

# A EU Carbon Border Adjustment Mechanism (CBAM) Legal Framework

15th HEEN Workshop

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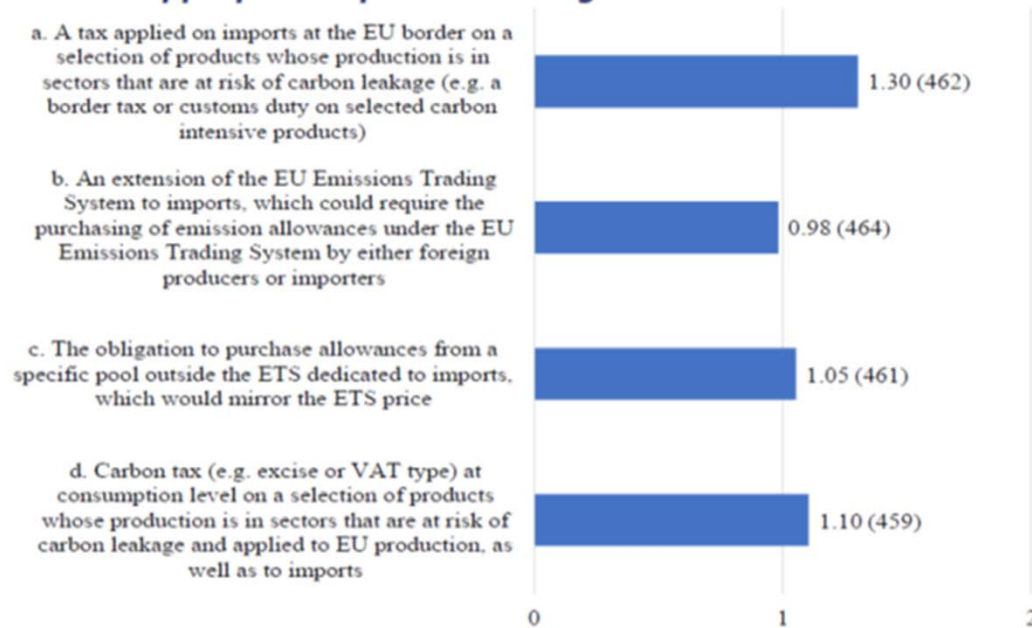
# Background

## Reasoning behind a Carbon Border Adjustment Mechanism

- ▶ **Paris Agreement on Climate Change:** EU als international leader on CO<sub>2</sub>-emission reduction
- ▶ **Carbon Leakage:**
  - Existing (EU) Mechanisms against carbon leakage
    - **Emission Trading System (ETS)** = harmonized system for CO<sub>2</sub>-cost - internalisation;
    - „**Non-ETS**“ = national targets and measures through the Member States
  - But: outside EU no/less stringent systems to control/internalize the costs of **CO<sub>2</sub>-emissions**;
    - „Leakage“ = industry (and emissions) moving to non-EU countries.
  - Existing „**Carbon Leakage-protection measures**“ in EU:
    - Free Allocation in EU;
    - State aid Law.

## Different options for the design of a CBAM And policital/legislative procedure

**Figure 5: Most appropriate options to design the CBAM**



Legend: 0 = Not relevant 1 = Somewhat relevant 2 = Highly relevant

Source: Public consultation questionnaire responses

- ▶ **EU Commission consultation** presenting four options.
- ▶ **EU Parliament:**
  - **Preference „Notional ETS“ (Option C);**
  - Benchmarks + individual proof of CO<sub>2</sub>-emissions;
  - **„Solidarity clause“** for developing and emerging nations
- ▶ **Leak of June 3rd** confirms **Notional ETS.**
- ▶ Official proposal from EU Commisison by **July 14th.**

# Legal aspects

## Potential Legal Basis in EU Law

- ▶ **Environment**, Art. 192 TFEU = Especially **Options B-D**:
  - Legal Basis for the ETS;
  - Ordinary Legislative Procedure – but for fiscal measures unanimity in the Council required!
- ▶ **Common commercial policy**, Art. 207 TFEU = **Option A (maybe B and C)**
  - For measures „at the border“ – international trade measures;
    - Classic example: Anti-Dumping Measures;
  - Ordinary legislative procedure (but normally no „harmonisation“ within EU).
- ▶ Income from CBAM for the EU budget?  
**Interinstitutional Agreement** of December 2020 = CBAM income supposed to be „new own resources“ for the EU from 2023
  - To pay back COVID money...

## WTO Law on CBAM

### Art. I GATT (= General Agreement on Tariffs and Trade WTO):

- ▶ General prohibition of **discrimination**
- ▶ **Most favored nation principle:**
  - Every advantage that is granted to one WTO-member needs to be granted to all other WTO-members.
    - BUT: What about developing/emerging countries?
- ▶ **National treatment principle:**
  - All imports from WTO-members need to be treated as „like products“ from national production.
    - However: definition of „like products“? – production processes not recognized as grounds for differentiation!

### Art. X GATT

- ▶ Potential justification via **climate protection (BUT: NON-Discrimination!)**

## Free allocation, State aid, Subsidies

- ▶ **Free Allocation** within ETS - EU Law
  - No „State Aid“ but intrinsic part of the ETS system;
  - „Granted“ by EU law.
- ▶ **State Aid** - EU Law
  - Granted through the Member States with „Approval“ through EU Commission;
  - EU Commission Guidelines on what is „compatible with EU market“.
- ▶ **EU Commission is reviewing** both Free Allocation as well as State Aid in the field of industrial decarbonization!
- ▶ **Subsidies** - WTO-Law
  - All subsidies problematic – in particular explicit „export subsidies“ – possibly retaliation measures by other countries.



# Other aspects

## International Law principles and political framework

- ▶ **Principle of „territoriality“**
  - Principle of International Law:
    - States are only „competent“ to legislate within their own territory;
    - Exceptions: explicit agreement by the other state.
- ▶ **Principle of „common but differentiated responsibilities and respective capabilities“**
  - Under (i.a.) Paris Agreement
- ▶ **Possibilities for enhanced cooperation**
  - E.g. under Art. 24 IVX GATT: possibility for a „**climate club**“?!
- ▶ **Dispute Settlement** under WTO Law?
  - U.S. blockage of the dispute settlement regime (Appellate Body);
  - Possibly higher risk for **retaliation** without (legal) procedures?!

# Summary

## A EU CBAM is possible

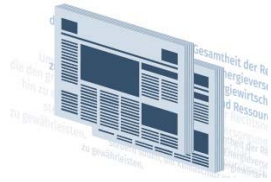
- ▶ CBAM as „climate protection/environment“ measure:
  - **Legal basis in Art. 192 TFEU**
    - If (primarily) fiscal = unanimity?
  - **WTO justification under Art. X GATT**
    - Non-discriminatory design features:
      - ▶ Consider existing policy measures in other WTO countries („production processes“;
      - ▶ Establish „fair“ procedures without too much administrative red tape;
      - ▶ Consider development status; ...
    - **The devil is in the details!**
- ▶ **Subsidies** regime (free allocation/State Aid/other) to be assessed and possibly adjusted.
- ▶ **Strong international political communication**
  - Creating alliances for environmental protection.

**IT'S COMPLICATED!**



# Questions?

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