

DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

THE REVISION OF THE EFFORT SHARING REGULATION: A KEY PIECE OF THE “FIT FOR 55” PUZZLE

Posted on 20 Aprile 2023 by [Morgan Eleanor Harris](#)

The [revision of the Effort Sharing Regulation \(EU\) 2018/842](#) (ESR) was adopted by the Council on 28 March 2023, after nearly 2 years of negotiations. This may seem like a long delay, but given the complexity of climate change and that of regional cooperation in Europe, it should be no surprise that the Union’s progress on tackling climate change has been slower than some would like. Nevertheless, the adoption of the revision of the ESR is well worth celebrating. Here we will see what it does and how its structure responds to the challenges of GHG mitigation at an EU level in pursuit our common goal: keeping climate change within planetary boundaries ([Rockström et al, 2009](#); [Herrington, 2022](#)).

The Union has been an active participant in efforts to tackle climate change since the creation of the United Nations Framework Convention on Climate Change in 1992, increasing the ambition of its GHG reduction targets over time. In 2008, it set a target of reducing GHG emissions by 20% (compared to 1990 levels) by 2020. In 2014, on track to meet this target and on the eve of the 2015 Paris COP, it raised its ambition to 40% by 2030 and committed itself to climate neutrality by 2050. Only five years later, it adopted an even more ambitious goal: 55% by 2030, setting out a

programme of reforms and new measures to achieve this target in the “Fit for 55” communication by the Commission ([COM/2021/550 final](#)).

Working out the details of the Fit for 55 reforms has taken several years. However, the adoption of the revised ESR (together with the [reform](#) of the Regulation on Land Use, Land Use Change and Forestry (EU) 2018/841(LULUCF)) is one critical piece of the puzzle.

The first [Effort Sharing Decision \(406/2009/EC\)](#) was adopted in 2009, replaced by the [ESR \(Regulation \(EU\) 2018/842\)](#) in 2018. From the start, the purpose of the effort sharing regime has been to set a GHG reduction target for the Union as a whole, then establish what each Member State must do to contribute to reaching the common goal.

The ESR applies only to certain sectors of activity, which together make up about 60% of the Union’s GHG emissions. These activities are road transport, heating of buildings, agriculture, small industrial installations and waste management. This may seem like a haphazard mix of activities, but they have one thing in common: reducing GHG emissions in these areas requires some form of public intervention. This makes ESR activities different from those falling within the Emissions Trading System (ETS) (such as electricity producers, large industrial installations and the aviation industry), where market forces should work to push operators to reduce GHG emissions over time, more or less effectively ([Marcu et al, 2022](#)).

What the ESR does is both simple and complex. It sets a specific GHG reduction target for each Member State of the Union (plus Norway and Iceland), which is then translated by a decision of the Commission into its annual emissions allocation (Decision (EU) 2020/2126 of 16 December 2020). The Member State is free to decide how to respect its AEA by using all of the regulatory and market instruments at its disposal: [incentives](#), [environmental taxes](#), [GHG emission permits](#), [land use regulation and planning](#), [public campaigns](#), [eco-labels](#), etc. Some of these instruments fall under other regulations or directives, such as energy efficiency for public buildings and houses, and methane emissions from agriculture (which, starting in 2026, will also be included in the LULUCF GHG targets), but not all.

There is an economic logic behind the choice to set an overall target for each Member State in the ESR, instead of specific targets for specific sectors. The idea is that Member States should use their limited resources wisely. Some types of mitigation actions cost little but reduce GHG emissions a lot; others have high costs and limited benefits. Economic efficiency requires that each state use its resources to do what is politically possible, cheap, and effective, so that they get the highest possible return on their investment, even if conducting a cost-benefit analysis on GHG mitigation is extremely difficult ([Köberle et al, 2021](#)). The flexibility offered by ESR allows states to adopt the mix of policy, market and non-market instruments that is best suited to their economic, social and political situation.

Not only do the costs of actions to reduce GHG emissions differ among Member States, but so too do their capabilities and their historical contributions to climate change. The principle of 'common but differentiated responsibilities' ([Zhang and Zhang, 2022](#)) requires us to take into account the capabilities of each state when deciding who will do what to face a common problem. The fact that different targets are set in the ESR can be understood as a compromise to respect this principle within the European Union's climate strategy ([Steininger et al, 2022](#)).

We can also find this principle at work in the revision of the ESR, which increased Member States' targets to different degrees. For some Member States, [the targets adopted in the revision](#) represent a major increase: Bulgaria, for one, has a GHG reduction target for the first time, even if it is only 10%. Italy's target was raised from 33% (which [it actually met in 2020](#)) to 43.7%. Several Northern European states' targets are now 50%, although a glance at the table of targets shows that for them, this was proportionately much smaller than the increase for Baltic and Eastern European states, some of which saw their targets more than double.

Since the outset, the Effort Sharing Regulation has included flexibility mechanisms to help states meet their targets. The revision has expanded these mechanisms, while also attempting to prevent them from being used to undermine the Union's overall 40% GHG reduction target.

First, if a state overperforms in one year (that is, its GHG emissions are

below its AEA), they can take advantage of this in two ways. First, they can 'bank' the excess and use it in a subsequent year. The previous ESR allowed states to bank 100% of their excess for 2021, and 30% from 2022 to 2029, which the revision reduced to 75% for 2021 and 25% for 2022 - 2029 (however, the Parliament had sought a [much stricter limit](#) of 5% and 10%.)

Instead of banking unused AEA, Member States can also transfer part of their unused allocation to another state, up to a maximum of 10% of their excess AEA from 2021 to 2025 and 15% from 2026 until 2029. Thus, a state that has been especially 'virtuous' in one year can use that to their advantage. To date, allocation transfer agreements have not been made. On the contrary, if a Member State emits more than its AEA, the ESR offers it several possibilities. For one, as mentioned, it makes use of its 'bank' of unused AEA or acquire that of another state. In addition, certain states (not including Italy) can issue fewer ETS permits, or even cancel existing permits, to cover the gap. Thus, a state that was making good progress in shifting to renewable sources of electricity or [green steel production](#) could use this to compensate for a part of their ESR shortfall. Also, states can count some removals through carbon sinks (afforestation, rewetting organic soils) against their AEA. How these removals are calculated falls under the LULUCF regulation and is one of the reasons these two instruments are so closely linked as to be revised together ([Romppanen, 2020](#)).

If a Member State is unable to cover its excess emissions with one of these flexibility mechanisms, it must submit an action plan to the Commission setting out, in detail, how it will meet its targets in the future. The revision of the ESR gives greater detail on what this action plan must include and makes them open to public scrutiny. Strategic planning instruments like this are an important regulatory tool found in EU environmental law and can be effective, with sufficient data and oversight at a European level ([Braaksma, 2021](#)). Besides drafting an action plan, the Member State also has to make up for the gap in the following years. In fact, the shortfall will be taken away from its future AEA, plus 8%. One could see the ESR as a top-down solution for climate change:

emissions targets established in Brussels, imposed on Member States according to opaque political criteria. At the same time, the momentum behind 'Fit for 55' began not in grand halls with round tables, but in the piazzas and on the steps outside the halls of power [back in 2018](#). Citizens of Europe have been calling upon both the Union and their national governments to do more, even taking them to court for their failure to adequately address climate change ([Setzer and Higham, 2022](#)). Increasingly, activists have been using strategic litigation against companies and financial institutions ([Milieudefensie et al v. Shell](#), and the pending suit against [BNP Paribas](#)), putting pressure on insurers to deny coverage of climate litigation risks ([Hodgson, 2022](#)). No doubt this trend will continue.

Some wanted the reform of the ESR to expressly include an article on access to justice, which would have stated that citizens may sue Member States' governments for failing to meet their targets under the ESR. This proposal, which was advanced by the Parliament (see [Amendment 42](#)), was not approved in the final text. Thus, the Commission remains the sole body tasked with enforcing the ESR. This is no surprise given the delicate political questions at stake, including the need to ensure that climate policy is fair and socially equitable ([Heyen et al, 2020](#)). However, even if the revised ESR is more 'top-down' than 'bottom-up', both types of solutions must work together in guiding the Union towards climate neutrality for 2050.