the term “*supplement*” is more complex, [...]. To determine whether an act to be adopted by the Commission actually “*supplements*” the basic act, the legislature must in principle evaluate whether the future measure will add new (non-essential) rules which expand the legislative framework of the basic act, particularly by leaving a considerable margin of discretion to the Commission. If the answer is affirmative, then it could be considered, depending on the specific circumstances, that the measure “*supplements*” the basic act. Conversely, measures intended solely to give effect to existing rules in the basic act, without adding new elements to the act, or to implement aspects already clearly defined by the legislature, would fall more under the scope of Article 291 TFEU than of Article 290 TFEU.”

⁵³ To make this note more readable, the term “the legislature” is used to refer to the author of legally binding acts conferring implementing powers on the Commission, even if the acts in question are not only legislative acts within the meaning of Article 289 TFEU.

⁵⁴ Legal service: 10.

corrective action, presently regulated in Article 7. These articles are, arguably, non-essential elements of the ESD. In legal terms they can be amended through delegated acts. To avoid lengthy legislative procedures, the Commission should continue to be entitled to amend and supplement these issues through delegated acts. Delegated acts would not only save time but would also reduce the risk of unpicking the ESD during the legislative process.

- **Legally binding nature of delegated acts:** Delegated acts supplement or amend elements of legislative acts. For this reason, only legally binding measures may be delegated under Article 290.⁵⁵ They cannot take the form of mere recommendations or guidelines. This nature of delegated acts fits well the purpose of the ESD to provide for a legally binding framework of non-ETS emissions.
- **General scope of delegated acts:** Only measures of general application fall within the scope of Article 290 TFEU.⁵⁶ Where the legislature wishes to confer powers on the Commission to adopt individual measures (e.g. individual authorisations to be granted to one or more Member States⁵⁷), it may not do so by reference to Article 290 TFEU. This general scope of delegated acts also fits the purpose of the ESD.
- **Continuation of the current system in principle terms:** There is an argument that the current Article 13.2 falls under Article 290. The Commission proposed a regulation that lists legislation that empowers the Commission to adopt delegated acts.⁵⁸ This proposal includes the ESD. However, the Commission withdrew the proposal in early 2015. Furthermore, the wording of Article 3.6 of the ESD is ambiguous and does not make a strong case for the application of Article 290: “Those measures, *designed to amend non-essential elements of this Decision by supplementing it*, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 13(2).”

It should be noted that the delegation of powers to the Commission must be strictly circumscribed and the use of words such as “in particular” and other not clearly defined formulas for delegating powers⁵⁹ should be avoided.

20. Reforming Article 14 (Report, new: Review)

Current text	Amendments (bold)
The Commission shall draw up a report	The Commission shall draw up a report

⁵⁵ See *mutatis mutandis* the opinion of the Legal Service of 19 November 2009 (16323/09).

⁵⁶ See *mutatis mutandis* the opinion of the Legal Service of 19 November 2009 (16323/09).

⁵⁷ It should be noted, however, that the Court of First Instance held that derogations from the general arrangements provided for under a Directive can, in certain circumstances, concern its general nature, “given that they are addressed in abstract terms to undefined classes of persons and apply to objectively defined situations.” (see Order of the Court of First Instance of 11 July 2000, *Fédération nationale d’agriculture biologique des régions de France and others v Council*, T 268/99, ECR p. II-2893, paragraphs 37 and 38, confirmed by the Order of the Court of Justice of 10 May 2001, *Fédération nationale d’agriculture biologique des régions de France and others v Council*, C 345/00 P ECR. p. I-3811; Order of the Court of First Instance of 16 February 2005, *Fost Plus VZW. v Commission*, T 142/03, paragraph 47).

⁵⁸ The Commission proposed COM(2013)751: Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny.

⁵⁹ See *mutatis mutandis* the opinion of the Legal Service of 6 October 2009 (14179/09), paragraphs 4 and 8.

evaluating the implementation of this Decision. That report shall also evaluate how the implementation of this Decision has affected competition at national, Community and international level. The Commission shall submit its report to the European Parliament and to the Council by 31 October 2016, accompanied by proposals as appropriate, in particular whether it is appropriate to differentiate national targets for the period after 2020.

~~evaluating~~ **review** the implementation of this **Regulation**. The review shall in particular evaluate progress in achieving the targets laid down in Article 1 and 3 of this **Regulation and the adequacy of this Regulation and its targets in achieving the purpose and long term mitigation goals of the Paris Agreement, taking into account the overall implementation of and the global stocktake under the Paris Agreement and the current state of science.** ~~That report~~ The review shall also evaluate how the implementation of this **Regulation** has affected ~~competition~~ **long-term competitiveness and innovation** at national, Community and international level. The Commission shall submit its ~~report~~ **first review** to the European Parliament and to the Council by 31 October ~~2016~~**2019**, accompanied by **legislative proposals to adjust targets in line with (Art. 3 and 4 of) the Paris Agreement in particular whether it is appropriate to differentiate national targets for the period after 2020 and every 5 years thereafter.**

The review shall be informed by a report published by the European Environment Agency (alternatively: independent body) on the implementation of this Regulation. The report should include recommendations on target adjustment, if appropriate. These recommendations take into account the criteria and requirements set out in Article 3.3. The European Commission shall provide explicit reasons if it intends to deviate from the recommendations contained in the report.

Justification

The PA requires a five-year review process. The reformed Article 14 will help implement this requirement.

- **Timing:** Following the facilitative dialogue in 2018 (Par. 20 of the Paris Decision text),⁶⁰ the Paris Decision requests all Parties with a time frame up to 2030 “to communicate or update by 2020 [their] contributions”. The PA provides for the first regular global stocktake in 2023 and every five years thereafter (Article 14 PA). The ESD should prepare the facilitative dialogue and the global stocktake; also in parallel with corresponding provisions in the ETS Directive. There has to be sufficient time for the EU to take into account the 2023 global stocktake when it prepares the EU's 2025 NDC. Accordingly, the review under the new ESD should take place after the stocktake but before the EU's subsequent NDC, e.g. in the spring of 2024 and every 5 years thereafter. By 2024, the EU will have some experience in the implementation of the new ESD which can feed into the review. The facilitative dialogue in 2018 will take place probably before the new ESD enters into force. For this reason, the old ESD will remain the legislative frame of the EU for the first review under this dialogue.
- **Content and scope:** The review should be broader than the current reporting system. It should explicitly evaluate the adequacy of the ESD and its targets for achieving the long-term goals of the decision and the PA. The review should also address the effects of the ESD on long-term competitiveness and innovation, rather than only ESD implementation and competition.
- **Proposal for target adjustment:** The review requires the Commission to explore and elaborate target adjustments and additional measures necessary to ensure the EU meets its 2050 ESD target and PA requirements. Recommendations for target adjustment must take account of the criteria and requirements set out in Article 3.3.
- **Independent advice or guidance:** To help ensure high levels of independence and credibility, the Commission's review should be based on a report provided by an independent agency / body or – alternatively – the EEA.
 - **Independent EU agencies or bodies:** There are various examples where the EU bases its policies on the advice of independent bodies. The European Food Safety Authority (EFSA) and the European Chemicals Agency (ECHA) are examples for such bodies. Though not legally binding, the Commission accepts their advice in most cases.⁶¹ The European Securities and Markets Authority (ESMA) is another example, which is particularly interesting because of its far-reaching powers (see below). As another alternative, an independent expert committee could provide the report that is the basis for the review. Nomination, appointment, composition and independence of this committee could follow the model of the UK's Committee on Climate Change.
 - **European Environment Agency:** As another option, the review could be based on a report provided by the EEA. In line with its legal basis (Regulation 401/2009), the EEA provides “sound, independent information on the environment”. To ensure high scientific quality, the EEA is assisted by a scientific committee which delivers public “opinions on scientific matters concerning the agency's activity” (Article 10 of Regulation 401/2009). Although the EEA is funded by the EU and despite the fact that

⁶⁰ Para 30: facilitative dialogue among Parties in 2018 to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Agreement and to inform the preparation of nationally determined contributions pursuant to Article 4, paragraph 8, of the Agreement

⁶¹ Meyer-Ohlendorf, Nils (2015): An effective Governance System for 2030 EU Climate and Energy Policy: Design and Requirements, <http://ecologic.eu/sites/files/publication/2015/meyer-ohlendorf-15-effective-governance-syystem-2030.pdf>.

the European Commission has an important role in the EEA's budgeting process (Article 12 of Regulation 401/2009), the independence of the EEA has not been put into systematic doubt.

There seems to be a case to mandate the EEA with producing the report. If the independence of the EEA were an issue, it would make more sense to strengthen the agency's independence than to establish another body, making an already complex governance system even more complicated. In addition, existing EU institutions should not be weakened (further) by establishing more institutions. In times when the EU is under high pressures and struggles to maintain its legitimacy, there is a strong argument for strengthening existing EU institutions. However, the EEAs mandate to propose targets would significantly change its current role and could entail its politicisation – with uncertain consequences.

- **Deviation from the recommendations in the informing report:** There are at least two options to strengthen the political weight of the informing report.

- **Commission must provide public reasons:** As one option, the European Commission could be obliged to provide reasons when it intends to deviate from the recommendations of the EEA. The Commission would have to make its reasoning public.
- **European Securities and Markets Authority (ESMA):** The process of adopting regulatory technical standards under the ESMA Regulation could serve as another model for strengthening the weight of the informing report. According to Article 10 of the ESMA-Regulation, the ESMA drafts regulatory technical standards. The standards enter into force after endorsement by the Commission. Where the Commission does not endorse a draft standard, it sends the draft back to ESMA for further adjustments. If ESMA continues to disagree with the Commission's proposed amendments, the Commission may adopt the regulatory technical standards with the amendments or reject them. In this case, the Commission must coordinate with the Authority. Importantly, the Commission may adopt a regulatory technical standard without a draft from the Authority only where the Authority did not submit a draft to the Commission within a specific time limit.

Applying the ESMA model to the ESD entails that (1) the independent body or EEA would draft the report and (2) that the Commission would have to send back the report to this body for further adjustment in case of disagreement. If disagreement continues, the Commission could only deviate from the initial report and its recommendations after coordination with the EEA or the independent body.

Automatic target adjustment?

There are proposals for an automatic target adjustment. Targets could be automatically tightened, for

example, according to a previously agreed formula which integrates indicators on responsibility, capability, mitigation potential and the global emissions gap.⁶² The 2009 NGO Proposal for the Copenhagen Agreement envisaged an automatic ratchet-up procedure based on a fixed percentage number.⁶³ Although environmentally ambitious, such a mechanism is problematic. It seems impossible to design a fully pre-defined formula that quasi-automatically accommodates all aspects of target setting. There are also potential legitimacy problems – only elected parliaments and governments should take decisions as fundamental as target setting. Echoing these concerns, Article 290 of the TFEU prohibits the delegation of fundamental decisions to the Commission; only “non-essential” elements of legislation be delegated to the Commission. Last but not least, such an automatism seems political unviable.

21. Article 15 (Entry into force)

Current text	Amendments (bold)
This Decision shall enter into force on the 20th day following its publication in the Official Journal of the European Union.	This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

22. Article 16 (Addressees)

Current text	Amendments
This Decision is addressed to the Member States.	Delete

Justification

As a legal act, the ESD could be adopted as regulation, directive or decision. All three options are under discussion. For the following reasons, we have a preference for adopting the new instrument as a regulation:

⁶² Donat, Lena and Ralph Bodle: A Dynamic Adjustment Mechanism for the 2015 Climate Agreement, Rationale and Options.

⁶³ Alden Meyer et al. (2009): “A Copenhagen Climate Treaty, Version 1.0”, A Proposal for a Copenhagen Agreement by Members of the NGO Community, June 2009.

- Regulations are legally binding and have general application. They are directly applicable in all Member States, i.e. do not require transposition by the Member States. Their entry into force and application is “independent of any measure of reception into national law”.⁶⁴ A regulation would have the advantage over the current decision of having higher symbolic value. A regulation would better reflect the fundamental importance of the new effort sharing instrument for EU climate policies.
- Pursuant to Art. 288 TFEU, “a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” Decisions specifying to whom they are addressed must be notified to the parties concerned and take effect upon such notification.⁶⁵ Being addressed to Member States, a decision would serve the fundamental purpose of the ESD – to set the basic framework for Member State mitigation policies in the non-traded sectors. As decision, the new ESD would, however, not communicate well its fundamental importance to EU climate policies.
- The ESD should only become a directive if it were to contain elements that require transposition into national laws. Our proposal does not contain such elements. As a downside, directives require transposition into national law. This would delay the effect of the ESD.

Importantly, the new instrument should have a **new name** that adequately reflects its purpose – to set a frame for the decarbonisation of the sectors not covered by the ETS. For that reason, “Regulation on the framework for the decarbonisation of the sectors not covered by the ETS” is a possible name. As an alternative, the new ESD could use the PA’s term of climate neutrality, i.e. “Regulation on the framework for ensuring climate neutrality of the sectors not covered by the ETS-Directive”.

⁶⁴ ECJ, Case 34/73, Variola v. Amministrazione delle Finanze [1973] ECR 981.

⁶⁵ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv%3Aai0036>.