

Carbon Border Adjustment Mechanism as proposed EU regulation to combat climate change

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Abstract

Purpose of the article Climate change is the key challenge facing the world today. Since the energy sector is responsible for two-thirds of global greenhouse gas emissions, transitioning from fossil fuels to clean energy is imperative. In 2019, the European Commission launched the Green Deal, a political project aiming to achieve the EU's ecological transformation by reaching carbon neutrality by 2050. To achieve this goal, the EU and its Member States are obligated to cut net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. In 2021, the European Union announced a set of proposals to facilitate the implementation of the Green Deal. One key component is the carbon border adjustment mechanism (CBAM), which will be gradually introduced for certain imports from non-EU countries. This mechanism has significant implications for World Trade Organization (WTO) provisions. This article analyzes CBAM, its potential consequences for global WTO rules, and how Poland approaches the concept. It also examines how CBAM affects commercial activities, such as those of banks and importers, and identifies potential challenges associated with its implementation.

Methodology/methods This article utilizes two research methods: dogmatic-legal analysis and case study.

Scientific aim Given the cross-border nature of CBAM and its impact on both EU and international law, the crucial issue is to analyze its legal framework at the EU level and assess its compatibility with the General Agreement on Tariffs and Trade (GATT). Specifically, the analysis will determine whether CBAM adheres to GATT principles or if it could be considered discriminatory.

Findings The CBAM is a complex piece of legislation. Within the EU, its structure resembles a customs duty. However from a WTO perspective, it can be seen as a charge imposed on goods or linked to industrial processes based on the energy consumed. While the EU CBAM has the potential to violate Article III.2 and Article I.1 of the GATT, such infringements may still be permissible and justifiable under Article XX of the GATT.

Conclusions The implementation of the EU CBAM may lead to potential conflicts with WTO rules.

Keywords: EU carbon border adjustment mechanism, carbon leakage, WTO

JEL Classification: K33, K34

Introduction

Rapid climate change and environmental degradation pose a significant threat not only to the EU but also globally. The primary driver of climate change is the greenhouse effect with carbon dioxide (CO₂) being the most common greenhouse gas. This phenomenon leads to global warming, causing rising average temperatures and more extreme climate events like flash floods, heat waves, and droughts.

The EU is a major greenhouse gas producer. In 2019, it ranked fourth globally following China, the United States, and India (European Parliament, 2023). Since the energy sector contributes to nearly two-thirds of global emissions, transitioning from fossil fuels to clean energy is crucial. Within the EU, the energy sector accounted for the highest share of greenhouse gas emissions in 2019 (77.01 %), followed by agriculture (10.55%), industry (9.10%), and waste management (3.32%) (European Parliament, 2023).

Addressing climate change requires decisive and wide scale action. In 2015, 194 countries and the European Union adopted the Paris Agreement, establishing a global framework to limit global warming to well below 2°C, preferably to 1.5°C. To achieve this goal, the European Commission (EC) launched an ambitious project in 2019 - the European Green Deal (EGD). The EGD outlines several actions to transform Europe into a modern, resource-efficient, and competitive economy, leading the EU towards a green energy transition to carbon neutrality by 2050.

As part of the EGD implementation, the European Commission introduced the "Fit for 55" package on July 14, 2021. This package comprises a set of legislative proposals in areas like climate, energy, and transport, aiming to achieve the EU's targets. By adopting "Fit for 55", the EU and its Member States are committed to reducing greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. The EU plans to introduce new initiatives in the field of renewable energies to achieve these goals. One key concept is the world's first Carbon Border Adjustment Mechanism (CBAM), proposed by the European Commission in 2023. CBAM complements the existing EU Emissions Trading System (EU ETS) launched in 2005, which promotes carbon pricing to drive reductions in global greenhouse gas (GHG) emissions.

Given the cross-border nature of CBAM and its impact on both EU and international law, this article aims to analyze CBAM's legal framework and its intended purpose. It will explore potential consequences for global WTO rules, how Poland approaches the concept, and how the instrument affects commercial activities, like those of banks and importers. Additionally, the article will identify potential challenges associated with CBAM implementation.

The primary scientific objective is to assess the legal framework of CBAM and determine whether it aligns with or contradicts the General Agreement on Tariffs and Trade (GATT).

The article is divided into three main sections. The first section examines the concept of CBAM. The second section focuses on the compatibility of the EU CBAM with the WTO regulations like the GATT. Finally, the third section analyzes CBAM's compliance with Polish requirements, specifically from the banking sector's perspective.

This article employs two research methods: dogmatic-legal analysis and case study.

1 The concept of CBAM

CBAM is a key element of the EU's "Fit for 55" package, introduced to address concerns about carbon leakage and the issue of a lack of uniformity in the coordination of internal policies. It is established by Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a Carbon Border Adjustment Mechanism (Regulation No. 2023). Regulation No. 2023 is binding in its entirety and directly applicable in all Member States and applies from 1 October 2023. However:

- (a) Articles 5, 10, 14, 16 and 17 shall apply from 31 December 2024;
- b) Article 2 (2) and Articles 4, 6–9, 15 and 19, Article 20 (1), (3), (4) and (5), Articles 21–27 and 31 shall apply from 1 January 2026.

Regulation No. 2023 was published in the Official Journal of the European Union on 16 May 2023.

CBAM's reach extends beyond the EU, impacting third countries whose goods enter the EU market. This reflects the EU commitment to combating climate change and encouraging stricter environmental practices globally. According to Article 1 (1) of Regulation No. 2023, CBAM aims to address greenhouse gas emissions embedded in the goods listed in Annex I on their importation into the customs territory of the Union to prevent the risk

of carbon leakage, thereby reducing global carbon emissions and supporting the goals of the Paris Agreement, also by creating incentives for the reduction of emissions by operators in third countries.

The CBAM is a climate policy tool introduced to preserve the integrity of the EU's climate ambition towards the ultimate goal of climate neutrality. In general terms, it functions as a kind of levy on imported products, reflecting the carbon emission costs that would be incurred by installations operating in the EU (Zhang, 2022). Non-EU producers can deduct the cost of CBAM if they have their domestic carbon tax. However, the legal details regarding this deduction are not entirely clear.

From a budgetary perspective, CBAM generates new "own resources" revenue, split 75% for the EU budget and 25% for Member States. It shares similarities with customs duties in two ways: firstly, it's imposed at the border in connection with the introduction of goods into trade, and secondly, the legal form of Regulation mirrors the unitary Customs Code established with Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (Regulation No. 952) which ensures immediate direct application of the rules at the national level (Selicato, 2022). According to K. Holzer, CBAM has features of a tax, but is more complicated and is not a typical carbon tax. Since CBAM is linked emissions trading schemes with a market value, it may not be considered a traditional tax in the strictest sense (Brauch, Arnold, Klonsky, Everard, 2021).

By using this mechanism, the EU intends to achieve three main results:

Firstly, to minimize the risk of emissions leakage outside the EU. This occurs when countries introduce carbon pricing unilaterally, creating a risk that domestic emission reductions are offset by increased emissions abroad from the international migration of production or an expansion of existing production. Countries with less restrictive climate policies become attractive locations for production (carbon heavens), leading to a situation where overall emissions might not decrease (Sheldon, 2011). By charging for the carbon content of imports, the EU effectively fights this effect. The purpose of CBAM is also to complement the EU ETS, a market-based system where importers purchase certificates corresponding to the greenhouse gas (GHG) emissions intensity of the products they import into the EU. These certificates (EU allowances) have a market price and are readily available in pools known to all participants. The EU ETS also allocates a certain amount of free allowances to the most energy-intensive industries to prevent carbon leakage. An official EU list specifies the sectors and subsectors eligible for these free allowances. However, the ceiling on free allowances is being progressively reduced, raising concerns for high-carbon industries that must now pay for these allowances instead of investing in preventative measures (Stoefs, 2022).

Secondly, to ensure a level playing field for goods produced within the EU and those imported from outside. Carbon pricing can disadvantage domestic emissions-intensive industries by raising their production costs compared to foreign competitors. CBAM aims to rectify this issue by ensuring imported goods are subject to the same carbon costs as those produced in the EU.

Thirdly, to contribute to strengthening the international credibility of carbon pricing scheme. As M. Keen, I. Parry, and J. Roal (2021) point out, a direct fiscal incentive exists for non-BCA countries (those without CBAM) as they effectively lose revenue on exports collected by the importing BCA countries. Indirectly, BCAs can also help to encourage the international credibility of carbon pricing schemes (Keen, Parry, Roaf, 2021).

CBAM introduces a tax on specific categories of goods imported into the EU, primarily from high-emission industries. This tax burden is calculated based on the amount of greenhouse gas emissions generated during the production of the good. According to point 32 of Regulation No. 2023, six product categories are currently identified in the Combined Nomenclature (CN): iron and steel, aluminum, fertilizers, cement, electricity, and hydrogen. Ultimately, the European Commission envisions the possibility of expanding CBAM to encompass all imports of goods.

The CBAM update process takes time, which may reduce its effectiveness. Its implementation is divided into two stages. This is regulated by point 1 of the Commission Implementing Regulation (EU) 2023/1773 of 17 August 2023 laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the Carbon Border Adjustment Mechanism during the transitional period (the Commission Implementing Regulation 2023), which includes the methodology for

determining emissions embedded in imported goods for the CBAM transition period, as well as the guidelines for importers and foreign operators of production installations issued at the same time.

The first stage is related to the transitional period as Regulation No. 2023 allows, under certain conditions, the temporary use of simplified methods. Embedded emissions in imported goods include both direct emissions and indirect emissions resulting from the production of electricity used in the production process. These obligations for importers related to CBAM enter into force on October 1, 2023, and until December 31, 2025, they will mainly concern determining emissions 'embedded' in imported products and submitting quarterly CBAM reports. This period is a kind of 'learning and recognition' period of the challenges associated with this new regulatory obligation. Entrepreneurs importing goods covered by CBAM from third countries to the EU will be obliged to submit periodic reports to the European Commission, which will need to demonstrate, among others: the quantity of CBAM-covered goods imported in a given period, the total 'embedded' direct and indirect emissions, and the price payable for the embedded emissions in the country of origin of the goods. However, reporting is not optional, but mandatory, and failure to do so may result in sanctions.

The second stage relates to the time of January 1, 2026, and becomes fully operational in 2034 (European Parliament 2022). Since that period, the import into the EU of certain goods produced in high-emission industries covered by CBAM will involve not only additional obligations and formalities but also additional costs, depending primarily on the emissions "embedded" in the imported goods. To put it simply, it can be concluded that CBAM will impose an additional cost on the import of certain categories of goods. The amount of burden borne by importers will depend on the number of emissions emitted in the production process of imported goods. From January 1, 2026, only entities registered for CBAM as "authorized declarants" will be able to import CBAM-covered products into the EU. They will be obliged to determine the level of emissions "embedded" in the products they import covered by the mechanism. It will also be the responsibility of authorized declarants to purchase and redeem, within appropriate periods, the appropriate number of CBAM certificates corresponding to the previously determined "imported" emissions. A Member State will sell CBAM certificates on a common central platform to authorized CBAM declarants established in that Member State. The price of CBAM certificates is to be linked to the price of ETS certificates. Authorized declarants will also be subject to a few other obligations and formalities, including those related to reporting and record keeping.

2 CBAM and the WTO perspective

For climate protection and the move towards net zero carbon emissions, compliance with all EU and WTO regulations is essential. Clear and consistent norms require countries to trade in a stable and regulated marketplace, as well as cooperate in the field of environmental protection. Although the EU emphasizes that CBAM has been approved following WTO rules, this issue needs to be addressed (European Parliament, 2021).

The aim of the World Trade Organization (WTO) is to create a level playing field for all members through the "substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce" (GATT, 1947). Although WTO countries have considerable autonomy in determining their environmental policy, climate protection must not violate WTO rules. The World Trade Organization (WTO) aims to ensure a fair and level playing field for all its members by reducing trade barriers and eliminating discriminatory treatment in international commerce, as stated in the General Agreement on Tariffs and Trade (GATT) of 1947. While WTO member countries have the autonomy to set their environmental policies in the field of climate protection, they must not violate WTO rules. CBAM which may be seen as an obstacle to market liberalization, must follow the GATT regulations to ensure that it does not hinder free trade WTO.

In 2019, Ursula von der Leyen, as a candidate for the President of the European Commission, announced her intention to introduce a Carbon Border Tax (CBT) to prevent carbon leakage. She said that it would be fully compliant with World Trade Organization rules and would start with selected sectors, gradually expanding over time (Von der Leyen, 2019). However, five months later, the European Commission did not mention the CBT in the European Green Deal but instead introduced the CBAM in Regulation No. 2023. Therefore, it's worth asking what the difference is between CBT and CBAM and what the implications of this distinction are in terms of the WTO.

CBT applies the destination principle as a fiscal measure. It may seem like an indirect tax or a product charge, but it aims to maintain fair competition between domestic and imported goods. CBT is an example of a border tax adjustment that imposes taxes on goods based on their carbon content. It ensures that imports pay for their greenhouse gas emissions and provides rebates for exports. The GATT uses the difference between import and export adjustments to achieve this goal.

The first is stated in Article II.2 (a) of the GATT nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part. The second is established by Ad Article XVI of the GATT which means that the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not over those which have accrued, shall not be deemed to be a subsidy.

It is debated whether a symmetric approach should be used for carbon border taxes, similar to value-added taxes (VATs). Some argue that it is not mandatory, and countries can instead adopt an asymmetric approach, which involves taxing the import of high-emission goods without providing an exemption from export taxation. Import taxes would be charged on emissions from imported goods, while the carbon price on domestic goods would be rebated. However, no carbon border taxes have been implemented yet. (Quick, 2020; Dibble, 2022).

The following text discusses the symmetrical approach towards CBAM and its potential impact on the environment. The approach is considered controversial as it involves exporting goods to global markets without any carbon price attached, which violates environmental protection principles. Additionally, it can be seen as a potential export subsidy, which goes against Article 3 of the WTO Agreement on Subsidies and Countervailing Measures but this is a complex question as there is no WTO jurisprudence in this field (Hufbauer, Charnovitz, Kim, 2009). However, not granting a rebate for export taxation could be justified under Article XI of the GATT. Therefore, it is difficult to determine whether a symmetrical approach is being taken in the concept of CBAM or not. CBAM is neither a typical indirect tax like VAT nor a conventional adjustment mechanism. The starting point for analyzing CBAM should be Article II:2 (a) and Article III:2 of the GATT.

Due to *China—Measures Affecting Imports of Automobile*, it can be distinguished as an import charge constituting an ordinary customs duty which is a levy on importation (Article II: 2 (a)) and a charge imposed on goods that have been already imported (Article III: 2). The right of a WTO Member to impose a customs duty, and the obligation of an importer to pay such a duty, accurately at the very moment the product enters the customs territory of that Member and by the event of importation. However, a charge imposed on goods relates to a determinant that occurs internally (for example the product was re-sold or used within the customs territory) and takes place after the importation from one to another Member State's territory (*China—Measures Affecting Imports of Automobile*). To avoid any doubts, charges levied on import of the high-emissions carbon products should be related to selling, offering for sale, and distributing these products (Trachtman, 2016).

It appears that CBAM should be considered as a charge imposed on goods and analyzed in the context of Article III:2 of the GATT, which pertains to the National Treatment principle. This principle requires that the charge must be directly or indirectly related to the products and should not be subject to internal taxes or other internal charges that are more than those applied to domestic products. Additionally, no contracting party shall apply internal taxes or other internal charges to domestic or imported products in a manner that contradicts the principles outlined in paragraph 1. As per Keen, Parry, and Roaf, carbon adjustment is deemed to comply with the GATT when it is aimed at a product (Keen, Parry, Roaf, 2021) or relates to the industrial processes when energy is consumed (known as a hidden tax). However, if CBAM potentially differentiates products based on process and production methods (PPM), it may not fulfill the requirements of Article III:2, as per Zhang (2022).

It is worth noting that CBAM may violate the National Treatment principle because the levy, which is based on the emissions of carbon content, is only applied to imported goods and not to domestically produced ones. However, it is not clear whether imported goods are similar to domestically produced ones. According to the WTO, there are four criteria to determine the similarity of products. These include physical properties, the extent to which the products serve the same purpose, how consumers perceive them, and the international classification used for tariff purposes (Dibble, 2022). It seems that the first criterion would suggest that they are not similar, as there are different compositions of carbon. However, there is uncertainty as to how the Panel and the Appellate Body would interpret this case study. Additionally, even if the products are not similar but are directly competitive or substitutable, they are still covered by the National Treatment principle. In that case, Article III.2 applies, as these products, produced with varying levels of carbon intensity, can be used by consumers interchangeably.

The question at hand is whether the CBAM aligns with Article I:1 of the GATT (General Most-Favoured-Nation principle - MFN principle). This principle states that customs duties and charges, as well as the method of levying them, and all rules and formalities related to any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country, should be immediately and unconditionally accorded to the like product originating in or destined for the territories of all other contracting

parties. The MFN principle is a fundamental aspect of the GATT, which aims to ensure equal competition conditions for similar goods imported from all WTO countries, regardless of the conditions prevailing in those countries.

It appears that the CBAM concept may breach Article I:1 of the GATT because it links the tax burden to environmental protection policies. Under the CBAM, third countries that have existing carbon pricing systems linked to the EU ETS with a comparable scope may apply for an exemption, while other WTO countries that lack restrictive regulations will have to pay higher tariff rates. This creates a situation where certain goods are favored by the CBAM depending on their place of origin, which results in *de jure* discrimination. To ensure compliance of the CBAM with the MFN principle, it should be applied equally to all WTO members without any differentiation based on origin, except for the least developed countries and small island developing states (Durán, 2023).

Even if it is found to be in breach of the General Agreement on Tariffs and Trade (GATT) and is discriminatory in nature, it may still be justified under the general exceptions of the GATT. The chapeau, or introductory clause, of Article XX, states that measures that fulfill the terms of Article XX(a)-(j) "should not be applied in a way that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."

Under Article XX (b) of the GATT, it is permissible to introduce a measure that is necessary to protect human, animal, or plant life or health. Further, due to Article XX (g) of the GATT which relates to the conservation of exhaustible natural resources, if such measures are taken, they will be effective when combined with restrictions on domestic production or consumption. CBAM is a type of such regulation because its purpose is to limit carbon leakage to protect the environment. It is challenging to justify a specific measure as only a few have been endorsed on this basis (Keen, Parry, Roaf, 2021).

The only requirement is that CBAM cannot be applied in a way that would create "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". To meet the chapeau requirements, the EU will need to demonstrate that the CBAM is designed and applied in an even-handed manner, without arbitrary or unjustifiable discrimination between countries where the "same conditions prevail." (Sasmal, Zhang, Lydgate, and Winters, 2023). Therefore, the EU should actively engage with trading partners, for example through the "International Carbon Club", to ensure that assessments of the comparability of carbon pricing regimes are carried out in a transparent and non-discriminatory manner. This may help defend CBAM under the chapeau (Durán, 2023).

3 CBAM and the Polish perspective

According to Article 11(1) of Regulation No. 2023, each Member State designates a body to handle the functions and obligations arising from this Regulation and notifies the Commission thereof. In Poland, this designated body is the National Center for Emission Balancing and Management (Krajowy Ośrodek Bilansowania i Zarządzania Emisjami (KOBiZE)). KOBiZE's primary function is to administering the EU ETS in Poland, including maintaining the Polish section of the EU emission allowance registry. They also manage a national database collecting data on greenhouse gas and other substances emissions. This continually evolving tool offers information on emission sources, including the location and operating parameters of individual installations. As a result, it provides accurate data based on annual reports submitted by entities.

Fulfilling international and national reporting obligations, KOBiZE also prepares annual national inventories of such emissions. Additionally, they create analyses, reports, and summaries for use by central and local government bodies and interested entities. Notably, KOBiZE develops product indicators reflecting the emission intensity of individual pollutants per unit of electricity production. These indicators can be used to calculate emission reductions or assess an installation's emissions compared to the national average. Typically, these indicators are used to evaluate the situation in the year following the reporting year they reference (KOBiZE, 2023).

Since CBAM is a pioneering solution for both the EU and the world stage, it's worth considering its potential impact on Polish banks and entrepreneurs (importers). Though institutions of public trust playing a vital role in the market economy, banks are not directly impacted by CBAM as they themselves are not importers of the listed products. However, they should be aware of this new regulatory requirement for Polish entrepreneurs and consider it within their customer ESG risk analysis, particularly the transition risk associated with regulatory changes. Additionally, banks should factor in a client's CBAM situation during both relationship initiation and ongoing cooperation, such as the creditworthiness assessment process. For instance, a company's mismanagement of acquiring and redeeming CBAM certificates could lead to liquidity issues and consequently, increased credit risk for the bank.

CBAM also presents an opportunity for Polish banks to engage in lending activities related to production line or supply chain modernization aimed at reducing emissions and lowering the carbon footprint. The rising costs of importing "high-emission" products may incentivize companies to invest in local production, potentially contributing positively to the EU's economic growth. Banks can play a significant role here by developing dedicated loan products or offering preferential financing conditions.

An additional observation is the significant shift in consumer awareness regarding environmental sustainability. Consumers are increasingly willing to pay a premium for products with a lower carbon footprint compared to their less sustainable alternatives. This trend presents opportunities for enterprises, including opening new markets by attracting environmentally conscious consumers and launching new distribution channels. For banks, this changing consumer behavior may necessitate a shift in their business approach. Banks can capitalize on this trend by tailoring their offerings towards enterprises seeking to reduce their carbon footprint and minimize their environmental impact.

The situation is dynamic, and companies with strong financial positions today could face challenges in the future. They may be forced to undergo significant restructuring of their supply chains or business models to adapt to the changing market landscape. Banks, therefore, must be responsive and flexible to navigate their clients' evolving situations. Considering these factors, it's clear that CBAM, while not directly impacting banks, has a significant indirect effect on banking activities in Poland.

Polish entrepreneurs (importers), particularly those in the micro and SME segments, face several challenges related to CBAM. Following the introduction of Regulation No. 2023, they will be obligated to: conduct a qualitative analysis and quantitative assessment of CBAM's impact on their business activities and supply chains, implement the process of collecting reportable information, calculate both the total amount of direct emissions and indirect emissions associated with their imports, using the methods specified in the Regulations, prepare quarterly reports detailing the emissions associated with their imported goods, prepare annual declarations and calculate the number of CBAM certificates required for purchase, monitor the minimum number of certificates held and ensure their timely redemption.

Currently, most Polish importers are familiarizing themselves with the upcoming regulations and building their knowledge and competencies on the issue. A crucial step in this initial phase is exposure analysis. This involves verifying the CN classification, origin, and customs value of their imported goods. It's also advisable to assess the impact on their existing and planned product portfolio, supply chain, and organization. Only then can they effectively gauge the impact on their business, accurately estimate the associated costs, and implement appropriate solutions.

A key challenge at this early stage of CBAM implementation is collecting reliable and complete emissions data from suppliers. Once this hurdle is cleared, importers can begin accumulating necessary paperwork, performing accurate emission calculations, and generating compliant reports. Polish importers already grapple with challenges related to correctly classifying imported goods under the CN system. CBAM adds another layer of complexity to this process.

The EU introduced CBAM as a regulation, meaning it becomes automatically applicable upon entering into force without requiring national-level implementation. According to Article 191 of the Treaty on the Functioning of the European Union (TFEU, 2012), environmental measures typically require a majority vote. While Poland, along with Belgium and Bulgaria, abstained or voted against the adoption of Regulation No. 2023, it was ultimately adopted by a qualified majority. On August 8, 2023, Poland brought action against the European Parliament and Council of the European Union (Case C-512/23). According to the Polish government, CBAM - through costs related to ensuring compliance with the law, emission calculation, and acquiring certificates - will translate into an increase in the costs of imported products: cement, fertilizers, steel, aluminum, and electricity. However, the formal reason for the challenge is the position of the Polish government that the provisions of the contested regulation establish a new public charge and set out all the conditions for its collection. Regulation No. 2023 is primarily fiscal (more broadly on the concept of fiscal - Tetlak, 2023), and according to Article 113 of the TFEU it must be approved unanimously and not - as was the case (with the opposition of Poland, Bulgaria, and Belgium abstaining from voting) - by a majority of votes. If the CJEU upholds the challenge, Regulation No. 2023 may be repealed partially or entirely. However, the legal process could take years, and the Regulation remains in effect in the meantime.

The initial experiences of Polish companies affected by the new obligations (trade in steel, aluminum, fertilizers, etc.) highlight two significant reporting challenges. The first concerns glitches in the new IT system, which are likely temporary and should be resolved quickly. The second, and more significant, challenge is the reluctance of suppliers (often from Asia and Africa) to provide the information necessary for accurate reporting. These suppliers may not perform such calculations themselves or be unwilling to share them. This presents a major hurdle for Polish companies. While there's a chance supplier behavior may gradually change, it's unlikely to happen within the timeframe dictated by EU regulations. Therefore, a collaborative effort is needed to address this challenge and potentially adjust adaptation deadlines.

Recognizing the complexities of achieving consensus on indirect taxation matters, the European Commission issued a communication in 2019 questioning the potential shift from a unanimous vote to a qualified majority vote in tax matters (Communication, 2019). While discussions on this topic are ongoing within the EU, such a change is unlikely as it would require the consent of all Member States.

Conclusion

Climate change is a cross-border problem that cannot be solved by action at a national or local level. The World Trade Organization (WTO), of which both the EU and its Member States are members, emphasizes compatibility among member states' legal regulations. For the first time in the world, the EU has taken steps to reduce CO2 emissions on a global scale which is crucial for fighting climate change. The idea is worth emphasizing but it needs to be highlighted that there is a long transitional period, CBAM is going to become fully operational in 2034, which will affect its effectiveness. The concept of CBAM is unique and its complexity relates to details. The legal status of the measure has been the subject of discussion since its introduction. This is because:

1. At the EU level, this measure mirrors the issue of customs duty and may be considered as an environmental/energetic or fiscal measure. CBAM aims to limit carbon leakage and protect the environment. Taking into consideration, ordinary legislative procedure with a simple majority is required. However, CBAM levies a burden that may be considered mainly of a fiscal nature and meets environmental and energy goals. In that case, a consensus agreement of the Member States is needed. A key point of contention is that CBAM's revenue will be added to the EU's own resources budget. The fact that three countries (Poland, Belgium, and Bulgaria) voted against Regulation No. 2023 indicates the significant challenge of achieving consensus among all 27 Member States.

2. CBAM presents legal complexities at the WTO level due to the lack of established precedent. As a novel global issue in the environmental/energy field, there are no relevant WTO case studies to serve as a reference point. Debate surrounds the legal basis of CBAM: is it a charge levied on goods themselves, or does it pertain to industrial processes where energy is consumed? This legal ambiguity has implications for interpreting WTO regulations. Analysis suggests a high probability that CBAM could be found to violate the GATT National Treatment and Most-Favored-Nation principles. However, Article XX of the GATT offers a potential justification, allowing for exceptions under specific circumstances.

3. In Poland, KOBiZE, operating within the structure of the Institute of Environmental Protection - National Research Institute in Warsaw, is responsible for implementing CBAM. While CBAM's impact on the Polish banking sector is currently indirect, it's still too early to definitively assess its full impact given the extended implementation timeline. Banks, as active participants in the economic process responsive to market changes, should be aware of the new regulatory obligations imposed on Polish importers of goods listed in Regulation No. 2023. This awareness can be integrated into their client interactions by analyzing a client's ESG risk, including transition risk related to regulatory changes, or by factoring it into creditworthiness assessments. Furthermore, CBAM's implementation may necessitate banks to adapt their business approach by developing services catered towards enterprises seeking to reduce their carbon footprint.

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