



A European Climate Law – What Should It Look Like?

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1 Summary

EU climate rules are detailed and comprehensive but **they will not make Europe climate neutral by 2050**. The EU will fail to achieve this target because its current rules lack some essentials of effective climate governance, such as legally binding reduction targets, transparent emission budgets, targets for negative emissions, independent advisory institutions, or comprehensive rules for mainstreaming climate policy.

Von der Leyen promised to propose a European Climate Law in the first 100 days of her term in office. This is a dedicated and possibly a unique opportunity to close these gaps. The European Climate Law can build on the many developments in Member States that herald a new phase of legally binding, reliable, transparent and inclusive frameworks for climate action. By the end of 2019, eleven Member States have climate laws, while six are in the process of adopting or considering them.

In detail, the European Climate Law should include the **following elements** to match ambition with the intention to deliver:

- **Legally binding reductions targets:** The EU has no legally binding climate target, neither for 2030, 2040 nor for 2050. These are critical gaps that have undermined the seriousness and predictability of EU climate policies for a long time. The European Climate Law should close them. Climate targets need to be sufficiently high to ensure that the EU stays on a realistic path toward mid-century climate neutrality at the very latest and within its remaining overall emission budget. To this end, the European Climate Law also needs to adopt a reduction trajectory that is compatible with the EU's emission budget.
- **Clearly quantified emission budgets for immediate reductions and 'climate honesty':** Reduction targets only require specific reductions at a certain point in time, but alone say nothing about the overall quantity of admissible emissions. Yet, it is this aggregated amount of emissions over time and corresponding concentration of greenhouse gases in the atmosphere that matter for the climate. Quantified emission budgets address this problem. Unlike reduction targets, they clearly limit the amount of admissible greenhouse gas emissions, introducing higher levels of '*climate honesty*'. In light of an unprecedented increase of greenhouse gas concentrations in the atmosphere and rapidly shrinking emission budgets, quantified emission budgets in law forcefully underline the urgency of immediate and drastic emission reductions.

For these reasons, the European Climate Law should set a quantified emission budget for the EU. The EU's emission budget should represent the EU's 'fair share' of the remaining global emission budget. It should include emissions from international aviation and shipping departing from the EU. Currently, the EU only has an emission budget until 2030, which is – problematically – non-transparent and politically impossible to communicate. This is a major shortcoming of the EU's climate framework. It hides the need for immediate reductions behind a political focus on targets, and it is dishonest about the EU's remaining emissions.

- **EU targets for negative emissions:** All scenarios that keep global temperature increase well below 2°C or below 1,5°C rely on removals of emissions from the atmosphere, so-called negative emissions. Currently, the EU has no targets on removing CO₂. The EU only has the so-called “no debit rule”, which stipulates that accounted LULUCF emissions may not exceed accounted removals. These EU rules are not sufficient to help the EU to achieve climate neutrality by 2050 (as proposed by Ursula von der Leyen).

Addressing this gap, the European Climate Law should set quantified targets for the EU and Member States to remove CO₂ from the atmosphere. This could include a legally binding commitment to restore a certain amount of hectares of degraded ecosystems in an effort to remove CO₂ from the atmosphere – and to protect biodiversity, water and soils. It could also include a percentage share of removals in the overall reduction efforts. The 1,5 LIFE scenario under the EU long term strategy, for example, assumes that sinks account for 6-9 % of the EU’s overall efforts to achieve climate neutrality by 2050. The Swedish Climate Act also offers lessons in this respect – Sweden aims to become climate neutral by 2045, which means domestic reductions of 85 % and 15 % through international off sets and sink enhancements. As international offsets are not an option for credible climate action, the EU removal target may only include enhancements of sinks through the restoration of degraded ecosystems – provided there is an undisputed priority of emission reductions.

- **Public participation and democracy:** The EU already has a relatively strong legal framework for involving its citizens in decision-making, but the European Climate Law could improve it further. The European Climate Law should clearly stipulate that the new energy and climate dialogues under the Governance Regulation are permanent. The European Climate Law should also require a holistic societal debate on climate policies, whereby citizens and stakeholders discuss the full range of policies to achieve climate policies and not only specific instruments. This holistic approach ensures that the rejection of specific instruments will require agreement on alternatives, if the agreed emission reductions are to be achieved. Practice in Member States, such as the Irish Citizen Assembly, can help inform the design of these dialogues as well as the EU Climate Pact proposed by von der Leyen. It should be noted that public consultation is not the only avenue of public participation – engagement in political parties or other civil society groups is another.
- **Independent advisory bodies:** Given the long timespan of climate action, its urgency and implications for societies and economies, independent advisory institutions are essential features of effective climate governance. Today, there is no obligation for the EU to establish such bodies. The European Climate Law should establish a new independent EU advisory body to close this gap. This body should consist largely or exclusively of experts, rather than interest groups. The advisory body should be entitled to publish preparatory reports that put forward proposals for measures, emission budgets and target adjustments. These reports should be the basis for the Commission’s proposals for measures or legislation. As public documents, they would also inform debates within and between all of the EU institutions. In this sense, the

independent body supports ratcheting up of targets over time in a democratic process, as required by the Paris Agreement and in line with the EU treaties.

To complement and reinforce the work of the EU independent advisory body, the European Climate Law should also oblige Member States to set up independent advisory institutions. Acknowledging the administrative differences and traditions in Member States, the European Climate Law should not prescribe the institutional set up of such a body but should only define minimum criteria for its functioning, such as independence, scientific excellence, political authority and adequate resources.

- **Financial flows:** Diverting investment to climate action and ending fossil fuel subsidies are essentials of effective climate policies. The European Climate Law should align public budgets and climate action - similar to the Swedish Climate Law. The European Climate Law should require Member States to report on how state capital investments help meet the objectives of the Paris Agreement and to what extent state capital investments are exposed to climate risks. Concerning fossil fuel subsidies, the European Climate Law should include a legally binding target for phasing them out.
- **Policy mainstreaming:** Mainstreaming of climate policies is a key aspect of effective climate action. For this reason, it needs to feature in a new European Climate Law. At the same time, mainstreaming is already a general principle of EU environmental policy-making, enshrined in the Treaty. This general principle of primary EU law is an important reference point of environmental policy making in the EU but achieving policy mainstreaming in practice remains a challenge. For this reason, the European Climate Law should acknowledge this reality and take the opportunity to better ensure compliance with this general mainstreaming principle – in particular through its provisions on financial flows in the areas of finance and investment as well as on public procurement, or state aid rules. An independent advisory body would also support climate mainstreaming in other policies.

In effect, the European Climate Law should become the ‘roof’ of EU climate action. It should not replace other climate and sector specific legislation (such as the renewables, and energy efficiency frameworks). The EU Climate Law should instead be simple and **focus on closing the governance gaps described above**. This focus would also help ensure better integration and consistency between the rest of the EU climate and energy acquis and would facilitate more coherent negotiation of subsequent amendments of that acquis over time. To ensure swift implementation, the European Climate Law should be adopted in the form of an EU regulation, rather than an EU directive.

Overview table – essential elements of the European Climate Law

	Gap	How to close it
Reduction targets	No legally binding overall EU reduction targets.	Legally binding target, using terminology such as “EU is obliged to/shall reduce...”
Emission budgets	Only emission budget until 2030 through Emission Trading Directive and Climate Action Regulation.	Introduce quantified EU emission budget until climate neutrality is permanently achieved.
Public participation	Strong existing rules but need for clarification.	Clear obligation for Member States and the EU to establish <u>permanent and holistic</u> energy and climate dialogues. Clear obligation on Member States to take account of consultation outcomes.
Negative emissions	No legally binding targets on CO ₂ removals from the atmosphere or restoring degraded forests and wetlands; only no-debit rule.	Quantified targets for EU and Member States to remove CO ₂ through restoring degraded ecosystems.
Institutions	No EU rules mandating the creation of independent EU and national institutions that are mandated to provide advice and / or propose measures.	Establish a body similar to independent climate committees in some Member States and independent EU institutions in other policy areas, such as financial markets authorities, European Central Bank or Court of Auditors. These independent scientific committees should be replicated across Member States.
Financial flows	A number of rules to report on ending fossil fuel subsidies but no legal requirement to phase out these subsidies. No rules on aligning public budgets and climate action.	Legal obligation to phase out fossil fuel subsidies within binding timeframes. Requirement to align budgets and climate action.
Policy Mainstreaming	Article 11 of the EU Treaty introduces the general principle of environmental mainstreaming.	Sharpen this general principle through specific mainstreaming obligations as well as monitoring by independent institutions.

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2 Introduction

Ursula von der Leyen, the new President of the European Commission, promised to **propose a European Climate Law in the first 100 days of her term in office**. Von der Leyen said that this law would include a climate-neutrality target for 2050. She did not give more detail on the law's content.

Her **initiative offers a dedicated opportunity** for a fresh and reinvigorated European debate about the fundamental objective of EU climate action – a moment of truth about what Europe really stands for on climate change and a critical opportunity to match the EU's stated ambition to be a leader on climate change with seriousness about the intent to deliver. This legislative initiative would have a powerful symbolic and real value. It could be informed by the rapidly growing number of climate laws in Member States: by the end of 2019, eleven Member States had adopted national climate laws, while six are in the process of adopting them or considering them in government.¹

Most fundamentally, **the European Climate Law should provide for:**

- **Closing existing gaps:** First and foremost, a European Climate Law is an opportunity to close gaps in the current acquis that impede the EU to become climate neutral by 2050 (as proposed by von der Leyen). In doing so, it can draw inspiration from the promising developments in national climate governance in recent years.
- **Smoothing and managing the transition:** By making a climate-neutrality target legally binding, the law would help manage and smooth the transition to a decarbonised economy. Its unequivocal legal commitment ensures predictability and enhances investment certainty.
- **Improving transparency and accountability:** With its targets, the European Climate Law would enhance transparency, oversight of policy implementation, policy coherence across the rest of the EU's climate acquis and thereby significantly enhance EU and national accountability for achieving the required outcomes.
- **International leadership:** The commitment to climate neutrality by 2050 would be a strong signal to international partners about the EU's seriousness of its decarbonisation efforts.
- **Enhancing public participation:** The Climate Law is an opportunity to make the path towards climate neutrality more democratic and participatory. Climate laws have a track record of building and maintaining political will for the transition. They support an ongoing national discussion and thereby keep the issue on the political agenda.

This **paper** provides an overview of what a European Climate Law should look like. It discusses the law's main elements and reviews where it is best placed in the EU acquis. It focuses on how a European Climate Law could close gaps in existing EU rules – with the aim of creating a governance regime that is commensurate with the EU's mission of reaching climate neutrality within its remaining emission budget. The paper's ideas will develop further as the political discussion progresses.

¹ The UK, France, Denmark, Ireland, Finland, Sweden, the Netherlands, Germany, Austria, Bulgaria and Malta have climate laws, while Spain, Croatia, Latvia, Belgium, Portugal, Slovenia are in the process of adopting or considering them.

3 The Climate Law's main features: Which gaps in EU rules should the law close?

3.1 Legally binding reduction targets

The **EU has no legally binding quantitative climate target for 2050**. The European Council has adopted a number of conclusions on emission reductions by 2050 but they are political declarations with no legal force. They do not call for climate neutrality by 2050. The Regulation on the Governance of the Energy Union and Climate Action (GR), a legally binding regulation, only states that the EU long-term strategy will include an analysis “covering a scenario on achieving net zero greenhouse gas emissions within the EU by 2050 and negative emissions thereafter”.² Von der Leyen promised that a European Climate Law would include a climate-neutrality target for 2050.

The **EU also has no overall interim climate targets for 2030 and 2040 in law**. The GR only states that it is “*designed*” to meet the 2030 objectives and targets (Article 1); the definition of the 2030 target in Article 2.11 omits the term “legally binding” (only using “binding”). The Climate Action Regulation (CAR) lacks overarching legally binding EU targets, because it does not cover all EU emissions. It is silent on 2040. The Emission Trading Directive only covers its specific sectors.

Interim targets are essential elements of effective climate action because they help to ensure that the pace and scale of change is sufficient to remain on a credible trajectory towards long-term climate goals. Although politically challenging, the **Climate Law should introduce EU-wide legally binding interim targets for 2030 and 2040, closing an important gap in the current EU acquis**. To introduce unequivocally legally binding reduction targets, it should choose wording such as “EU is obliged to/shall reduce emissions by...” The wording can be informed by the CAR: “This Regulation requires the EU to reduce the greenhouse gas emissions ...”.

The **interim targets for 2030 and 2040 need to be sufficiently high to ensure that the EU stays within its remaining overall emission budget** (see next item). To this end, the European Climate Law also needs to adopt a **reduction trajectory** that is compatible with the EU's emission budget. The reduction trajectory could be set through annual reduction targets (similar to the CAR), average minimum reductions throughout a decade (similar to the Swiss draft Climate Law), or through interim targets for 2035, 2040 and 2045 (in line with the review cycle under the Paris Agreement).

² In addition a place to point to is Article 1 which sets out the targets and includes this vague reference:

“1. This Regulation establishes a governance mechanism to:

(a) implement strategies and measures designed to meet the objectives and targets of the Energy Union and the long-term Union greenhouse gas emissions commitments consistent with the Paris Agreement, and for the first ten-year period, from 2021 to 2030, in particular the Union's 2030 targets for energy and climate;”

3.2 EU emission budget

Reduction targets only require specific reductions by a certain point in time, but say nothing about the overall quantity of admissible emissions. Yet, it is this **cumulative amount of emissions over time and corresponding concentration of greenhouse gases in the atmosphere that matters for the climate**.³ Quantified emission budgets address this problem. Unlike reduction targets, quantified emission budgets clearly limit the overall amount of greenhouse gas emissions, introducing higher levels of “climate honesty”. In light of an unprecedented increase of greenhouse gas concentrations in the atmosphere and rapidly shrinking emission budgets, clearly quantified budgets forcefully underline that only drastic emission reductions now can keep temperature increases well below 2°C, or below 1,5°C.

Currently, the **EU has only de facto emission budgets until 2030 but not through 2050**⁴ – the timeframe for climate neutrality discussed in the EU and proposed by von der Leyen. Aggravating the problem, the EU not only lacks an emission budget for 2050, but its 2030 emission budget is not transparent. The 2030 emission budget does not result from a clear ex-ante decision introducing a single quantified EU emission budget but only from a calculation of reduction of targets and trajectories. The various flexibilities in the ETS and the CAR obscure the EU's 2030 emission budget further. This lack of transparency has undermined the effectiveness of EU climate policies because the EU's remaining emission budget remains a secret to experts. **The lack of transparency hides the importance of total cumulative emissions and – crucially – the need for immediate action.**

To address this shortcoming, the **European Climate Law should set a quantified emission budget for the EU – as a new starting point of EU climate action.** This emission budget would make visible the amount of emissions that the EU is eligible to emit until it reaches climate neutrality. This budget should represent the EU's “fair share” of the remaining global emission budget, including emissions from international aviation and shipping departing from the EU. There are various criteria for calculating the EU's “fair share”, including per capita emissions and cost effectiveness. Depending on the criteria, the EU's remaining emission budget will vary considerably. This makes it politically challenging to agree on a single value for the EU's “fair share”. The emission budget approach, however, has the essential advantage of putting the EU's mitigation effort in the context of remaining global emission budgets that allow the world to keep average temperatures well below 2°C, or below 1,5°C. It should also be noted that the logic of an EU emission budget would not be new: *de facto*, the EU already has a greenhouse gas emission budget until 2030 (see above); and the National Emissions Ceilings Directive, for example, operates on the basis of emission ceilings that the EU and Member States may not exceed. In one way or another, some Member States have climate laws that contain emission budgets.

³ Recital 10 of the GR: “For the climate system the cumulative total anthropogenic emissions over time are relevant for the total concentration of GHGs in the atmosphere.”

⁴ The CAR introduces an emission budget only until 2031, and it has a multitude of legally-binding annually declining caps with differing trajectories per Member State. The Emission Trading Directive (ETS) sets an emission budget for the covered sectors until they are fully decarbonized, which is – according to estimates by the Commission - around 2063. The GR does only stipulates that the EU's long-term strategy analyses the implications of various mitigation scenarios on the global and EU's carbon budget.

The emission **budget should cover the period until the EU intends to be permanently climate neutral**. The budget period would be until 2050 or within the next 30 years, if the EU agrees on this target and if this target – combined with a specific trajectory – would be compatible with the EU's fair share of remaining global emissions. If the EU were to agree on an earlier target, the budget period would change accordingly.⁵ Because 30 years is not a workable period in politics, the budget should be divided **into five year emission budgets** – similar to the system in the UK and in France (also being considered in New Zealand and Ireland). These interim budgets should be set years before they enter into force to enhance predictability and investor certainty – possibly 12 years in advance like in the UK or 10 years like in France. These budget periods need to be aligned with the NDC update intervals under the Paris Agreement.

Similar to the UK, emission volumes for each budget period could shrink disproportionately over time – in the hope that technological progress will allow for steeper emission cuts at a later stage. However, this approach is a problematic bet on future developments. The **precautionary principle requires that interim budget volumes are not allocated in a way that make staying within the overall budget unrealistic at the end of the overall budget period**. Similar to relevant rules in the CAR or the UK Climate Change Act, the European Climate Law could introduce flexibilities that allow accommodation for unforeseen developments such as extreme weather.

3.3 Negative emissions: targets for emission removals

All scenarios that keep global temperature increase well below 2°C or below 1,5°C rely on removals of emissions from the atmosphere, so-called negative emissions. Today, **natural sinks – in particular healthy forests and wetlands – are essentially the only way to remove large amounts of greenhouse gases from the atmosphere**. Technical solutions are still risky, largely unexplored, expensive, and unable to remove large amounts of greenhouse gases. The Commission's 1.5LIFE scenario, for example, assumes that LULUCF sectors will sequester 464 Mt of CO₂ in 2050 – an increase of over 50% compared to current sequester capacities of sinks.⁶

Currently, the EU has no sufficient targets on removing CO₂ through enhancing natural sinks but only the so-called “no debit rule”. According to this rule, Member States ensure that accounted LULUCF emissions may not exceed accounted removals by LULUCF.⁷ No other legal provision of the EU contains removal targets. The GR only requires that long-term strategies must cover, among others, the enhancements of removals by sinks, including LULUCF.

⁵ Provided that the EU stays within its fair share emission budget, a later date for climate neutrality is possible. This would require considerable steeper reductions throughout the budget period, in particular at its beginning.

⁶ European Commission (2018): A Clean Planet for all - A European long-term strategic vision for a prosperous, modern, competitive and climate neutral economy, in-depth analysis, p. 198

⁷ Article 4 of the LULUCF Regulation: For the periods from 2021 to 2025 and from 2026 to 2030, taking into account the flexibilities provided for in Articles 12 and 13, each Member State shall ensure that emissions do not exceed removals, calculated as the sum of total emissions and total removals on its territory in all of the land accounting categories referred to in Article 2 combined, as accounted in accordance with this Regulation.

These EU rules are not sufficient to help the EU achieve climate neutrality by 2050 (as proposed by von der Leyen). First, the no-debit rule is not designed to remove CO₂ from the atmosphere, but only stipulates that accounted LULUCF emissions may not exceed accounted removals. Second, there is no obligation that long-term strategies must help remove carbon through sinks; strategies should merely “cover” sinks, which only means that long-term strategies have to make reference to sinks. Third, other relevant EU policies, such as the EU Biodiversity Strategy, the Forest Strategy or Rural Development Programmes, are non-binding policies with a focus on reporting and coordination. As such, they have not driven Member States to scale up the restoration of degraded forests. In fact, the quality of Europe’s forests and forest sinks has continued to decline since the adoption of these non-binding strategies.

To address this gap, the **European Climate Law should have specific targets for removing greenhouse gases, primarily through restoring degraded ecosystems**. There are various ways to design these targets.⁸ For high levels of accountability, targets should be legally binding and quantified. Quantified targets could feature restoration goals for degraded sinks and / or for removal of CO₂ from the atmosphere:

- **Targets to restore degraded forests and wetlands:** Restoration targets can build on Target 2 of the Nagoya Biodiversity Plan and Target 2 of the EU Biodiversity Strategy. According to these targets, countries commit to restore at least 15% of degraded ecosystems by 2020. This option can also build on SDG goal 15.3 (Land Degradation Neutrality) and the Aichi Biodiversity Target 15.

Removal targets for sinks: There are various ways to design removal targets. For one, the target could stipulate a specific amount of tonnes of CO₂ that sinks should remove from the atmosphere within a specific time. While this target is transparent and suggests high levels of accountability, it is a problem to agree on the amounts – because of challenging methodological and accounting issues. For this reason, it is an option to learn from the Swedish Climate Act. According to this law, Sweden aims to become climate neutral by 2045, which means domestic reductions of 85 % and 15 % international off sets and sinks enhancement. The EU removal target should not include international offsets but only enhancements of sinks. The 1,5 LIFE scenario under the EU long term strategy, for example, assumes that carbon removals through sinks account for 6-9 % of the EU’s overall efforts to achieve climate neutrality by 2050.⁹ The removal target can also be informed by the CAER which allows Member States to use removals by sinks to comply with its targets (in specific circumstances).

In either option, targets should take account of **these considerations**:

- **Removal and restoration targets complement reduction targets:** Restoration of degraded ecosystems and emission removals are essential, but not the most effective climate change

⁸ For a detailed analysis of possible design options for removal targets: Nils Meyer-Ohlendorf, Frelth-Larsen, 2017: EU climate policies: friend, foe or bystander to forest restoration and carbon sinks?

⁹ European Commission (2018): A Clean Planet for all - A European long-term strategic vision for a prosperous, modern, competitive and climate neutral economy, in-depth analysis, p. 195 and 198.

solutions. First, the estimated potential of restoring degraded ecosystems varies considerably and can decline drastically because of the expected and unexpected impacts of climate change on natural sinks. Second, carbon removal through sinks is less safe than leaving gas, coal and oil in the ground. In consequence, greenhouse gas emissions need to go as close to zero as possible, accompanied by ecosystem restoration. Removal targets should not encourage the introduction of credit systems, in particular if these credits are tradable and of dubious climate effect.

- **Sustainability and resilience:** It is essential that target designs take into account sustainability concerns, in particular biodiversity, food security, water quality and soil protection, and meticulously examine possible unintended consequences. This is also essential because healthy ecosystems are ultimately more resilient towards the impacts of changing climates than degraded ecosystems. For this reason, the Climate Law should also include a qualitative commitment to making forests, peat land, and bogs more resilient to a changing climate.

In the light of these considerations, the **restoration of degraded ecosystems, in particular forests, is a particularly promising way to heed all these concerns:**

- In principle healthy or restored forests sequester significantly more carbon in trees and in particular soils than degraded forest.¹⁰
- Healthy or restored forests are much better for biodiversity, food security, water quality and soil protection.
- They are more resilient to climate change, disease and other threats.

3.4 Public participation and democracy

Public participation is an indispensable feature of policy making in the EU. Article 11 of the EU treaty grants citizens the “opportunity to participate in all areas of Union action”. It requires EU institutions to “maintain an open, transparent and regular dialogue with representative associations and civil society”. According to the same provision, the Commission must carry out “broad consultations with parties concerned”. Article 10 stipulates that the EU is founded on representative democracy, where its citizens are directly represented in the European Parliament.

Energy and climate policies have specific rules on public participation. **The Regulation on the Governance of the Energy Union and Climate Action (GR), for example, requires Member States to establish multilevel dialogues on energy policies with all relevant stakeholders and the public** (Article 11). During these dialogues, stakeholders may discuss the integrated national energy and climate plans (NECP) as well as “the different scenarios envisaged for energy and climate policies, including for the long term, and review progress”. According to recital 30 of the GR, these dialogues

¹⁰ Mackey, B., ed. (2008). Green Carbon: The Role of Natural Forests in Carbon Storage. ANU E Press, Canberra, ACT; Achat, L.: Forest soil carbon is threatened by intensive biomass harvesting, (2015), <https://www.nature.com/articles/srep15991>

should be permanent. Member States are exempted from these requirements if they already have a structure that serves the dialogue's purposes.

The GR also obliges Member States to give the **public “early and effective opportunities to participate in the preparation of the draft NECPs as well as of the long-term climate strategies”** (Article 10). It requires Member States to ensure that the public is informed. Member States must “set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views”. Complementing these requirements, the Aarhus Convention requires Member States and the EU to provide for early public participation, “when all options are open and effective public participation can take place” (Article 7 in conjunction with Article 6.4).

In light of these various commitments, **the EU already has a relatively strong legal framework for involving its citizens in decision-making¹¹, but the European Climate Law could improve it further by ensuring:**

- **Permanent dialogue on climate policies as a whole:** Recital 30 of the GR implies that the energy dialogue should be permanent, but the European Climate Law should clearly state that this is a legal obligation. Currently there is no clear legal obligation to establish a permanent dialogue because recitals are not legally binding but only a tool to interpret the legal text. A requirement to create a permanent dialogue should also be accompanied by provisions indicating that this is more than a passive ‘consultation’ with the public. The Climate Law could identify a series of structural options for convening this dialogue drawing on best practice in other countries. The permanent dialogue should also require a holistic debate on climate policies in the EU, whereby citizens discuss the full range of policies to achieve climate policies and not only specific sectoral instruments. This holistic approach ensures that citizens understand that the rejection of specific instruments requires agreement on alternatives – if agreed emission reductions are to be achieved. Practice in Member States, such as the Irish Citizen Assembly, can help inform the design of this dialogue. Von der Leyen’s proposal for an EU Climate Pact could learn from these experiences.¹²
- **All options are open:** The Aarhus Convention requires Parties to hold early public participation “when all options are open, and ensuring that due account is taken of the outcomes of public participation.” Although this is already an existing legal requirement in the EU, the Climate Law should specify this requirement for reasons of clarity.
- **Outcome of public participation is accounted for:** The GR does not include an explicit requirement for Member States to take due account of the outcome of the participation process.

¹¹ In this context, it should be noted that implementation of this framework is another matter. There are also some ambiguities in the legal framework itself. The Aarhus Compliance Committee noted that article 10 of the Regulation does not require Member States to carry out public participation on draft 2021-2030 NECPs prior to the draft NECPs’ submission to the Commission on 31 December 2018. This is not in line with Article 7 of the Aarhus Convention. Accordingly, Member States did not consult the public in line with the requirements of the Aarhus Convention during the preparation of the 2021 – 2030 NECPs. These consultation problems, however, are specific to the preparation and adoption of the 2021-2030 NECPs.

¹² Von der Leyen proposed a European Climate Pact which “will bring together regions, local communities, civil society, industry and schools. Together they will design and commit to a set of pledges to bring about a change in behaviour, from the individual to the largest multinational”.

Article 10 (1) and Annex I Part 1 only requires Member State authorities to summarize the views expressed during the consultation process. For reasons of clarity and to underline the importance of meaningful public participation, the European Climate Law should include a clause to this end. This clause would provide additional clarity, but it should be noted that such a clause would only reiterate existing requirements that stem from, for example, Articles 10 and 11 of the TEU – or – in the case of strategic environmental assessment – from Article of 8 of the SEA Directive.

These improvements would strengthen the existing framework and emphasize the fundamental importance of democratic accountability to a successful transition. However, it is important to note that **public participation cannot satisfy all diverging views**. Some will remain minority views. They need to be taken into account but will not be implemented. But the perception and reality of meaningful public participation will render the final policy choices more legitimate and therefore more likely to be accepted and supported by the public – even by those in the minority. In the end, elected governments and parliaments will take the decision. Furthermore, public consultation is not the only avenue of public participation – engagement in political parties or other civil society groups is another.

3.5 Independent advisory institutions

Given the long timespans of climate action, its urgency and profound implications for societies and economies, **independent and strong advisory institutions are essential features of effective climate governance**. It is a common element of national climate laws.¹³ There are broadly two forms of advisory institutions – independent expert bodies and bodies comprised of stakeholders.

Experience from Member States shows that independent bodies can support consistency between long-term goals and short action, enhance the role of science in decision-making, help build and maintain the necessary political will to decarbonize economies and strengthen public confidence in climate policies. The example of the UK highlights the importance of independent advisory institutions – in this case the Committee on Climate Change – which is comprised of established experts in various fields of climate science and economics and which is credited with playing a key role in supporting the development of national policies that have reduced emissions by 44 % between 1990 and 2018. There are also numerous examples where **the EU bases its policies on the review and advice of independent bodies**. The European Food Safety Authority and the European Chemicals Agency are examples. The European Securities and Markets Authority (ESMA) is another – with particularly far-reaching powers (see text box below).

Today, **there is no obligation on the EU to establish such bodies**. The GR established the Climate Change Committee as well as the Energy Union Committee, but both committees are not independent (they consist of Member States representatives) and have only a limited mandate (which does not even include contributions to reviewing the EU's climate policies). Furthermore, these bodies were created

¹³ Matthias Duwe, Heidi Stockhaus (2019): Klimaschutzgesetze in Europa

when climate neutrality was not advocated by the large majority of Member States or the Commission's president elect. Closing this gap and taking account of new political circumstances, the European Climate Law should establish an independent EU institution.

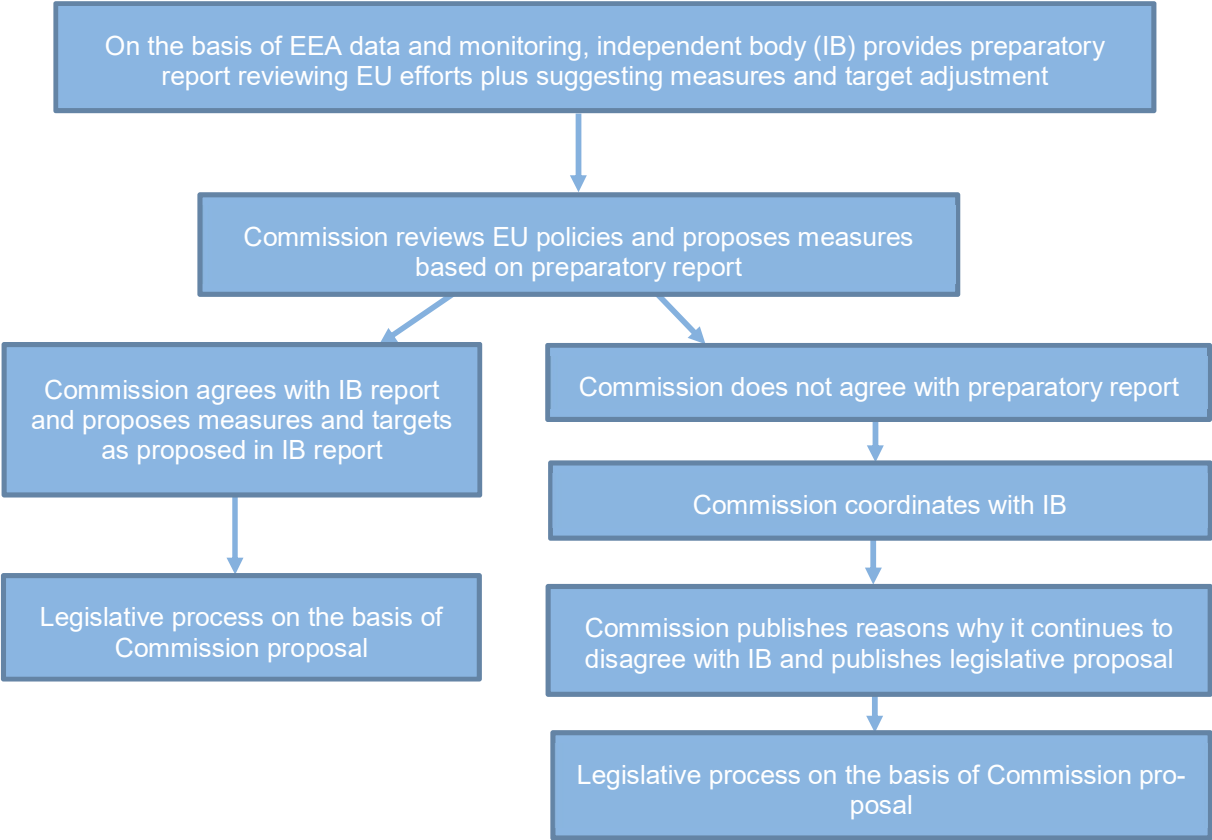
The **design of this body should take account of these considerations:**

- **Mandate:** The independent body of the EU can learn from various examples in Member States. National institutions have mandates differing in scope and activities. Some have a mere advisory role on general issues, others are mandated to propose measures or emission budgets and to report on policy effectiveness over time and to publish their views on all issues.
 - **Advisory role:** Like in Member States, the body has only an advisory function, final decisions remain the exclusive domain of elected body. It would provide advice to the EU institutions but also to other stakeholders through its public reports.
 - **Proposing measures and target adjustments:** As an option for designing its mandate, the advisory body could and ideally should be entitled to propose measures, emission budgets and target adjustments.¹⁴ This mandate could be informed by the process of adopting regulatory technical standards under the ESMA Regulation. According to Article 10 of the ESMA-Regulation, the European Securities and Markets Authority (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 ESMA.
 - **Annual report on policy mainstreaming:** To foster mainstreaming of climate policies into other policy areas – an essential feature of successful climate protection –, the independent body should compile an annual report on the state of climate policy mainstreaming in the EU. This report – primarily addressed to the EU institutions – should be public.
- **Independence:** There are various ways to ensure the institution's independence. To this end, there is a strong case that the advisory body consists largely or exclusively of experts, rather than interest groups. Rules on the nomination and appointment of members as well as the termination of their mandate are also important. Various country models can help inform the discussion on how to ensure independence. There are also informative examples in other policy fields, such as how to ensure independence of central banks or Courts of Auditors. Adequate resources and budgetary autonomy are also essential to ensure independence

¹⁴ This mandate should help implement the requirement of the Paris Agreement to continuously scaled-up efforts over time (progression). Article 3 of the PA stipulates that efforts of Parties in response to climate change "will represent a progression over time". Article 4.3 of the PA determines 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 capabilities [...]".

- Scientific excellence:** Members of the independent body should have a strong background in climate science, policies and economics. This makes mandating Courts of Auditors with a climate advisory role problematic. Courts of Auditors do not have background in climate science and policies but often a strong focus on public finance. This instils a focus on short-term spending and cost savings and impedes full understanding of the long-term dimension of climate action.
- New or existing body?** To avoid duplicative mandates and to reduce complexity, there is an argument that existing bodies should be strengthened rather than establishing new agencies. In the case of the EU, the EEA could be mandated to perform the functions of an independent body because it has a strong record of providing sound and credible advice to environmental policy making in the EU. However, the EEA is very different from a strong independent climate advisory body. It has no mandate to propose measures. It is not independent because its board consists of Member State representatives. The board also includes representatives from non-EU countries. For these reasons and to signal clearly that the EU is embarking on a new era of climate policy making, there is a stronger argument to establish a new agency. Based on the EEA's monitoring work and data collection, this new agency could review EU climate policies and support the Commission in proposing policies (for details see the graphic).

Overview: Role of independent body in EU legislative process (informed by the mandate of the European Securities and Markets Authority)



In addition to this obligation of the EU, the **European Climate Law should also oblige Member States to set up independent advisory institutions**. Acknowledging the administrative differences and traditions in Member States, the European Climate Law should not prescribe the institutional set up of such a body but should only define minimum criteria, such as a clear mandate, independence, scientific excellence, political weight and adequate resources. In line with the subsidiarity principle, the European Climate Law should grant Member States broad discretion, only requiring Member States to establish such bodies in national laws and in compliance with these minimum criteria. The European Climate Law could state that Member States would comply with these requirements if they already have institutions that meet the respective requirements of the European Climate Law.

3.6 Monitoring, review, planning and strategies

The GR contains detailed rules on monitoring and review, complemented by specific rules in the ETS and CAR. The GR also regulates energy and climate planning and strategies in detail. The European Climate Law should amend these rules only where necessary. It refers to them if needed. It should have its own review clause for the overall EU targets and emission budgets, which should be aligned to the reviews under the other pieces of relevant EU rules and Paris Agreement.

3.7 Financial flows: Public Budgets, Subsidies, investment strategies

Diverting investment towards climate action and ending fossil fuel subsidies are essential for effective climate policies. There are various ways a European Climate Law can help in this respect:

- **Aligning public budgets:** According to section 2 of the Swedish Climate Act, Sweden's climate work "shall be conducted in such a way as to allow for climate policy and budgetary policy objectives to cooperate with each other." A European Climate Law could make similar provisions, requiring EU budget spending to be in line with climate action. In a similar way, EU public procurement rules, state aid guidelines, and development aid could be aligned with the objectives of the Paris Agreement.
- **Reporting on capital investment:** The initial draft of the German Climate Act required the state authorities to report on how state capital investments help meet the objectives of the Paris Agreement and to which extent state capital investments are exposed to climate risks. The European Climate Law could require Member States to include similar provisions in national law. To the extent applicable, the Law could make similar provisions for the EU.

- **Ending fossil fuel subsidies:** The EU is committed to phasing out *inefficient* fossil fuel subsidies by 2025 in the G7 and G20 context. Sustainable Development Goal 12 contains a similar commitment. Currently, EU legal obligations relevant for ending fossil fuels are primarily procedural, requiring Member States to report on their fossil fuel subsidies. Addressing these gaps, the European Climate Law should **include a legally binding target for ending fossil fuel subsidies**. It should also contain a precise and workable definition of fossil fuels that avoids current vague terminology of “inefficient” subsidies. This ambiguity has undermined efforts to end fossil fuel subsidies. The European Climate Law should also require Member States to provide detailed plans to this end, supported by specific timeframes.

3.8 Policy Mainstreaming

Mainstreaming of climate policies is a key aspect of effective climate action. For this reason, it needs to feature in a new European Climate Law. At the same time, mainstreaming is already a general principle of EU environmental policy-making, enshrined in the Treaty.¹⁵ This general principle of primary EU law has been an important reference point of environmental policy making in the EU but, **achieving climate policy mainstreaming in practice remains a challenge** – even with its commitment in the Treaty.

For this reason, the **European Climate Law should sharpen the principle of policy mainstreaming**. To this end, the European Climate Law should specify that climate policy mainstreaming is an overarching principle that applies to the development and implementation of all EU policy. It should make provision for a process of ‘climate-proofing’ that must be undertaken when any new EU policies is being developed. The European Climate Law would do this primarily through its provisions on financial flows in the areas of finance and investment. Similar to national climate laws, it should introduce rules to mainstream climate action in public procurement, or state aid rules. In addition, the independent body will support climate mainstreaming – partly through an annual report on climate policy mainstreaming (see above).

¹⁵ Article 11 of the TFEU states that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.

4 The law’s legal ‘home’: Where to place the law’s elements in the acquis?

It is clear that the European Climate Law would build on the existing EU acquis. It would not replace it. **The European Climate Law would be the ‘roof’ of EU climate action; the laws and policies that comprise the rest of the EU’s climate acquis should be considered as the implementing measures or ‘pillars’ supporting that roof.** An EU Climate Law is no substitute for additional implementing measures but a European Climate law would help ensure that the implementing measures are sufficiently ambitious and well designed to ensure the effective and timely delivery of the outcomes required by the Climate Law. In effect, the pillars would be sufficiently robust to properly support the roof of the EU’s climate acquis. Similar to the roles played by climate laws in a number of Member States, the **prime function of the EU’s climate law would be to:**

- strengthen the full commitment to reach the climate targets and emission budgets,
- to enhance policy consistency across the acquis and the economy as a whole, transparency in decision making about the acquis and reinforce investor certainty by ending the debate about whether the EU is committed to the long term action required to achieve carbon neutrality and refocusing it on how to achieve the outcome,
- to send an unequivocal signal about the direction of travel (through its legally binding long-term targets and emission budgets),
- to establish an adequate institutional set-up to support the demands of policy making for carbon neutrality within the EU, and
- to ensure that each and every political decision stands the test of “climate-proofing”.

To fulfil this function as the roof of EU climate policy, the Climate Law’s elements could be embedded in the acquis in three ways:

- **Option 1 – Amending the ETS and the CAR**
- **Option 2 – Amending the Governance Regulation**
- **Option 3 – A new climate framework directive or regulation:**

Each option has its specific advantages and disadvantages as outlined in the following table.

Overview table

	Pro	Contra
Amend ETS and CAR	<ul style="list-style-type: none"> • Already contains targets and emission budgets 	<ul style="list-style-type: none"> • ETS and CAR do not cover all emissions. • Limited scope of both (ETS/Non-ETS)

<p>Amend GR</p>	<ul style="list-style-type: none"> • GR covers all emissions, not only certain sectors. • With its focus on targets, implementation and monitoring, the GR's logic is similar to that of the European Climate Law 	<ul style="list-style-type: none"> • Concerns of unravelling the GR thus delaying decision making and distracting from a dedicated debate about the core elements of the Climate law.
<p>New directive or regulation</p>	<ul style="list-style-type: none"> • Avoids unraveling the existing acquis, in particular the GR. • Better placed to communicate the fundamental importance of the missing elements of EU climate policy and governance. • Creates an integrated policy roof rather than splitting it across other mechanisms (ETS and CAR) • Helps the new Commission to set the agenda and to pitch it as what it is: a watershed moment in EU climate policy making. 	<ul style="list-style-type: none"> • Coherence of the acquis, avoid duplication? • Questions could arise regarding its relationship to the GR and other relevant pieces of EU law.

The European Climate Law would be adopted in the form of an **EU regulation or directive**. The EU regulation would have immediate effect and thus not require transposition into national law. This would shorten the time span until it impacts policy making. This is an argument to adopt the European Climate Law in form of a regulation. In practice, however, regulations can also require implementation steps by Member States. For an example, if the European Climate Law would require Member States to establish an independent body, implementation of this provision would depend on further steps by Member States.