# Make them abide

## Strengthening the ESR compliance rules

March 2022

## Summary

The Effort Sharing Regulation (ESR) sets binding 2030 emissions reductions targets for the EU and its member states in the road transport, buildings, agriculture, waste and small industry sectors. As such, it is essential to ensure that countries put in place the needed climate measures to clean up these sectors. But **if binding national targets are not supported by a strong compliance framework, they become mere suggestions**. T&E and CAN Europe have conducted an **in-depth evaluation of the compliance framework of the ESR** to identify the shortcomings and the solutions at hand.

In theory, the Commission controls and assesses compliance with the ESR provisions through 2 processes: i) an annual preliminary assessment of progress towards meeting the targets that can trigger a process requiring the member state to adjust its course of action, and ii) in-depth compliance checks every 5 years which can trigger automatic sanctions. In practice, **the rules governing both of these processes lack the stringency that creates a real deterrent against failing to meet national climate targets**.

Observations of past compliance with national climate targets led to the conclusion that many member states did not have in place climate and energy measures adequate to meet their annual ESR obligations. In 2020, 3 countries overshot their emissions limits even after the pandemic brought down emissions. Forecasts for the future reveal that member states will need to significantly step up their climate action in order to meet the now higher ESR targets. Weak enforcement makes that highly uncertain. While **any risk of national non-compliance in 2030 - which would have disastrous effects on the climate - should be prevented.**

**T&E and CAN Europe suggest strengthening the compliance rules of the ESR through the following interventions:**

- Firstly, it would be necessary to **increase the transparency and the bindingness of the corrective process**. This would ensure that member states commit to adjust their course of action with good quality corrective action plans.
- Secondly, **the consequences of not complying with the ESR should become more tangible and credible** in order to create a real deterrent effect, for example by providing sanctions of a financial nature.
- Finally, to ensure that governments take the pathway towards decarbonisation seriously, the **scrutiny of national action by civil society** becomes particularly essential. Especially the inclusion of the right for the public to bring governments to national court if they breach their ESR or climate and energy planning obligations, is an essential instrument to make member states accountable, foremost, to their citizens.

# 1. How national climate targets are enforced and why it is insufficient

The Effort Sharing Regulation (ESR) was agreed in 2018 and sets national-level climate targets for the period 2021-2030. The Regulation is now being reviewed to bring it in line with the Union's new economy-wide 2030 goal of -55% net emissions reductions (compared to 1990). To achieve that, in July 2021 the Commission proposed to increase the target for the ESR sectors to -40% (compared to 2005) and to increase each member state's national target in line with that collective goal.

The decarbonisation of road transport, buildings, waste, agriculture and small industries requires that member states commit to their targets and do the most to comply by putting in place the necessary measures. Thus, a core element of the Regulation is the set of rules that ensures, through its enforcement, that in the first place member states stick to their obligation to reduce emissions. Those rules should also induce countries to swiftly undertake the necessary measures to get back on track when they deviate from their reductions targets. According to these rules, the European Commission controls and assesses member states' compliance with their obligation through two processes: an **annual assessment of progress** towards the targets and **compliance checks** every 5 years.

However, T&E's and Climate Action Network-Europe's evaluation of the compliance rules of the ESR points to a weak enforcement framework that is not up to the challenge of preventing national breaches of the ESR's emissions reductions requirements.

If the annual assessment of progress reveals that member states are not making sufficient progress towards their targets, a process to induce them to correct their course of action kicks in. However, this process has a deficit of stringency and does not guarantee the quality of the outcome. Lack of transparency around the adoption of corrective action plans, lack of public scrutiny of national action

and lack of consequences if countries breach their target for 2 consecutive years contributes to this deficit.

Consequences of non-compliance also seem weak, not swiftly activated and not credible. Moreover, member states are not made accountable to their citizens for compliance with their climate mitigation obligations.

This framework is problematic because observation of compliance with the targets reveals that for the period 2013-2020, 11 member states breached their annual emissions reduction limits for 2 years in a row. In 2020, 3 countries managed to exceed their limits even after the pandemic's impact that brought down emissions. In the next decade, emissions projections already show that member states will need to step up their game and adopt additional measures to be sure to meet their now increased ESR 2030 targets[1]. If these identified shortcomings of the compliance framework are not addressed and the deterrence effect remains weak, nothing guarantees that countries will answer that call for higher climate ambition. This is where national and European failure to meet the 2030 climate targets looms.

The Commission's review of the ESR is limited in scope, but it now offers the opportunity for co-legislators to provide a stronger compliance framework. This briefing aims at proposing solutions to strengthen the compliance rules of the Regulation and to ensure the credibility of its enforcement mechanisms.

## 1.1. Annual assessment of progress and the corrective action

The annual assessment of national progress towards meeting the ESR targets does not check compliance, but gives the chance to member states to get back on track if they are deviating from their annual emissions limits. Each year in autumn, the Commission prepares the Climate Action Progress Report[2] for that purpose, covering historic emissions and projected future emissions for every country[3]. The process to do so is the following: the member states produce themselves their GHG emissions inventories and submit them to the EEA[4]. The EEA then prepares the EU GHG inventory which is a compilation of the national inventories submitted by each member state. The inventory normally covers emissions up to 2 years before the year of compilation, while for the more recent year member states report approximated estimations of emissions.

[1] European Commission, November 2021, EU Climate Action Progress Report, p. 10.
[2] This report is part of the State of the Energy Union Report that the Commission sends to the European Parliament and the Council in autumn each year.
[3] The Report also covers information on EU policies and measures, climate finance and adaptation.
[4] The relevant framework for the GHG emissions monitoring and reporting rules has been the Climate Monitoring Mechanism Regulation until 1 January 2021. This regulation has now been replaced by the Regulation on the Governance of the Energy Union and Climate Action.

If, on the basis of these data, the Commission finds that a member state is not making sufficient progress, it has to submit a corrective action plan with additional actions to implement and a strict timetable to do so.

There are a number of reasons why this corrective process lacks teeth:

- There is no guarantee that member states will present good quality corrective plans. The Commission *'may'* give its opinion on how a country is planning to improve its climate action, but it is not obliged to do so. Countries must take the Commission's opinion into consideration. But if their plan is found to be insufficient, they are free to decide whether to follow the Commission's opinion and revise their plan or not.
- Moreover, if a country is found to be making insufficient progress for 2 consecutive years, no additional consequence is provided. According to the EEA's data reporting[5], 11 countries (AT, BE, BG, CY, DE, EE, FI, IE, LU, MT, PL) exceeded their emissions limits for 2 consecutive years during 2013-2020 and of these, 6 countries also exceeded their 2020 emissions allocations (BG, CY, DE, FI, IE, MT). This trend clearly indicates that non-compliant member states do not swiftly correct their course of action and that the measures planned in those member state's National Energy and Climate Plan (NECP) are probably not adequate to meet their targets.
- The process is not transparent enough, meaning national civil societies lack data and information to keep their national governments accountable. It is unclear to the public on which basis or through which criteria the Commission assesses if a member state is making sufficient progress, nor does civil society have access to the Commission's recommendations on national corrective action plans or to member states' response to them. Hence, there is no control by citizens over the actions undertaken by their governments.
- There is no connection between the corrective action plans and the NECPs. This lack of a link is surprising, since the NECPs indicate which measures and policies a country has planned to put in place to reach its energy and climate objectives, including its mitigation target for the ESR sectors. The corrective action plans, on the other hand, add climate actions to those already planned and, as such, are substantially an addition and a correction to the NECPs.

## 1.2. Compliance check

In 2027 and in 2032, the Commission will check whether member states have complied with their ESR obligations. Member states that breach their Annual Emissions Allocations[6] are not yet non-compliant:

[5] https://climate-energy.eea.europa.eu/topics/climate-change-mitigation/effort-sharing-emissions/data

[6] Under the ESR, member states' pathway towards the 2030 targets is described by an emission reduction trajectory. The travel direction towards the CARE target is set by a linear reduction trajectory. On that basis, Annual Emissions Allocations (AEAs) break each member state's 2030 target down into yearly emissions budgets. National emissions must remain below the allocations.

they have the possibility to resort to flexibilities[7] provided by the ESR which gives access to extra allocations. If after that a country still exceeds its annual emissions levels, automatic sanctions apply.

Currently, the ESR provides two sanctions for a non-compliant country:

- Its emissions in excess are increased by a multiplier (1.08) and added to the emissions reported in the following year.
- It cannot transfer[8] its emissions allocations to other countries.

The problem with the first sanction is that increasing the reduction effort demanded from a state that is already in breach with its ESR obligations might not be a sufficient deterrent. Similarly, only limiting the possibility to trade allocations for a non-compliant country is not enough to urge it to start complying. In principle, if a country is breaching its targets, even after using the flexibilities, it should be pushed to step up domestic mitigation action to comply with its obligations beyond the use of *any* flexibility.

In addition, the Commission could choose to start an infringement procedure against the non-compliant member state as provided by the EU treaty law[9]. However, this procedure does not seem to be the right instrument to react to a breach of the ESR's emissions limits, foremost because it does not provide a timely and certain response. The procedure is complex, involves many steps (which require member state collaboration – which is not granted) and above all takes a long time before producing the result that the member state complies[10]. But even if the procedure is triggered in 2032 and is carried out successfully, by the time that member state cuts its emissions, it would already be too late to meet the 2030 target. And too little: extra emissions would already be warming up the atmosphere.

Instead, foreseeable, tangible and credible sanctions should kick in immediately to avoid a further increase of emissions above the limits and to instantly put the member states back on track. The urgency of tackling climate change does not hand the EU the luxury to wait for the lengthy infringement procedure to produce results. To make member states stick to their binding emissions

[7] Flexibilities are provided by the ESR to help member states to comply and consist in processes of borrowing, banking and trading of AEAs. Within certain limits, extra AEA are also made available via the Safety Reserve and the credit-offsetting with the LULUCF and the ETS sectors. For an in-depth description of how flexibilities work and what is their impact on the environmental integrity of the ESR, see T&E's briefing "Fit to lose the climate challenge".

[8] Article 5 of the ESR gives the possibility to member states to sell their surplus of allocations to other member states against the payment of a certain amount agreed between the parties. There is no transparency around these transfers and the amount of the revenues nor there is an obligation to reuse these revenues to finance mitigation and adaptation measures in the ESR sectors.

[9] Articles of 258 and 260 of the Treaty on the Functioning of the European Union (TFUE)

[10] Stages of an infringement procedure.

limits, real deterrence to compliance failure should be embedded in the Regulation itself, through its own compliance rules.

## 1.3. Compliance so far: know the past to understand the future

The Effort Sharing enforcing tools have never been used during the period when the Effort Sharing Decision still applied[11]. In the past years, member states that exceeded their annual emissions limits have used the flexibilities provided by the ESD to comply, hence no corrective process or sanctions have been needed. For instance, in 2018 all the countries that exceeded their emissions limits (AT, BE, BU, CY, EE, FI, DE, IE, LU, PL, MT) could use their own saved surpluses of the previous years. These countries were able to remedy the breach by using their surplus and avoiding to buy allocations from other countries. This was possible because the Allocations in the ESD system were rather generous (See Fig. 1 below).

Malta is the only country that needed to buy allocations (in this case from Bulgaria) to fill its compliance gap. For the 2019 compliance check, something similar can be expected[12]. AT, BE CY, DE, EE, FI, IE, LU, PL, MT have exceeded their emissions limits and will use the surplus that they banked. However, DE, IE, MT have not banked any allocations and will need to buy them.

Also for 2020, the approximate emissions data currently available suggest a similar scenario: BU, CY, FI, DE, IE, MT exceeded their annual emissions allocations and once again, DE, IE and MT will have to buy allocations. What is concerning is that, even if emissions in the ESR sectors (and economy-wide) have decreased significantly in 2020 due to the Covid-19 pandemic, those three countries still breached their limits.

[11]The ESD set national climate targets for the non-ETS sectors for 2020 and distributes Annual Emissions Allocations (i.e. annual limits to emissions) to each member state for the period 2013-2020. According to its rules, the Commission checks whether member states comply with their ESD obligations *annually*. The sanctions for non-compliance are similar to those of the ESR: production of a corrective action plan, increase of the reduction effort by a multiplier and the ban on transfer allocations. The compliance check has been moved to 5-years cycles in the ESR because the Commission estimated that this would make the EU save administrative costs of 1 150 000 EUR per year (COM(2016) 482 final, p. 7).

[12] The 2019 compliance cycle is still ongoing as the emissions reporting for that year was initiated in 2021. After a Union's review of national GHG emissions is made by a group of experts and the EEA, the Commission adopts the decision determining the level of emissions of each country. At that point, member states with emissions above their ESD allocations have 4 months to comply by using the flexibilities.

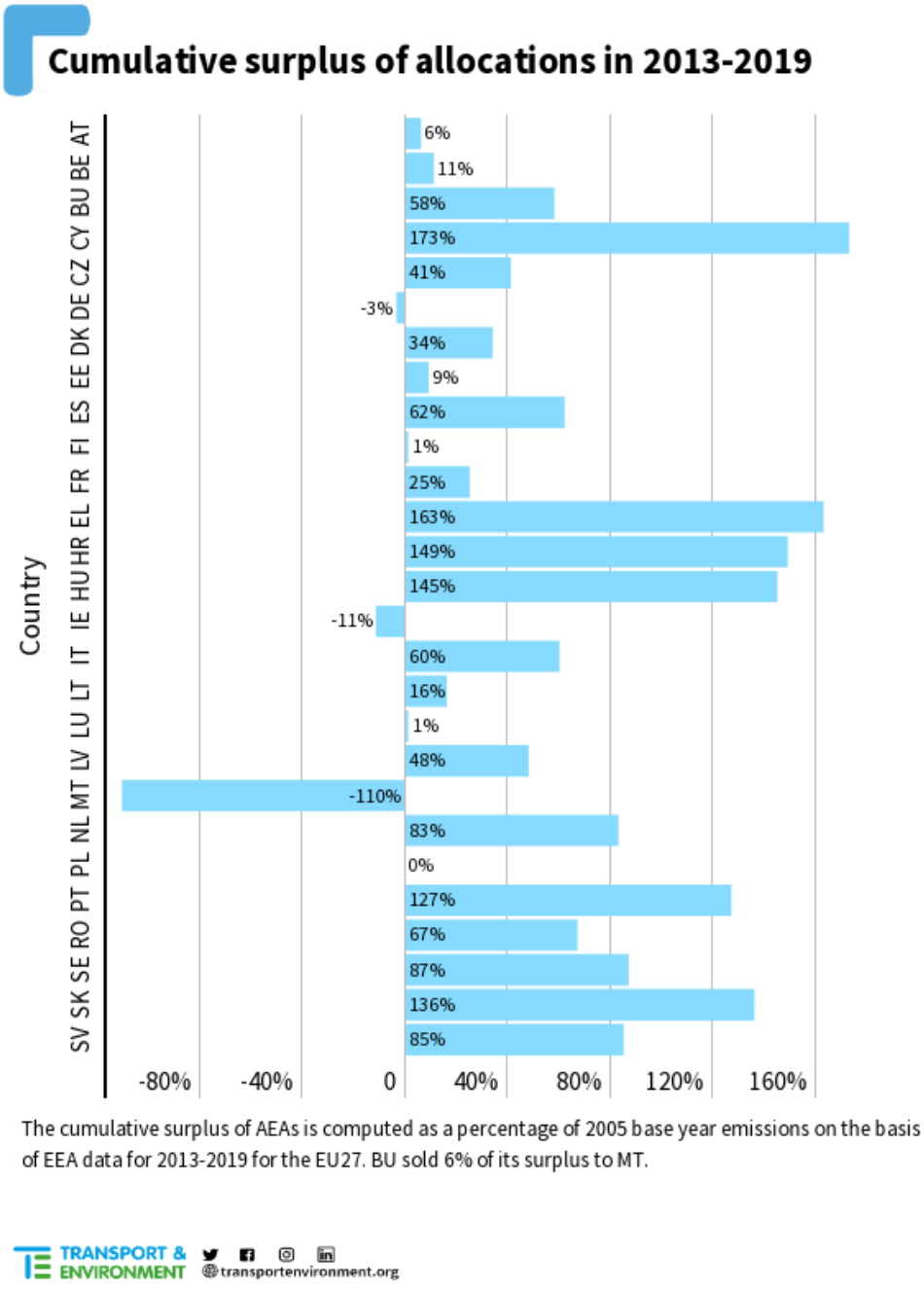


Figure 1: Cumulative surplus of allocations in 2013-2019

With the ESD compliance checks for 2019 and 2020 ongoing, it is already clear that some member states missed their binding emissions limits in those years, even if the emissions allocations under the directive were rather generous and even if the pandemic gave a downward push to emissions. These

countries will now have to buy allocations from other countries that are willing to sell their allocation surplus.

If this is the picture of compliance under the ESD, then full compliance with the old 2030 ESR targets is not guaranteed either. Back in 2021, the EEA and the European Commission[13] estimated that the national measures planned in the NECPs would only be just sufficient to meet the EU's collective ESR target, while some individual countries would fall below their national targets.

Now, as part of the Fit for 55 package, the Commission proposed an increase of the 2030 ESR national targets. If member states do not update their NECPs by planning sufficient additional measures and policies, the risk of non-compliance looms. The measures included in the old NECPs will result in insufficient emissions reductions. Fig. 2 below shows how far the emissions projections based on the old NECPs place us from reaching the new and higher ESR 2030 targets.

However, if they wanted to, member states would be capable of meeting the new and higher targets by putting in place additional climate measures. In fact, the Commission estimated that they can do it in a cost-effective way[14]. In addition the generous funding from the Recovery and Resilience Facility should be used precisely to finance a green post-pandemic economic recovery. The problem is: a weak ESR compliance framework will not deter member states from taking the urgent need of stepping up the ambition of European and national regulatory measures lightly.

[13]See:https://www.eea.europa.eu/data-and-maps/indicators/progress-towards-national-greenhouse-gas/assessment and https://ec.europa.eu/clima/system/files/2021-11/policy_strategies_progress_com_2021_960_en.pdf

[14] See the Impact Assessment of the Commission accompanying the proposal to review the ESR (SWD(2021) 611 final), p.35.

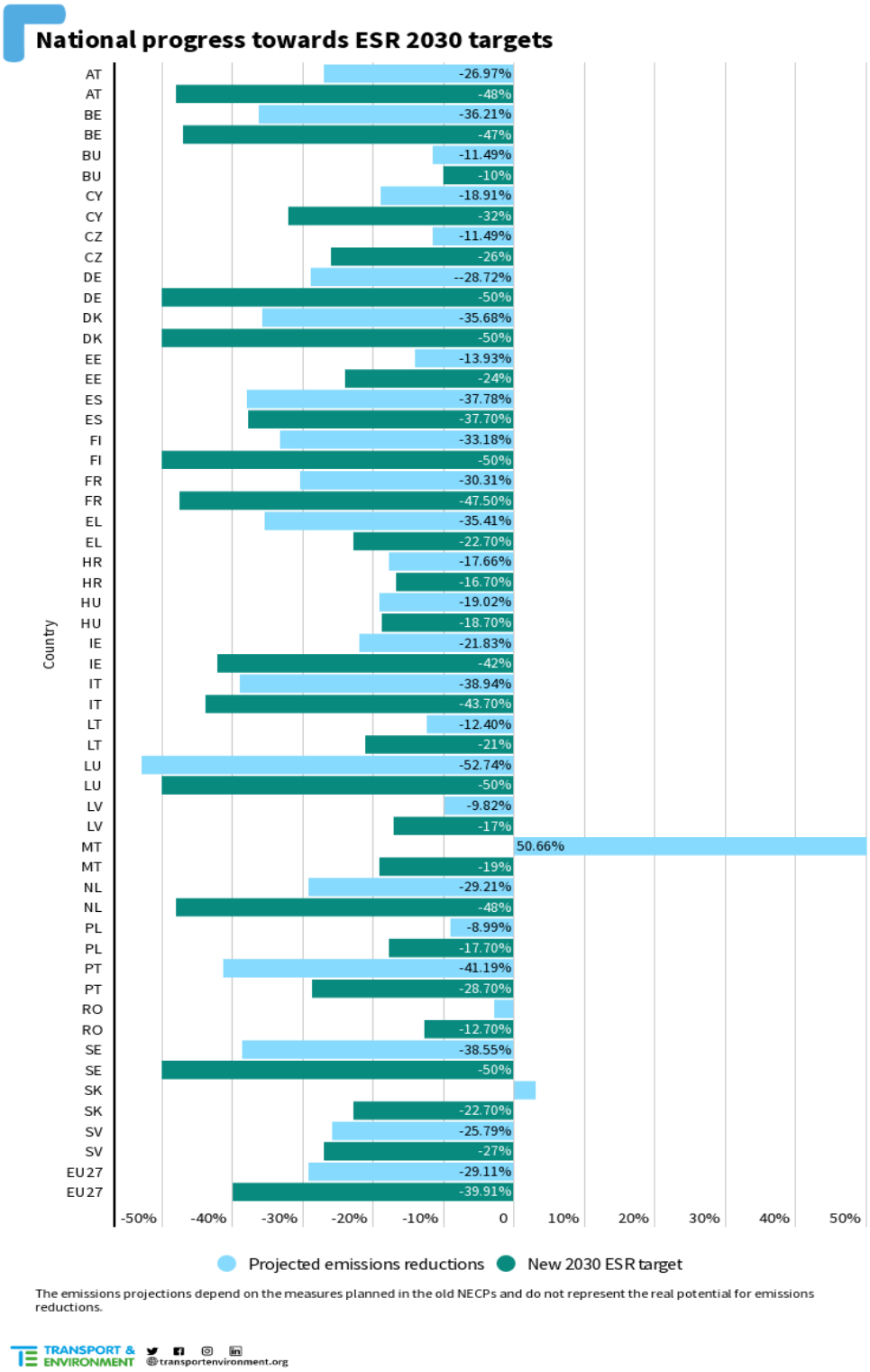


Figure 2: National and EU progress towards 2030 ESR targets

# 2. How to make ESR's rules fit for its binding targets?

Strengthening the compliance framework of the ESR is necessary and possible. T&E and CAN Europe have identified the solutions at hand which are presented below.

## 2.1. A corrective action process that bites

Before asking member states to produce a corrective action plan, we are suggesting, as did the European Parliament's ESR rapporteur, for the member state to present an explanation as to why they have not met their target. This measure is in no way an alternative to the corrective action plan but a first step. The plan will include a concrete measurement of how much the policies and measures included in the corrective action plan will enhance their emissions reductions in relevant sectors and will link this to their NECPs. The methods used for this accounting will be made easily accessible to the public, allowing NGOs and individuals to analyse the methods used and avoid any 'miscalculations'. To make sure the link with the NECPs is made, member states should reference any corrective action plans and Commission's opinions in their revised NECPs.

Indeed, good quality and publicly available data would help to identify which measures are adopted, how successful they are and why. At present, this information is very widely dispersed and it can therefore be difficult to compile and evaluate.

For more robustness and relevance of the corrective action plan, not only will the Commission's opinion of the corrective action plan be mandatory, but if member states do not address in full or in part the Commission's opinion by adapting their plans, they will be denied access to all flexibilities under Article 5. This process guarantees the quality of the corrective action plan and provides for a deterrent mechanism, to make sure there is follow up and that member states take this exercise seriously and are not left off the hook.

Adding to this, if for two consecutive years, a corrective action plan is required from the same member state, it is obliged to delay the process, initially planned for 3 months, to allow for there to be meaningful public participation included. This will allow for NGOs and individuals to be empowered, will increase national ownership of the targets and force the member state to be in the spotlight and put an end to doing the process behind closed doors with no consequences. To add a deterrent to this, if the member state has had to provide an action plan for 2 consecutive years then there will also be a monetary sanction, whereby the Commission shall impose a fine.

The above processes are designed to help member states make the right adjustments and guarantee they are on the right pathway towards their targets and climate neutrality.

## 2.2. Make non-complying expensive

The most effective way to make the consequences of non-compliance more tangible for member states, is to provide a sanction that hurts financially. A penalty of a financial nature would constitute a concrete and stronger deterrent to deviation from the ESR emissions limits than the provision of the "multiplier" as is currently the case.

There are two alternative options to produce such an effect:

1) The European Commission could impose a monetary penalty on the non-compliant state. The amount of such penalty should reflect the real social cost of emitting the tonnes of CO2eq in exceedance of the ESR limits. The best measure of this real social cost is the 2030 shadow price of carbon estimated by the European Investment Bank: 250 EUR/tonne of CO2eq. The shadow price is meant to be used to guide climate-proof investment decisions, but it also reveals well what is the burden imposed on the society when a member state pollutes above its ESR limits. The revenues collected from the sanctioning should then be recycled to make the ESR sectors greener and to help vulnerable households and citizens in their transition towards sustainable solutions. A way to do it would be to make these revenues flow into the Social Climate Fund (SCF) that the Commission proposed to establish in connection with the new European Emissions Trading System (ETS) for road transport and buildings.

2) An amount equivalent to the shadow cost of carbon, multiplied by the tonnes of CO2eq in excess of the ESR national target, could be withheld from the allocations of EU funds to which the non-compliant member state would be entitled. The allocations would be released only once that the member state starts complying again and cut emissions accordingly.

Either way, it is ensured that the member state pays to the society the real cost of the climate damage it is causing by breaching its climate limits.

In addition, the current sanction that forbids the member state to transfer its allocations as long as non-compliance persists, could be extended to the use of all flexibilities of the ESR. Insofar they provide additional emissions allocations to member states, flexibilities can be considered as a buffer between complying and not. Thus, if even after the use of flexibilities and the undertaking of the corrective action process, a member state misses its target, it should be compelled to rethink its climate strategy without relying any further on the availability of those flexibilities.

Such a financial penalty would be part of the wider compliance framework, which would also entail the mechanisms through which member states' action becomes visible and the civil society keeps their governments accountable.

### 2.3. Access to justice

Access to justice (A2J) is a package of rights which allows members of the public (i.e. individuals and NGOs) to go to court when there is a violation of law. Unfortunately, evidence is that in an appreciable number of Member States access to environmental justice fails to meet the standards required by EU and international law; so in those states access to the national courts will be difficult or even impossible, which is why including access to justice provisions in sectoral legislation is so very crucial.

The EU Commission has long recognised there is a problem with respect to the absence of EU rules guaranteeing public rights of A2J and in 2020 called on the Council and the Parliament to introduce explicit access to justice provisions in sectoral legislation, stating that it "is for the co-legislators to include provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters".

What is more, effective access to justice will contribute to national ownership of the 2030 targets, by ensuring that Member States' authorities are accountable to their own citizens and their national courts, rather than leaving citizens dependent on the EU institutions and lengthy processes to ensure that Member States make their minimum contributions as required.

With this in mind, the provision we are looking to include into the ESR would play a double role. Firstly, it will allow for all acts or omissions going against the scope of article 4 to be challenged. More concretely this includes targets contained in the ESR and corrective action plans, if for example a Member State were to disregard the opinion from the Commission.

In addition to this, the ESR has been deemed the best vehicle at present to try and amend the outdated Governance Regulation, which has not been reopened. Here, by including acts and omissions under Article 10 of the governance Regulation we allow for there to also be challenges to NECPs and nLTS that are not ambitious enough, do not comply with satisfactory levels of policy participation.

## 4. Conclusions

The in-depth evaluation of the ESR compliance rules has revealed a weak framework for enforcement that is not fit for binding and ambitious national climate targets. Those rules would not be sufficient to create a real deterrent effect and ensure that member states stick to their (now higher) ESR targets. While the increase of the ESR targets has been necessary to ensure that the EU follows its promises of mitigation and long-term climate neutrality, the risk that countries do not sufficiently commit, each of them, to put in place the measures and the policies that would make their achievement possible could materialise. The compliance framework of the ESR could be strengthened through improvements of

different nature. Firstly, it would be necessary to increase the transparency and the bindingness of the corrective process to ensure that member states commit to correct their course of action with good quality corrective action plans. Secondly, the consequences of not complying with the ESR should become more tangible and credible in order to create a real deterrent effect, for example by providing sanctions of a financial nature. Finally, to ensure that governments take the pathway towards decarbonisation seriously, the scrutiny of national action by civil society becomes particularly essential. Especially the inclusion of the right for the public to bring governments to national court if they breach their ESR or climate and energy planning obligations, is an essential instrument to make member states accountable, foremost, to their citizens.

**5 ways to improve the ESR**

The present briefing is part of a series which addresses the 5 areas for improvement of the ESR as identified by the green NGO community:

1) Improving the integrity of the 2030 target
2) Introducing a framework for binding national climate targets after 2030
3) Strengthening the compliance framework
4) Ending the zero-rating of all biomass
5) Bringing the Governance Regulation in line with the EU's new 2030 target

For a focus on area 1 "improving the integrity of the 2030 target", see T&E's briefing "Fit to lose the climate challenge" which analyses the environmental impact of the current ESR proposal and the solutions at hand to ensure that the 2030 target is met.

## Further information

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