Not a Disaster, but a Missed Opportunity

The Amendment to the Federal Climate Protection Act

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Following lengthy negotiations within Germany's coalition government, on 26 April 2024, the Bundestag passed an amendment to the Federal Climate Protection Act (*Bundes-Klimaschutzgesetz* (KSG)). One part of the amendment in particular has drawn sharp criticism from environmental NGOs, experts, and commentators (see here, here, here, here, and here): the abolition of annual, sector-based targets for greenhouse gas (GHG) emissions reduction, which form the basis of the obligation for ministries to submit 'immediate action programmes' (*Sofortprogramme*). Deutsche Umwelthilfe (DUH), for example, spoke of a "slap in the face of young people and future generations". The chairman of the German Federation for the Environment and Nature Conservation (BUND), Olaf Bandt, concluded that "the bite of the law had been significantly reduced".

The original version of the KSG stipulated that if a certain sector (e.g. transport, buildings) did not deliver the required annual GHG emissions reductions in the previous year, the federal ministry responsible for that sector would have to submit an 'immediate action programme' to make up for the missed target. Missed targets were determined based on analysis of emissions data by the Federal Environmental Agency (*Umweltbundesamt* (UBA)), with these data confirmed by the Council of Experts on Climate Change (*Expertenrat für Klimafragen* (ERK)). The amendment modifies this mechanism. Now, if the ex-ante projection data for two consecutive years indicate a shortfall in the *cumulative* emissions reduction target for the whole period 2021-2030, the German government is, as a whole, obliged to adopt measures to meet this overall target. Ministries in charge of the sectors contributing to the emissions overshoot have the primary – but not the sole– responsibility to submit corrective policy measures.

We argue that many critics overestimated the effectiveness of the *Sofortprogramm* mechanism, as enshrined in the original version of the KSG, in enforcing Germany's ambitious climate targets. Instead, we must realistically assess the potential, and limits, of institutional design to deliver ambitious climate policy. Doing so suggests that the amendment to the KSG introduces several gradual, potentially effective reforms, but opportunities for improvement remain.

In this article, we discuss the key advantages and disadvantages of the KSG amendment and identify several reform options, which could help to create a (more) robust legal framework for ambitious national climate policy. Yet we also acknowledge that these reforms, on their own, cannot guarantee that Germany delivers on its emissions reduction targets. There are limits to the degree to which any institution – even a central climate institution like the KSG – can solve the fundamental challenges of climate policy.

The limits of legal enforcement

Advocates of the original KSG mechanism maintain that the legal requirement to submit immediate action programmes and the clear assignment of ministerial responsibility make it more likely that ministries will propose ambitious measures for climate action (ERK 2023, Chapter 7, Table 9). This legal mechanism can be reinforced by an informal sanction mechanism: if substantial media attention is devoted to a ministry missing a climate policy target, this creates reputational damage and hence political pressure to comply (Zwar et al. 2023 p. 37).

Is this argument convincing? It must first be noted that the Federal Ministry for Digital and Trans-

port Affairs (*Bundesministerium für Digitales und Verkehr* (BMDV)), under the leadership of Volker Wissing (FDP), has made it abundantly clear in recent years that it is not prepared to follow this legal requirement of the KSG. In 2022, the ERK found that the immediate action plan submitted by the transport ministry fell short, by a wide margin, of the requirements of the KSG. A lawsuit, initiated by DUH and BUND, led to a ruling by the Berlin Brandenburg Higher Administrative Court in Autumn 2023 that the Federal Government was obliged to submit a KSG-compliant immediate action programme – but this did little to change the BMDV's stance. Until today, the BMDV has failed to present an ambitious and effective immediate action programme (ERK 2023).

This is hardly surprising if one analyses the potential effectiveness of climate institutions in their broader political and institutional context, based on the assumption that (limitedly) rational political actors act in their own interests (Zwar et al. 2023). So long as institutions do not decisively change the costs or benefits for political actors – in this case, political parties, ministers, and ministries – they will not create substantial changes in behaviour. Legislative requirements and negative media coverage can both be ignored.

This appears to have occurred in the case of the original KSG 'follow-up' mechanism of sector targets and immediate action programmes. There is simply no authority that can force a ministry to alter its behaviour. In order to be effective, institutions instead must restructure the incentives of the actors involved in such a way that a change in behaviour is in their self-interest. Rules are 'self-enforcing' when actors comply with them, even though there is no third party that compels them to do so (Przeworski 1991, 2008, 2018; Myerson 2009; Fearon 2011; Svolik 2015). Given this was not the case with the original KSG mechanism – as illustrated by the transport ministry's insufficient *Sofortprogramm* – describing its abolition as a 'climate policy disaster' seems exaggerated.

This does not mean that we welcome the new amendment to the KSG unreservedly. Rather, we wish to point out the limits of a primarily legal approach to climate policy, which sees legally binding, annual sector targets as the *conditio sine qua non* of ambitious mitigation policy. This approach fails to recognise that the sector targets were not self-enforcing because – despite tightening their *de jure* obligations – they did little to alter the incentives of the relevant actors. It is also worth noting that sector targets continue to exist in the KSG, even if they no longer serve as triggers for ministerial *Sofortprogramme*. The sector targets could continue to be used informally, for instance by the ERK or by other organisations, as an indicator of climate policy progress in individual sectors and the 'performance' of the responsible ministry.

Seen in this light, the KSG amendment represents less of a deviation from the status quo than most comments and reactions suggest. The amendment is therefore not a disaster, but a missed opportunity. Despite some promising moves, the German government has largely failed to strengthen the incentives for relevant actors to implement ambitious climate policy.

Focus on a cross-sectoral, ex-ante perspective

Two other aspects of the changes in the amendment are particularly welcome. The first is a shift in focus from sector-specific targets and sector-specific steering to a *cross-sectoral* approach. The second is the switch from an ex-post to an ex-ante perspective in triggering the obligation to present *Sofortprogramme*. Nevertheless, both changes have not been consistently implemented in the amendment, leaving substantial room for improvement.

The cross-sectoral approach should be seen in the context of recent EU climate policy developments. The EU's Fit for 55 package reaffirmed the central role of emissions trading as a key instrument in EU, and therefore also in German climate policy. The EU's emissions trading system covers the electricity, industry, intra-European aviation and now also shipping sectors (EU ETS 1), and from 2027 will cover the heating and road transport sectors (EU ETS 2). These two systems set binding emission caps for around 80% of EU GHG emissions, which will decrease linearly to zero by around 2039 (ETS 1) and 2045 (ETS 2) (Pahle et al. 2023). The introduction of an EU ETS 3 for the agricul-

tural sector is currently being discussed. In the future, there will (need to) be a discussion about merging these systems. In Germany, preparations are also underway to realign the Fuel Emissions Trading Act (BEHG), which has imposed a national emissions trading system for the transport and buildings sectors since 2019.

Given that carbon pricing (in the form of emissions trading schemes) is the central plank of the European and German climate policy mix, sector-specific measures have a supplementary role to play. They should complement carbon pricing systems by addressing specific market failures and other barriers in the various sectors to achieve cost-effective, rapid decarbonisation. This is a very different function than that enshrined in the original KSG, where sector targets were the central instrument for delivering emissions reductions. Although the old KSG allowed the government to include cross-sectoral measures in its *Sofortprogramm*e, the focus on sectoral targets incentivised *ad hoc* solutions that could quickly result in a patchwork of reforms. The sector targets did not encourage policymakers to consider the key aspects of climate policy instruments – their effectiveness, distributional effects, and consistency with one another – in an integrated manner. The amendment recognises this shortcoming – rhetorically at least – by emphasising that ministries' proposals "may also contain cross-sectoral measures" (Section 8 (2) KSG).

The focus on cross-sectoral measures could be developed further in ways that change the incentives of political actors when crafting and implementing climate policy. One option could be to establish a few binding parameters for the inter-ministerial process of planning climate policy reforms. For example, the government could introduce an obligation that ministers first consider possible reforms to the EU ETS 1 & 2 (although these cannot be changed directly by the German government) or adjustments to the national BEHG when seeking to reduce emissions, before sector-specific measures are considered. It would even be conceivable to link increases in funding or the introduction of certain regulations to the level of the CO_2 price in a rule-based manner, akin to automatic stabilisers in fiscal policy. Finally, the government could demand that ministers provide a justification for their policy choices, whether these are reforms to emissions trading schemes and/or sector-specific measures, to encourage more explicit analysis and debate over the appropriate reform response. Existing measures – such as the Building Energy Act (*Gebäudeenergiegesetzes* (GEG)) – are currently not systematically evaluated ex-post. A binding obligation to conduct ex-ante and ex-post assessments of the effectiveness, economic efficiency, and distributional effects of the mix of measures adopted could improve climate policy planning. More evidence-based transparency and a critical discussion of the impact of existing and potential future measures could increase the likelihood of achieving targets.

Incremental progress

In addition to the shift to a more cross-sectoral and ex-ante perspective discussed above, the KSG amendment also contains some other, incremental improvements. We highlight two. First, it includes a provision, similar to that contained in the Swedish Climate Protection Act, whereby each new federal government must adopt a climate protection programme – its overall climate policy plan – within 12 months of the start of the legislative period. In Sweden, this institutional feature had an agenda-setting effect: governments were forced to consider climate policy even if they otherwise would not have prioritised it (Zwar et al. 2023).

In the context of German coalition governments, the mandated process of developing the climate protection programme might contribute to positive coordination among ministries and parties. It represents an opportunity for these actors to engage in joint stocktaking of existing measures and to work together to develop a detailed climate policy agenda. Inter-ministerial task forces could play a role in developing the joint plan, with a corresponding mandate at higher levels in the administrative hierarchy. Of course, innovative formats like this require a willingness on the part of the coalition partners to cooperate politically – it is unclear whether this would work in the German

political system. Nevertheless, such formats provide an opportunity to resolve political conflicts and focus on substantive issues in close coordination at the start of the legislative period. They can also remove detailed climate policy planning – a substantial task – from high-level coalition negotiations. Finally, this planning process provides an opportunity to pool and harness the considerable climate policy expertise in Germany, for instance via (internal or public) hearings or mandated short studies (Flachsland et al. 2021).

A second positive development is the extension of the mandate of the Council of Experts on Climate Change. The amendment grants the ERK the right to provide "expert opinions on the further development of suitable climate protection measures on the basis of emissions and projection data" (Section 12 (5) KSG). In our view, it is also helpful that the ERK now has an explicit mandate to consider distributive social effects, economic efficiency, and effectiveness in its opinions and expert reports. It remains unclear, however, how the ERK can accomplish this mandate with a level of staffing, equipment and financial capacity originally intended for a different, more narrowly defined task (i.e. review of emissions data). It may therefore be necessary to expand the ERK's structure and capacity to deliver its expanded mandate under the amendment.

A missed opportunity, but not a disaster

Despite the improvements outlined above, which could at least gradually shift the incentives of actors involved in the climate policy process, the amendment to the KSG contains some missed opportunities. Options remain to improve the content and structure of the climate policy reform process, to improve the position of the ERK and UBA, and to strengthen the process for developing the emissions projection report.

The requirements for government action at the federal, state, and municipal level to achieve Germany's ambitious national climate targets are exceptionally high. In this context, it appears urgent to (i) strengthen personnel capacities in the administration, (ii) critically review and reform institutional structures for coordination, and (iii) ensure financial compensation in Germany's multilevel political system. At the federal level, the (iv) reactivation and strengthening of the Climate Cabinet could be a catalyst for further development of Germany's national, as well as European and international, climate policy. Anchoring the Climate Cabinet in the KSG should therefore be considered (Flachsland et al. 2021). These are further missed opportunities – it seems unlikely this will be the final KSG amendment.

Contrary to what its critics claim, however, the KSG amendment is not a disaster. We cannot expect that Germany's future emissions will significantly increase as a result of the change to the reform mechanism. Rather, the structure of the former and now the amended KSG both fail the litmus test for effective institutions: to re-align political incentives towards self-enforcement of Germany's ambitious climate policy goals.

How could institutional designs of this kind – beyond the KSG – be developed? Approaches aimed at avoiding concentrated, high short-term costs appear central to the political stability of climate policy – such is the logic of the redistribution of revenues and price caps in the context of emissions trading systems. More research and debate, as well as concrete proposals for the institutional design for climate policy that is compatible with political incentives is urgently needed.

In principle, however, the potential to solve fundamental climate policy problems through formal institutional design is limited. One may criticise the stance of (parts of) the German government for good climate policy reasons. Yet, in order to increase the party-political incentives for ambitious climate policy, other means must be sought than the original KSG's reform obligation based on sector targets and *Sofortprogramme*. The tightening of the EU ETS 1 and introduction of the ETS 2, with the goal of reducing GHG emissions to zero within just 15 (EU ETS 1) and 21 years (EU ETS 2), sets a highly ambitious and effective institutional framework for German and European climate policy. From a climate policy perspective, the aim should be to supplement this framework with targeted reforms in such a way that it is in the interests of any

future government to adhere to this high level of ambition.

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