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C H A N C E



**10 QUESTIONS ON THE EU CARBON
BORDER ADJUSTMENT MECHANISM**

10 QUESTIONS ON THE EU CARBON BORDER ADJUSTMENT MECHANISM

The EU has adopted a Regulation establishing a Carbon Border Adjustment Mechanism (CBAM) to deal with the long-standing problem of ‘carbon leakage’ that impedes the EU’s decarbonisation plans. It is part of the Commission’s ‘Fit for 55’ initiative published in July 2021 that will help towards achieving the EU’s target for a 55% reduction in greenhouse gas (GHG) emissions by 2030 (against 1990 levels). Here we answer 10 key questions about the new Regulation.

1. What is the purpose of the EU Carbon Border Adjustment Mechanism?

For many years the EU has struggled with perceived ‘carbon leakage’, a problem that occurs when EU producers heavily regulated by schemes such as the EU Emissions Trading System (EU ETS) cannot compete with cheaper, more carbon-intensive goods manufactured outside the EU. This creates a risk that EU producers may relocate production to areas outside of the EU where carbon pricing measures are less stringent, or that customers may substitute EU products with cheaper (and more carbon-intensive) imports. Carbon leakage therefore not only affects the competitiveness of EU business, but also shifts global carbon emissions outside the EU, potentially impacting global efforts to reduce carbon emissions and the likelihood that Paris Agreement targets can be achieved.

The EU has sought to address this problem in the past in different ways, e.g. by granting free allocations of allowances to the best-performing EU producers under the EU ETS, and allowing some carbon-intensive industries to be compensated for the indirect carbon costs embedded in energy prices that they pay. However, these measures have been criticised as creating insufficient incentives for EU producers to decarbonise production of their products.

The CBAM seeks to prevent carbon leakage by imposing an emissions-based levy on imports of certain products, thereby aiming to maintain the competitiveness of EU production in carbon-intensive sectors, and potentially allowing free allocation of ETS allowances to cease. It is being imposed unilaterally by the EU, requiring companies seeking to access the EU market to pay the carbon cost associated with production in countries with less ambitious climate policies and, in theory, incentivising the decarbonisation of production processes.

Key issues

- The EU has adopted a Regulation establishing a carbon border adjustment mechanism which will impose a carbon price on imports of certain goods to prevent carbon leakage
- This briefing looks at 10 key questions on the CBAM:
 1. What is the purpose of the EU Carbon Border Adjustment Mechanism?
 2. What is the CBAM and which imports does it cover?
 3. How will the CBAM operate?
 4. How will emissions for individual goods be calculated?
 5. Will there be a phase-in period?
 6. How will the CBAM be enforced? In what circumstances might importers avoid being caught by the CBAM?
 7. How do other jurisdictions plan to respond? Are other CBAMs planned?
 8. What are the WTO implications of the Regulation?
 9. What are the next steps and timeline?
 10. What should businesses be doing to prepare?

Changes since the 2021 proposal

Various changes have been made to the CBAM since the original 2021 European Commission proposal. Key changes include:

- Inclusion of **hydrogen** within the scope of the CBAM
- Extension of the CBAM to **indirect** embedded emissions (with some exceptions)
- Requirement to apply for authorisation as an Authorised CBAM Declarant **brought forward to 31 December 2024**
- Reporting obligations in some form will continue **throughout the life of the scheme** (not just during the transitional period), reporting is **to the Commission**, and will start **from 1 October 2023**
- Creation of a **central CBAM registry** run by the European Commission

2. What is the CBAM and which imports does it cover?

The European Commission consulted on various options for a CBAM in 2020, including a carbon tax at the border on imports or at consumption level, or an extension of the EU ETS to importers. However, the final option, and the one ultimately adopted by the EU, was an obligation for importers to purchase carbon allowances from a separate pool with prices linked to the EU ETS, which was felt to be more effective at preventing carbon leakage than other options.

The CBAM will apply to imports into the EU of various specific goods, some precursors and some downstream products, within the following broad categories: cement, electricity, fertilisers, iron, steel, aluminium and hydrogen, as well as processed products from those goods brought into the EU for processing under the EU's inward processing procedure (Relevant Goods). This is a narrowed down list compared with the list of producers benefiting from existing carbon measures (including free allowances and compensation for energy costs), and represents the industries where there is the highest level of embedded carbon in the upstream part of the value chain, and thus the greatest

chance of carbon leakage. However, the intention is for the CBAM to evolve over time to cover a wider range of goods, and to include all of the sectors covered by the EU ETS by 2030.

In broad terms, importers of Relevant Goods would be required to purchase *CBAM Certificates* representing a calculated carbon price for the embedded carbon emissions in those goods, except to the extent they can demonstrate that a carbon price has already been paid (see further Question 7). For most goods (except electricity), embedded emissions include both direct emissions released, and indirect emissions from electricity consumed, during the production process of the goods and upstream products. However, indirect emissions are not included, at least initially, for a sub-set of products which already benefit from financial compensation for the costs of indirect emissions factored into electricity prices – comprising iron, steel, aluminium and hydrogen. This is due to the current uncertainty about how to build those costs into the mechanism, given how electricity prices are set in the EU. Indirect emissions for these products may be included in the future, dependent on further analysis, allowing the indirect compensation mechanism to be removed.

3. How will the CBAM operate?

Importers, or their representatives, declaring Relevant Goods at EU customs, will have to be authorised (Authorised CBAM Declarants) by the competent member state authority (National Authority) where the customs declaration is lodged. National Authorities will register Authorised CBAM Declarants in a central EU CBAM registry.

By 31 May each year, Authorised CBAM Declarants will need to submit a CBAM declaration to the National Authority specifying:

- the amount of GHG emissions embedded in Relevant Goods they imported during the last calendar year;
- the number of CBAM Certificates required to cover those emissions being surrendered (one certificate equates to 1T CO₂ equivalent of embedded emissions); and
- verification information (see Question 5).

A reporting obligation will also apply. This will begin on a quarterly basis during the transitional phase, but the obligation may be refined for the enduring CBAM (see Question 5).

Authorised CBAM Declarants would also need to surrender the relevant number of CBAM Certificates to cover relevant emissions by that date. They would purchase CBAM Certificates directly from the National Authority in which they are established, through a central platform to be established by the Commission. They must ensure that, by each quarter date, they have purchased at least 80% of their CBAM Certificate requirement for the calendar year so far. The National Authority would sell each CBAM Certificate for a price equating to the average EU ETS allowance auction price in the week before the sale. Where Authorised CBAM Declarants buy too many allowances, they will be able to seek a refund of up to one third of their allowances purchased in the previous calendar year. CBAM Certificates would be held on the central platform, with information on sales, repurchases and cancellations contained in the EU CBAM registry.

Significantly, and in contrast to the EU ETS, CBAM Certificates cannot be traded between importers, or on a wider trading market. Any allowances which are not refunded could be banked over to use in the following scheme year but would be cancelled thereafter if not used or refunded at that point. This is intended to ensure that importers pay a set carbon price, rather than be able to pay a lower price through trading. It remains to be seen whether, in the future, the CBAM could be linked more closely to the EU ETS.

Changes recently made to the EU ETS confirm that free allocation of allowances to EU operators in sectors covering Relevant Goods would continue in full during the transitional period (see Question 5) and would reduce on a trajectory which accelerates each year

from 2026 (when the full CBAM comes into force) to 2034, when no further free allocations would apply. However, the number of CBAM Certificates required to be surrendered would be reduced to reflect the level of free allocations granted in respect of the same kind of goods. This will help alleviate some of the risk of potential WTO inconsistency (see further Question 8).

Importers would need to demonstrate financial solvency and be free from serious customs, tax, market abuse and CBAM breaches, or serious criminal breaches, in the last five years. Financial security for CBAM Certificate liability may also be required in certain cases.

4. How will emissions for individual goods be calculated?

For physical goods, direct emissions would be calculated by the importer but the Commission would set default values for each of the products, to be used in cases where such calculation was not done, or not done properly.

For imported electricity, and indirect emissions from production of goods, for which embedded emissions may be more complicated to calculate, default values would be used unless the importer provided its own calculations based on a methodology which complies with prescribed criteria.

While the Regulation sets out broad parameters for calculating embedded emissions, much of the detail will be contained in delegated legislation. Key questions are likely to arise over matters such as how to set the 'system boundaries' for processes and whether offsets can be credited against emissions. Some of these issues are already being

considered for the transitional phase (see further Question 9).

Notably, default values for physical goods will be set at the average of the X% of worst-performing EU sites for the relevant processes (although the value of X has been left to delegated legislation). For electricity, it would generally be established using the average CO₂ equivalent emission factor in the relevant country or region where it was produced or, in the absence of such, using the EU CO₂ emission factor. For indirect emissions, the principal methodology remains to be determined by delegated legislation, but it will be an emissions factor deriving from the EU, the electricity grid of the country of origin of the product, or of the country where the electricity was produced.

Use of default values is likely to be disadvantageous for goods produced in highly efficient production process chains in third countries, while they might be favourable for goods produced in the most CO₂-intensive processes. It is possible that the Commission may come under pressure to set the default levels at even lower, more polluting, levels for reasons of fairness.

Many efficient third country manufacturers are likely to want embedded emissions in their products to be based on actual emission levels and it is clear that the process to achieve this could be burdensome. In particular, declared embedded emissions would need to be verified by an independent accredited verifier. For this reason, the Regulation allows manufacturers of goods in third countries to apply to be registered by the Commission and to have verified embedded emissions calculations confirmed for those goods.

5. Will there be a phase-in period?

The full CBAM will come into force on 1 January 2026. From 1 October 2023, transitional provisions will impose a simple reporting obligation on importers when they import Relevant Goods. Under this obligation, importers (or their representatives) will need to report quarterly to the Commission on the total volumes of Relevant Goods imported, associated embedded emissions and any carbon price paid in the country of origin. The first quarterly report must be submitted by 31 January 2024.

This light reporting regime is being imposed initially to alleviate the burden on importers and also to prevent major disruptions in trade. Significantly, and unlike the full CBAM, indirect embedded emissions must be reported during the transitional period for all imported goods, but no verification of emissions is required during this period. On 13 June 2023, the European Commission launched a call for evidence on the proposed draft implementation regulation setting out the detailed reporting requirements (see further Question 9).

Given the urgency of industrial decarbonisation, many will be disappointed that substantive new carbon leakage measures under the CBAM will not come into force until 2026.

Applications for authorisation must be made before the first import of Relevant Goods into the EU after 31 December 2024 (and authorisation must be obtained before the first import in 2026 or later). Registration of third country manufacturers will also be possible from the same date (see Question 5).

6. How will the CBAM be enforced? In what circumstances might importers avoid being caught by the CBAM?

National Authorities will enforce the CBAM. Where an Authorised CBAM Declarant fails to surrender sufficient CBAM Certificates by the deadline, it faces penalties of EUR 100 for each CBAM Certificate not surrendered (equivalent to EU ETS penalties), in addition to having to satisfy the initial obligation. Penalties will also apply for failure to seek authorisation as an Authorised CBAM Declarant before making relevant imports.

Where embedded emissions relating to a Relevant Good have already been subject to a carbon price in a third country, through a tax or emissions trading system, an Authorised CBAM Declarant may claim a discount on liability to surrender CBAM Certificates. Any rebates or compensation available that would effectively reduce the carbon price paid would be taken into account.

Electricity from countries with markets integrated with the EU will be exempt from the CBAM where it is not technically possible to apply the CBAM, provided certain conditions on electricity market rules and climate action are complied with. Countries participating in the EU ETS (Norway, Iceland, Liechtenstein), are exempt from the CBAM, as is Switzerland, whose emissions trading system is linked to the EU ETS. The EU may conclude individual sectoral agreements with third countries to take account of further carbon pricing mechanisms in such countries. An obvious contender for such an agreement would be the UK Emissions Trading

Scheme, which is based on the EU ETS and largely comparable to it. It is likely to be more challenging to agree a position for other types of carbon pricing mechanism where the carbon pricing methodology might be different or more opaque, e.g. in relation to some other carbon-related taxes / levies. The impact of other non-price related policies and regulations may also prove problematic. This area will be ripe for disputes.

It is possible that some importers may change their products specifically to seek to avoid the CBAM. However, where the Commission feels that the CBAM is being circumvented, e.g. by changes to products or patterns of trade with insufficient due cause or economic justification, the Commission will investigate and may extend obligations to 'slightly modified products'. An example might include a switch to a new shaped aluminium product different from the bars, rods, profile, wire, plates, tubes, pipes, etc. that are covered in the Regulation.

7. How do other jurisdictions plan to respond? Are other CBAMs planned?

Given the global impact of a unilaterally-imposed CBAM, it is not surprising that it has given rise to significant controversy. The prospect of the CBAM has encouraged some countries, such as Bosnia and Herzegovina and Turkey, to enhance their decarbonisation efforts. However, the Regulation does not contain exemptions or discounts from the CBAM for developing countries and this is proving contentious. BASIC Countries (Brazil, South Africa, China and India) have officially criticised the CBAM as discriminatory, issuing a statement at COP27 in November 2022 noting

“Unilateral measures and discriminatory practices, such as carbon border taxes, that could result in market distortion and aggravate the trust deficit amongst Parties, must be avoided” (see further Question 8 in relation to the WTO). Broader concerns have been raised that imposing a uniform EU carbon price on developing country exporters may result in significant economic impacts in those countries, in particular those with lower income levels, an issue the Commission will be reviewing following implementation of the CBAM.

Discussion of the CBAM has so far been largely absent from international climate meetings despite calls for global discussions around trade impacts of carbon reduction initiatives. Various separate initiatives have been explored for broader climate clubs of international countries. The US Government and the EU are working on a sectoral Global Arrangement on Sustainable Steel and Aluminium (GASSA). GASSA would impose tiered levels of tariffs on imports of steel and aluminium dependent on the carbon-intensity of the products, as a solution enabling their respective tariffs to be lifted between them. This framework would be opened up to other like-minded countries. The G7 group of companies is also working on a climate club aimed at hard-to-abate industrial sectors, although it is not clear whether early ambitions for agreement on carbon pricing will be progressed.

IMF staff papers in 2021 and 2022 explored a proposal for an international carbon price floor, which it suggested would obviate the need for CBAM measures, but would impose varying levels of carbon costs dependent on the level of development in those countries. In September 2021, the OECD and the IMF issued a joint paper directed to G20

Finance Ministers recognising the value of carbon pricing but criticising carbon border adjustments as having limited effectiveness for scaling up global carbon mitigation. An emerging theme, raised in the report and elsewhere, is the suggestion that carbon pricing revenues should be ploughed into developing country carbon reduction investment, something the CBAM will not do. COP28 is expected to look at carbon pricing and trade in more detail.

In some Canadian provinces, there are limited CBAM-type measures applicable to certain imports of electricity – though the regimes are significantly more limited than the EU’s CBAM and apply only at a subnational level. Canada consulted on possibilities for a Canadian CBAM in 2021, but so far this does not seem to have been taken further.

In the US, the Fair, Affordable, Innovative and Resilient Transition and Competition Act (FTCA) was introduced to Congress in July 2021 and contained a proposal for a ‘border carbon adjustment’ on the importation of certain carbon-intensive products, e.g. cement, steel, aluminium, and fossil fuels. Unlike the EU CBAM, this measure would not be complemented by a US-wide emissions trading scheme and, as such, would only protect the US against cheap, carbon-intensive imports. The Act would need bipartisan support to become law, has been substantially delayed, and seems unlikely to become law. The US is instead prioritising incentives for green investments through the Inflation Reduction Act, and sectoral arrangements such as GASSA in relation to carbon-intensive imports. However, we must expect that there will be a further US reaction and likely countermeasures to the EU CBAM.

In March 2023, the UK Government consulted on a number of measures to deal with carbon leakage and is considering implementation of a CBAM. The intention would be to include those product sectors at risk of carbon leakage that already feature in the UK Emissions Trading Scheme. Similarly to the EU CBAM, the UK CBAM would seek to build in both direct and indirect emissions. It would also incorporate a carbon allowance price linked to the UK ETS, and CBAM costs charged at the border would be reduced to factor in the benefits to UK operators of obtaining free allowances and other compensation for indirect UK ETS costs. Unlike the EU, however, the UK has, so far, not committed to reducing and removing free allocations to industry in the future, only to reviewing the position in 2026 (before which time the current support would be retained). See further Question 7 in relation to the UK’s Emissions Trading Scheme.

8. What are the WTO implications of the Regulation?

While proposals for carbon border adjustments are not new, to date no country has applied such a mechanism to international trade and the WTO-consistency of such measures therefore remains untested.

The EU’s CBAM has the potential to engage several core WTO obligations, including the National Treatment and Most-Favoured Nation provisions of the GATT 1994. In general, these obligations require that a CBAM must not have the effect of according less favourable treatment to imported products than ‘like’ domestic products; or to discriminate between ‘like’ products originating from different countries. Given that past WTO decisions have found products to be ‘like’

based on their competitive economic relationship in the marketplace, there are good arguments that domestic and imported products affected by the CBAM would be found to be 'like' irrespective of their carbon footprint.

However, even if the CBAM were determined to be *prima facie* inconsistent with an obligation under the GATT, it may still be justifiable under Article XX of the GATT. Article XX contains several public policy exceptions, which provide some further flexibility for the EU to implement the CBAM. However, the invocation of such exceptions requires certain non-discrimination conditions to be satisfied.

In this context, the consistency of the CBAM with WTO obligations under the GATT 1994 will be influenced by the extent to which it results in: (a) EU producers being treated less favourably than non-EU producers; or (b) producers from certain third countries being treated more favourably than those from other third countries (e.g. through the application of CBAM exemptions, or the methodology for calculating carbon prices paid in third countries). To the extent that such discrimination exists, the EU would need to be able to demonstrate that such discrimination is justifiable having regard to the relevant public policy objectives under Article XX.

In addition, if the CBAM were expanded to cover exports from the EU (e.g. by rebating the cost of compliance with the EU ETS in relation to goods exported to third countries), this would pose additional risks under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

The EU has made a number of design choices in the CBAM regulation that are designed to minimise the extent to which

the CBAM discriminates against imported products, and thus mitigate the risk of a successful WTO challenge. For example, by aiming to achieve broad consistency in the EU ETS price and the CBAM price, limiting the scope for country-exceptions, phasing out free allowances to EU producers in tandem with phasing in CBAM obligations, etc. and not including exports within the scope of the regime (at least initially).

However, there remain open questions as to whether the CBAM would withstand WTO challenge. For example, while the CBAM is broadly designed to approximate the price effects of the EU ETS, there will (by design) be circumstances in which importers pay different prices for CBAM Certificates from the price paid by domestic producers under the ETS. Similarly, as explained in Question 6 above, there are very difficult methodological issues in determining the extent to which producers are subject to direct or indirect pricing of emissions in non-EU countries, and this could pose a risk that products imported from certain countries are subject to a higher effective carbon price than the EU ETS. Moreover, the additional administrative burden imposed on importers subject to the CBAM could – depending on its implementation – itself pose a risk of WTO inconsistency.

Against this complex legal backdrop, and the inherent challenges in accounting for the different approaches taken by countries to price (and otherwise reduce) emissions, questions around WTO-consistency will continue to be raised and there remains a real possibility that the CBAM will, at some point, be challenged through WTO dispute settlement.

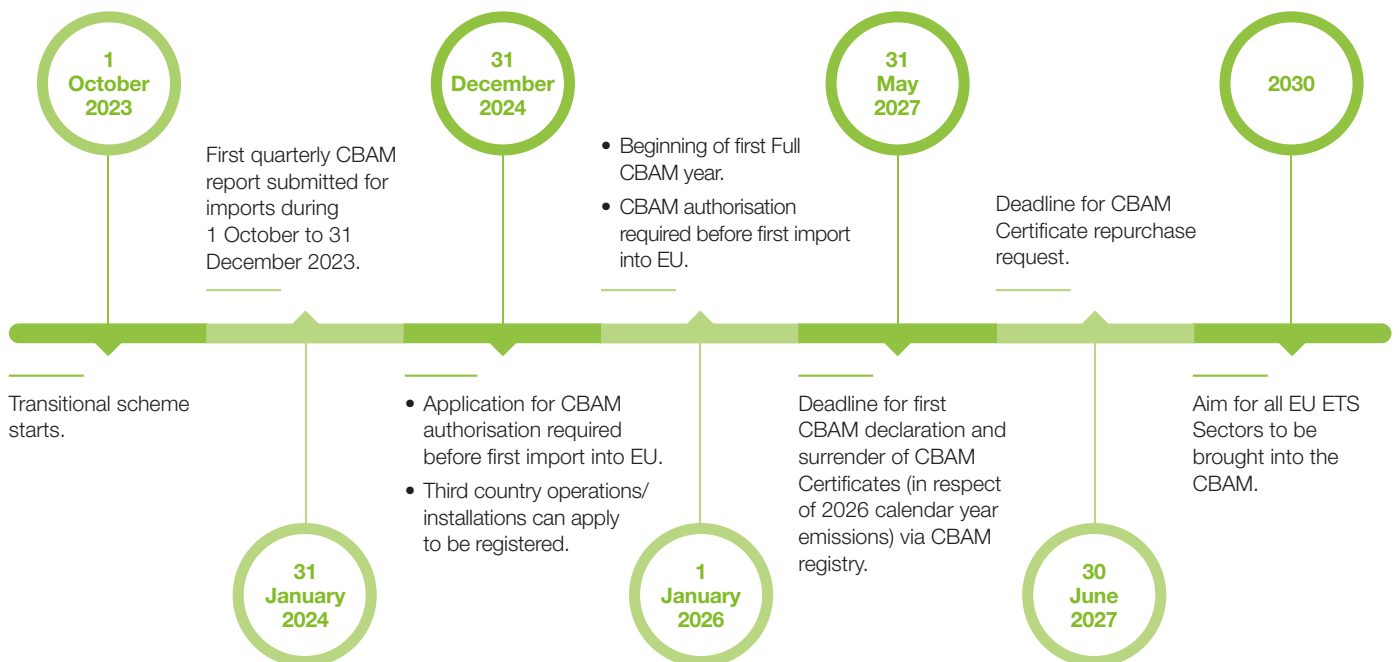
In this regard, China and India have both raised the issue of CBAM in March and June meetings of the WTO Committee on Trade and Environment – with China proposing “dedicated multilateral discussions” on the trade aspects and implications of certain environmental measures (including CBAM) and India presenting a confidential paper to WTO members on “*concerns on emerging trend of using environmental measures as protectionist non-tariff measures*”. In the face of a potential showdown over the CBAM and similar measures, WTO Director-General Ngozi Okonjo-Iweala has also stepped up calls for the WTO to be involved in international carbon-pricing discussions – though the appetite for such discussions in the WTO is unclear and any such discussions are likely to be fraught with challenges.

In parallel with formal multilateral discussions, a wide spectrum of WTO members are closely monitoring the evolution of the CBAM and its impact on exporters. South Korea, for example, has established an EU Trade Issues Task Force that is specifically tasked with responding to the CBAM (among other EU proposals), and other countries will be working closely with both the EU and their domestic industries to seek to minimise the CBAM's impact.

9. What are the next steps and timeline?

The CBAM has been adopted in the form of an EU Regulation (EU/2023/956) meaning that it will be directly applicable as soon as it came into force on 17 May 2023, rather than being dependent on individual states bringing it into force.

The following key timeline then applies:



In the meantime, a considerable amount of detail needs to be worked up on a number of aspects of the CBAM, and this will be provided through Commission delegated legislation. This is likely to cover, among other areas:

- Details of applications and procedures for CBAM authorisation.
- Information required and procedure for CBAM declarations.
- Application of the methods for calculating direct and indirect embedded emissions, including system boundaries, emissions factors, default values (and when they must be used), carbon prices paid in third countries, adjustments due to free allocation of EU allowances.
- Verification of embedded emissions.
- How the CBAM registry will work.
- Procedures for sale and repurchase of CBAM Certificates.

On 13 June 2023, the European Commission launched a call for evidence on the proposed draft implementation regulation setting out methodologies for calculating emissions data, system boundaries, embedded emissions, carbon prices paid and on the detailed reporting requirements for the transitional phase. Responses must be received before 11 July 2023.

In addition, given uncertainty as to how the CBAM will operate in practice, the Commission will be conducting regular reporting on various aspects of the scheme which may lead to further amendments to the CBAM Regulation, including:

- A report by the end of 2024 on whether to extend the CBAM to products further down the value chain of those products already included.
- A report by the end of 2025 on whether to include additional products within the CBAM, or to extend coverage of indirect embedded emissions to those products that are initially covered only in respect of direct emissions (see Question 3).
- Reports every two years from 2028 on the effectiveness of the CBAM, the impact on carbon leakage, commodity prices and international trade, and practices of circumvention of the Regulation.

10. What should businesses be doing to prepare?

The CBAM is clearly likely to impose significant burdens on many businesses outside the EU (and potentially inside the EU for re-imports), both in terms of cost and administration. In addition to understanding whether your imports to the EU are included within the CBAM, you should be thinking of the following:

- Who will be the importer with the obligation to satisfy the authorisation, declaration and other CBAM duties, and should an indirect representative be appointed for this purpose? A key obligation will be to ensure that an application for CBAM authorisation has been made before the first import of Relevant Goods into the EU as from 31 December 2024.
- What are the calculable embedded emissions in the Relevant Goods (including in the supply chain) and what information do you have or can you collect to demonstrate them (following the methodologies within the Regulation, and emerging implementing legislation)? What monitoring and reporting lines will you need to set up in your business and supply chain to identify emissions and other relevant information? Is it worth seeking to have

your CBAM liability determined by actual emissions, and for the operation / installation therefore to be registered with the Commission? What are the likely resulting CBAM costs?

- If your operation / Relevant Goods are already subject to an internal emissions trading scheme, carbon tax or other levy, how will these payments be treated under the CBAM and what difference is this likely to make to your CBAM liability?
- What is the government in the product's country of origin doing about imposing future carbon costs on businesses, and are these being designed in a way that would see an appropriate reduction in CBAM liability, either because of the way the relevant carbon cost mechanism is being designed or because a specific agreement with the EU is foreseen? Can you / your sector association participate in relevant lobbying efforts?
- Is there anything you can do to reduce or avoid a CBAM liability in a commercially viable way within your product range and supply chain? For example, importers of hydrogen or ammonia (which is covered by the CBAM) for use in producing fuels should be aware that other derivatives and carriers, such as liquid organic

hydrogen carriers (LOHCs), methanol and synthetic gases and e-fuels, are not included within the scope of the CBAM, and should therefore consider whether to focus their production on those non-covered products or relocate certain processes to produce the final product outside the EU.

- Consider responding to the 13 June 2023 Call for Evidence on calculation methodologies and reporting (see further Question 9), and further consultations as they emerge.

We can assist you in your consideration on all of these questions and, more generally, with preparations for the entry into force of the CBAM. Please contact one of the specialists listed below to discuss the CBAM further.

Links:

[Regulation \(EU\) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism](#)

[Call for Evidence on the reporting obligations during the transitional period of the carbon border adjustment mechanism – European Commission – 13 June 2023](#)

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