

# *Legal Status*

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1. Energy
2. Tax
3. Disputes

# Carbon Border Adjustment Mechanism (CBAM)



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As On April 18, the European Parliament reached a decisive agreement for the approval and implementation of the Carbon Border Adjustment Mechanism (CBAM). The Resolution adopted by the Parliament introduces some amendments to the initial Regulation proposal adopted by the Parliament and the Council in July 2021.

These amendments mainly refer to the products to which the Adjustment Mechanism applies and the need to equalize the carbon price paid by EU products, which are currently affected by the Emissions Trading System (ETS), and imported goods. Thus, it aims to incentivize non-EU countries to increase their climate ambition while ensuring that the EU's efforts in this area are not weakened in international trade.

In the coming months, the Parliament and the Council will have to formally approve the agreement for the entry into force of the European Regulation.

### 1. "Objective 55"

European Climate Legislation makes it a legal obligation to achieve the European Union's climate target of reducing emissions by at least 55% by 2030. Member countries are

working on new legislation to achieve this goal and make the European Union climate-neutral by 2050.

The "Objective 55" package of measures is a set of proposals aimed at revising and updating EU legislation and launching new initiatives to ensure that Europe's policies align with the climate targets agreed upon by the Council and the European Parliament.

The objective of this package of proposals is to provide a coherent and balanced framework for achieving the EU's climate goals that ensures an equitable and socially just transition, maintains and enhances the innovation and competitiveness of the European industry, while ensuring fair competition conditions for economic operators from third countries. It also supports the EU's leading position in the global fight against climate change.

"Objective 55" includes, in addition to the Carbon Border Adjustment Mechanism, the following initiatives: Energy Efficiency, Renewable Energy, CO2 Emission Standards for Cars and Vans, Energy Taxation, EU Emissions Trading System, "ReFuelEU Aviation" and "FuelEU Maritime" Initiatives, Social Climate Fund, Alternative Fuel Infrastructure, Land Use and Forestry, Effort Sharing Regulation.

### 2. Legislative proceedings

The ordinary proceedings, or "co-decision proceedings," are the most commonly used, and they gives equal importance to the European Parliament and the Council of the European Union in various areas such as

immigration, energy, transportation, climate change, environment, consumer protection, and economic governance.

The proposals of the “Objective 55” pack of measures were first presented and discussed at the technical level within the working groups of the Council responsible for the relevant areas of action. Subsequently, they were debated by the permanent representatives of the EU member states in the Permanent Representatives Committee (COREPER) to lay the groundwork and reach agreements among the 27 member states within the Council of the European Union.

### **3. Carbon Border Adjustment Mechanism**

This environmental measure aims primarily to prevent carbon leakage. In this regard, it will also encourage member countries to establish carbon pricing policies to combat climate change.

The Carbon Border Adjustment Mechanism (CBAM) seeks to ensure, in accordance with international trade rules, that the EU's emissions reduction efforts are not counteracted by increased emissions outside its borders due to production relocation in non-EU countries (where climate change policies are less ambitious) or due to increased imports of carbon-intensive products.

CBAM focuses on imports of products from carbon-intensive industries. It is designed to be applied in parallel with the EU Emissions Trading System (EU ETS) and to replicate and complement its functioning with regard to

imported goods. It will gradually replace the mechanisms that the EU has put in place to address the risk of carbon leakage, specifically the free allocation of emissions allowances under the EU ETS..

Current status for implementation:

**(i) Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism:** The issue addressed by the CBAM is how to reduce greenhouse gas emissions (GHG emissions) in the EU while avoiding that efforts to decrease emissions are offset by an increase outside the Union (carbon leakage).

Technical work on the proposal is carried out through an ad hoc group called the “Carbon Border Adjustment Mechanism” established by the Council specifically for negotiations on this proposal.

#### Contents of the proposal:

Six different options were evaluated regarding this dynamic framework, all formulated to take into account the requirements of the World Trade Organization and the EU's international commitments, such as free trade agreements concluded by the EU or the Energy Community Treaty. These options are as follows:

- 1<sup>a</sup>.** Imposing a carbon tax on imports, paid by the importer upon entry of products into the EU.
- 2<sup>a</sup>.** Applying to imports a system similar to the EU ETS regime applicable to domestic production. This option involves, like the EU ETS emissions trading system, the issuance of certificates (“CBAM

certificates") by importers, based on the implicit emissions intensity of the products they import into the Union, acquired at a price equivalent to the EU ETS emissions allowances at a given time.

- 3<sup>a</sup>. The third option functions similarly to the previous one, although the carbon price of imports is based on the actual emissions of third-country producers rather than a default value based on averages of EU producers.
- 4<sup>a</sup>. This option would be applied in the same way as the third option, through the issuance of CBAM certificates. However, this option also includes a gradual introduction period of 10 years starting in 2026, during which free allocation of emissions allowances under the EU ETS would be phased out gradually by 10 percentage points each year, and the CBAM would be introduced progressively.
- 5<sup>a</sup>. Option 5 is a variant of the third option with a broader scope along the value chain. Carbon-intensive materials that are part of semi-finished and finished products would be covered throughout the value chain. In the case of imports, the CBAM would again be based on the actual emissions of third-country producers.
- 6<sup>a</sup>. Option 6 is a variant of the first option, establishing a special tax on carbon-intensive materials that would cover consumption in the Union of both domestic and imported products, while the EU ETS would be maintained, including the free allocation of emissions allowances for EU production.

#### Transitional period:

The proposal establishes a transitional period between 2023 and 2025 during which a CBAM without financial adjustment will be applied to facilitate a gradual development of the mechanism, thereby reducing the risk of trade disruptions. Declarants will be required to report quarterly on the implicit emissions in imported goods during the transitional period, specifying direct and indirect emissions and the carbon price paid abroad. During the transitional period, the proposal states that it will be appropriate to continue the dialogue with third countries and establish a space for cooperation on possible solutions that can guide future specific options regarding the design details of the measure during its implementation, particularly during the transitional period.

In this regard, Article 2 of the proposed regulation concerning its scope establishes that the Commission will be empowered to adopt implementing acts to determine the conditions for the application of the CBAM to goods referred to in paragraph 2 (related to emissions trading). Such implementing acts will be adopted in accordance with the "examination procedure" established by EU Regulation No 182/2011 of February 16, 2011, which sets out the rules and general principles for the modalities of control by Member States of the exercise of executive powers by the Commission.

**(ii) Council of the EU Agreement, March 15, 2022:** The Council reached an agreement (general orientation) on the Regulation concerning the Carbon Border Adjustment Mechanism (CBAM) as one of the key elements of the "Objective 55" package of measures:

- The following sectors' products will be covered by this mechanism: cement,

aluminum, fertilizers, electricity production, iron, and steel.

- Compared to the initial proposal by the Commission, the Council has opted for greater centralization of the CBAM's governance in cases where such centralization is justified and contributes to greater efficiency. For example, EU-wide centralization of the new register of declarants (importers) for CBAM purposes has been foreseen.
- The Council also foresees a minimum threshold that exempts shipments below 150 euros from CBAM obligations. This measure would reduce administrative complexity, as approximately one-third of shipments destined for the Union fall into this category and their aggregated value and quantity constitute an insignificant portion of greenhouse gas emissions generated by total imports of such products into the Union.

**(iii) European Parliament legislative resolution of 18 April 2023 on the Council proposal for a Regulation:** According to the recent agreement reached by the European Parliament, the products to which the Carbon Border Adjustment Mechanism applies are iron, steel, cement, aluminum, fertilizers, electricity, and hydrogen, as well as indirect emissions in certain circumstances. Importers of these products would have to pay the difference between the carbon price paid in the country of production and the price of carbon emission allowances in the EU ETS. The new Carbon Border Adjustment Mechanism will be gradually introduced from 2026 to 2034, at the same pace as free emissions allowances are phased out in the EU ETS.

According to the agreement, a Carbon Border Adjustment Mechanism (CBAM) will be established to equalize the carbon price paid

by EU products operating under the EU Emissions Trading System (EU ETS) and imported goods. This will be achieved by requiring companies importing into the EU to purchase the so-called CBAM certificates to pay the difference between the carbon price paid in the country of production and the price of carbon emission allowances in the EU ETS.

The law will incentivize non-EU countries to increase their climate ambition and ensure that the EU's and the world's climate efforts are not undermined by the relocation of EU production to countries with less ambitious policies.

This mechanism is designed to fully comply with the rules of the World Trade Organization (WTO). It will be applied from October 1, 2023, but with a transitional period in which importers' obligations will be limited to notification. To avoid double protection of EU industries, the duration of the transitional period and the full phase of the CBAM will be linked to the gradual elimination of free emissions allowances under the EU ETS.

Before the end of the transitional period, the Commission will assess the desirability of expanding the scope to other products at risk of carbon leakage, with the aim of including all products covered by the EU ETS by 2030. They will also assess the methodology for indirect emissions and the possibility of including more processed products.

At the end of 2027, the Commission will conduct a comprehensive review of the CBAM, including an assessment of progress in international negotiations on climate change, as well as the impact on imports from developing countries, particularly least developed countries.

**(iv) Next steps:** The European Parliament and the Council will now have to formally adopt the new Regulation. Once formally adopted by the co-legislators, the final set of rules and methodology for implementing the CBAM will be specified in greater detail in an implementing act to be adopted by the Commission, following consultation with the EU Member States' Expert Committee.

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## Cryptocurrencies: Capital Gain in the Sale



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Considering the growing impact of cryptocurrencies in the global economy, this article addresses the tax treatment applicable to their transmission.

Virtual currencies are a new reality with great potential for innovation in the financial sector, but at the same time they carry high risks, as they can be used by criminals to launder the proceeds of illicit activities.

The Tax Authorities consider that these virtual currencies may give rise to capital gains or losses based on Article 33.1 of the Personal Income Tax Law. From the article, it can be deduced that cryptocurrency trading operations can give rise to a capital gain or loss to the extent that, by carrying them out, an alteration in the composition of the taxpayer's net worth is generated.

The capital gain or loss is determined, for each sale transaction of each type of cryptocurrency, by the difference between the acquisition and transfer values of the assets and liabilities (unless the transfer value is lower than their normal market value on the date of the sale, in which case the normal market value prevails).

Such gains or losses obtained in the sales of cryptocurrencies must be allocated to the tax

period in which such transfers are made and will constitute savings income.

Net savings taxable income – Up to euros	Total quota – Euros	Remaining net savings taxable income – Up to euros	Applicable type – Percentage
0	0	6,000	19
6,000	1,140	44,000	21
50,000	10,380	150,000	23
200,000	44,880	100,000	27
300,000	71,880	From there on	28

In addition, the General Directorate of Taxes in its consultancy V2179-22 states that the results derived from the differences in the exchange rate that may exist between the price in euros at which the currencies used in the purchase of the cryptocurrencies being transferred were acquired and the equivalent value in euros of such currencies on the date of acquisition of the said cryptocurrencies must also be recognized as capital gains or losses.

For this reason, although in Spain there is no specific legislation regulating the cryptocurrency market, the Tax Agency is trying to find a solution by requiring taxpayers to keep, during the prescription period, the receipts and documents evidencing transactions, revenues, expenses, income, reductions and deductions of any kind.

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## DISPUTES

# The European Restructuring and Second Chance Directive and its transposition into Spanish law.



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In 2019, the European Commission published the Restructuring and Second Chance Directive, which is considered to be the first European regulation with a harmonising purpose in this area.

As its name suggests, this Directive provides insolvent or over-indebted business with a second chance so that they can be exonerated from their debts under certain circumstances.

However, it is worth noting that in spite of its harmonising intention, the Directive is not directly applicable as each Member State has to transpose the Directive by adapting it to its own legislation on second chance. In the case of Spain, this has given rise to a recent reform of the Insolvency Act, which includes the new regulation of the exoneration of unsatisfied liabilities.

The reform of the Insolvency Law came into force last September and now includes an important variation in the proceedings for the

exoneration of unsatisfied liabilities, better known as “second chance”, which simplifies the proceedings and costs.

Specifically, two of the requirements that were indispensable for obtaining this second chance are now eliminated: the payment of a minimum debt threshold and the prior liquidation of the debtor’s assets.

The regulation on having unsuccessfully attempted an out-of-court settlement and the regulation on not having rejected a job offer in the four years prior to the declaration of insolvency are also repealed.

The most beneficial change which makes the application of second chance proceedings more accessible is the reduction of the term of the debtor's payment plan to three years and the extension of the exemption to all insolvency debts and debts against the mass.

This new configuration of second chance proceedings in Spain could be aimed at increasing the little use that has been made of this mechanism when compared to the rest of the European Union countries.

However, the reform is also currently being criticised since the credits that can be exonerated in this way in terms of public credit only reach a maximum of 10,000 euros for the Spanish State Tax Administration Agency (AEAT) and the General Treasury of the Social Security (TGSS), which is a great disadvantage for Spanish debtors compared to other European countries in which the exoneration of debt is greater or even total.



As we can see, the correct transposition of the European Directive into Spanish law not yet confirmed, and a preliminary ruling has already been made before the CJEU by the Provincial Court of Alicante. Therefore, we must be attentive to the way in which the question of the full exoneration or otherwise of public credit is finally clarified by Spanish courts.

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