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LEGAL ANALYSIS:
FEASIBILITY STUDY OF AN EU LEGISLATIVE ACT BANNING NEW FOSSIL FUEL PROJECTS

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INTRODUCTION: OBJECTIVES OF THE STUDY AND STRUCTURE

In 2015, world governments agreed in Paris to limit global temperature increase to well below 2°C above pre-industrial levels, and to pursue efforts to limit it to 1.5°C. Despite this, global net greenhouse gas emissions continue to rise. Global average temperatures have already risen by 1.3°C compared to pre-industrial levels, increasing the frequency and severity of extreme weather events. If governments do no more than maintain their current policies, then by 2100 warming will reach 2.7°C.[1] According to the Intergovernmental Panel on Climate Change (IPCC), global carbon emissions need to decline by at least 45% from 2010 levels by 2030, and reach net zero around 2050, in order to limit global warming to 1.5°C.[2] As of January 2023, to have even a 50% chance of meeting the 1.5°C target in the Paris Agreement, there were less than 250 gigatonnes of carbon dioxide left in the global carbon budget. With about 40 gigatonnes of emissions per year currently, this budget could be exhausted as soon as 2029.[3] It is therefore clear that the only way to avoid climate and ecological breakdown is a drastic reduction of carbon emissions and an orderly and socially just transition, without delay.

Fossil fuels – coal, oil and gas – are by far the largest contributor to the global climate crisis. Fossil fuels account for over 75% of global greenhouse gas emissions and nearly 90% of all CO_2 emissions.[4] Research shows that there is no room for new fossil fuel projects within a 1.5°C-compatible carbon budget.[5]

The most urgent actions governments must take to limit global warming are, therefore, to stop the expansion of fossil fuels and to phase out their use. To date, most governments' climate policies have aimed at reducing the demand for fossil fuels, but these efforts have so far been insufficient to reduce global greenhouse gas emissions in a manner consistent with meeting the 1.5°C target. Supply-side policies are gaining more and more attention as the world rapidly burns through the remaining carbon budget.[6]

In this context, the Greenpeace European Unit, together with Professor Dörte Fouquet, has produced the present legal analysis, focusing on the following question: whether under the EU Treaties it would be possible for the EU to adopt a legislative act that would ban new fossil fuel projects in the EU.

This act would apply, at minimum, to the following activities: the exploration for and extraction of fossil fuels; the construction of fossil fuel transport and storage infrastructure (e.g. pipelines and liquified 'natural' gas terminals), and the construction and operation of fossil fuel-powered installations for electricity generation.

1 See the Climate Action Tracker, https://climateactiontracker.org/global/cat-thermometer/.

2 IPCC(2019): Special Report on Global Warming of 1.5°C, https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf, page 12.

3 Lamboll, R.D., Nicholls, Z.R.J., Smith, C.J. et al. (2023): Assessing the size and uncertainty of remaining carbon budgets. Nat. Clim. Chang. 13, 1360–1367. https://doi.org/10.1038/s41558-023-01848-5.

4 See United Nations Causes and Effects of Climate Change, https://www.un.org/en/climatechange/science/causes-effects-climate-change.

5 See, for example, Calverley, D., & Anderson, K. (2022): Phaseout Pathways for Fossil Fuel Production Within Paris-Compliant Carbon Budgets, available at https://pure.manchester.ac.uk/ws/portalfiles/portal/213256008/Tyndall_Production_Phaseout_Report_final_text_3_.pdf

6 Lazarus, M., van Asselt, H. (2018): Fossil fuel supply and climate policy: exploring the road less taken. Climatic Change 150, 1–13 (2018). https://doi.org/10.1007/s10584-018-2266-3. See also below Part II, section 2.1.

In view of answering the proposed question, the analysis will consider the following issues:

1. The impacts of the climate crisis, as recognised by international and EU scientific institutions;
2. The EU's commitments at international level in view of combatting climate change and the obligations that derive from such commitments;
3. The main policy and legal measures adopted by the EU at internal level, in view of meeting its international commitments under the 2015 Paris Agreement;
4. The insufficiency of these policy and legal measures to ensure that the EU contributes to limiting the average global temperature increase to 1.5°C;
5. The enactment of a ban on new fossil fuel projects as a necessary, appropriate and proportionate measure to correct the current policy failures;
6. The competence of the EU to adopt a measure to ban new fossil fuel projects and the correct legal basis for such a measure;
7. The justification of such a measure from a human rights perspective;
8. Possible risks to such a course of action which are linked to the Bilateral Investments Treaties (BITs) binding on the EU and the Member States, such as the Energy Charter Treaty, and how these can be mitigated.

The analysis will also outline the main elements of a proposal for a binding and enforceable EU legislative act that imposes a full ban on new fossil fuel projects in the EU.

PART I: THE CASE FOR AN EU BAN ON NEW FOSSIL FUEL PROJECTS – FACTUAL AND LEGAL BACKGROUND

1. THE CLIMATE CRISIS AS A THREAT AT GLOBAL AND EUROPEAN LEVELS

It is a firmly established scientific conclusion that: *"Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperatures reaching 1.1°C above 1850-1900 in 2011-2020"*.[7] Scientific conclusions are equally clear in identifying fossil fuels as one of the major sources of greenhouse gas emissions responsible for climate change, responsible for around 90% of carbon dioxide (CO_2) emissions and 40% of methane (CH_4) emissions.[8]

Science has unequivocally demonstrated the gravity of global warming impacts on the natural environment: *"Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (high confidence). Hundreds of local losses of species have been driven by increases in the magnitude of heat extremes (high confidence) with mass mortality events recorded on land and in the ocean (very high confidence). Impacts on some ecosystems are approaching irreversibility such as the impacts of hydrological changes resulting from the retreat of glaciers, or the changes in some mountains (medium confidence) and Arctic ecosystems driven by permafrost thaw"*.[9]

7 IPCC 2023, Synthesis Report, Summary for policymakers (IPCC 2023), Page 4.

8 Friedlingstein P. et al, Global Carbon Budget 2023 (2023) 15 Earth System Science Data 5301, 5341, https://doi.org/10.5194/essd-15-5301-2023; International Energy Agency (IEA), 'Global Methane Tracker 2023 – Analysis'. See also: IPCC 2023, Page 4: "Global net anthropogenic GHG emissions have been estimated to be 59 ± 6.6 $GtCO_2$-eq9 in 2019, about 12% (6.5 $GtCO_2$-eq) higher than in 2010 and 54% (21 $GtCO_2$-eq) higher than in 1990, with the largest share and growth in gross GHG emissions occurring in CO_2 from fossil fuels combustion and industrial processes (CO_2-FFI)". The report also shows that: "In 2019, approximately 79% of global GHG emissions came from the sectors of energy, industry, transport and buildings together".

9 IPCC 23, page 5.

The repercussions for humans are similarly dramatic, and affect each aspect of human life, including access to food and water, physical and mental health, economic activities in climate-exposed sectors and the good functioning of urban areas.[10]

Europe is not immune from the consequences of climate change. As pointed out by the European Environmental Agency (EEA): *"Europe is the fastest-warming continent in the world. Extreme heat, once relatively rare, is becoming more frequent while precipitation patterns are changing. Downpours and other precipitation extremes are increasing in severity, and recent years have seen catastrophic floods in various regions. At the same time, southern Europe can expect considerable declines in overall rainfall and more severe droughts"... "These events, combined with environmental and social risk drivers, pose major challenges throughout Europe. Specifically, they compromise food and water security, energy security and financial stability, and the health of the general population and of outdoor workers; in turn, this affects social cohesion and stability. In tandem, climate change is impacting terrestrial, freshwater and marine ecosystems".*[11]

Like the IPCC, the EEA has predicted that climate change will have disruptive effects on a number of closely connected climate-sensitive systems, such as food, health, ecosystems, infrastructures and the economy and finance, warning of potential "risk cascades" where a risk originating in one system is transmitted to others.[12]

In a stark warning to policymakers, the EEA indicated that: *"Most climate hazards in Europe will further increase during the 21st century, even under optimistic scenarios compatible with the Paris Agreement, but the magnitude and pace depend on global efforts to reduce greenhouse gas emissions (...) A pessimistic scenario without additional policy action suggests that economic damages related to coastal floods alone might exceed EUR 1 trillion per year by the end of the century in the EU".*[13]

The European Scientific Advisory Board on Climate Change (ESABCC) confirmed these concerns. The ESABCC made it clear that: *"Scenarios towards net-zero emissions in the EU imply that fossil fuel use decreases sharply and is almost fully phased out from public electricity and heat generation by 2040".*[14] It also confirmed that not all EU policies are consistent with a progressive phase-out of fossil fuels in future energy systems (e.g. the TEN-E Regulation, the proposed Gas Directive and Gas Regulation, state aid rules, and the EU Taxonomy).[15]

2. THE INTERNATIONAL RESPONSE TO CLIMATE CHANGE: THE UNFCCC AND THE 2015 PARIS AGREEMENT

The two main instruments of international law that deal with climate change are the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement (PA).

The objective of the UNFCCC, pursuant to its Article 2, is *"to achieve, in accordance with the relevant provisions of the Convention, stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".*

Adopted within the framework of the UNFCCC on 12 December 2015, the PA formally entered into force on 4 November 2016, 30 days after the date on which at least 55 parties to the UNFCCC, accounting in total for at least an estimated 55% of the total global greenhouse gas emissions, had deposited their instruments of ratification. Currently, 195 out of the 198 UNFCCC parties have ratified the PA.[16] The PA is laid out according to the logic that climate change is a shared problem and thus calls on all parties to set greenhouse gas emissions reduction targets.

10 IPCC 23, page 6.

11 EEA, European Climate Risk Assessment, EEA Report 01/2024, page 11.

12 EEA, page 14.

13 Ibid.

14 See the report of the European Scientific Advisory Board on Climate Change, Towards EU climate neutrality: progress, policy gaps and opportunities, 18 January 2024, Summary, page 21.

15 Ibid, Summary, page 23.

16 Of the three UNFCCC Member States which have not ratified the agreement, the only major emitter is Iran. The two other countries are Libya and Yemen. The United States withdrew from the agreement in 2020, but re-entered under the Biden administration in 2021.

The overarching goal of the PA, as set out in Article 2, is to hold *"The increase in the global average temperature to well below 2°C above pre-industrial levels"*, and pursue efforts *"To limit the temperature increase to 1.5°C above pre-industrial levels"*.

For the purpose of this analysis, it is already important to point out that the EU has committed itself to the 1.5°C goal. Likewise, a decision adopted at COP 28 shows the resolve of the parties to the PA to *"pursue efforts to limit the temperature increase to 1.5°C"*.[17] It is also important to bear in mind that such a goal cannot be understood as *"safe"*, as it poses *"significant risks to natural and human systems as compared to the current warming of 1°C"*.[18] Likewise at COP28, parties to the PA agreed to *"[transition] away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science"* – for the first time mentioning fossil fuels and the need to "transition away" from them in an international climate agreement.[19]

Article 4 of the PA establishes binding commitments for all parties to prepare, communicate and maintain nationally determined contributions (NDCs) and to pursue domestic measures to achieve them. It also prescribes that parties shall update regularly and communicate their NDCs every five years and provide information necessary for clarity and transparency. To set a firm foundation for higher ambition, each successive NDC will represent a progression beyond the previous one and reflect the highest possible ambition. The PA addresses the major emitting countries to set carbon-neutrality goals and structure their policy for this purpose and integrate net zero targets.

The PA is a *"genuine Treaty under the terms of general international law"*,[20] and therefore creates specific international obligations for its contracting parties. As will be discussed below, this has clear legal implications for the EU and its Member States when they implement climate policy measures.

17 Decision 1/CMA.5, para 4.

18 In 2018, the IPCC's 1.5 Special Report (1.5SR) explicitly stated that with global warming already at 1°C above pre-industrial levels, the world was experiencing forms of extreme weather that threatened human rights, and that global warming at 1.5°C above was not safe "for most nations, communities, ecosystems and sectors" and posed "significant risks to natural and human systems as compared to the current warming of 1°C (high confidence)", especially for people and communities in vulnerable situations. (See IPCC, 1.5SR, SPM, A.1-A..3.; IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, SPM, B.1.6 (2022) [IPCC AR6 WGII]).). All 195 IPCC Member States (including the EU and its Member States), which approved by consensus the Summary for Policymakers of the 1.5SR gained actual and constructive knowledge of the impacts of global warming of 1.5°C on people and ecosystems, and the need for rapid and deep reductions in GHG emissions to keep global warming below 1.5°C. (see Commission Communication COM/2018/0773, "A Clean Planet for all – A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy," 28 November 2018; Resolution 2019/2582/RSP of the European Parliament of 14 March 2019; Resolution 2019/2956/RSP of the European Parliament of 15 January 2020.)

19 Decision 1/CMA.5, para 28(d)

20 Tomuschat, C.: Enforcement of International Law- from the authority of hard law to the impact of flexible methods, in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 79 (2019), page 626.

3. THE ADOPTION AND IMPLEMENTATION OF THE PA BY THE EU AND BY ITS MEMBER STATES

The European Union and its Member States entered the PA, each within the respective fields of competence.[21] Therefore, from the perspective of EU constitutional law, the PA is a "mixed agreement", which engages the international responsibility of both the EU and its Member States.[22]

As carefully reflected in the declaration by which it joined the PA,[23] the EU relied on the specific competences established, in the areas of climate and environmental action, by Articles 191 and 192(1) of the Treaty on the Functioning of the European Union (TFEU[24]) as well as on its general competence to conclude international agreements, established by Article 216 TFEU. [25]

Article 191 TFEU, included under Title XX of the TFEU, is the provision that lays the foundation of the Union's environmental policy and determines the principles for the exercise of the EU's competence on environmental and climate matters, as well as the objectives of the EU's activities in this field, notably:

- Preserving, protecting and improving the quality of the environment;
- Protecting human health;
- Prudent and rational utilisation of natural resources;
- Promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Article 192(1) TFEU, on the other hand, entrusts the European Parliament and the Council with the competence to "decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191".

However, given that under Article 4 TFEU the environmental competence is shared between the EU and the Member States, and that therefore the nature of the PA is that of a "mixed agreement", the EU had to legislate in order to share out the obligations between the EU and national levels.

The relevant internal legislative acts that implement the PA and define the obligations at EU level are Regulation (EU) 2018/1999[26] (the "Governance Regulation") and Regulation 2021/1119/EU (the *"EU Climate Law"*).[27]

21 Under Article 4(2)(e) TFEU, the EU and its Member States share the competence on environmental matters. See below Part II, section 4.

22 Stegmann, P.T. (2019), International Obligations of the EU and the Member States Under EU IIPAs., page 15, In: Responsibility of the EU and the Member States under EU International Investment Protection Agreements. European Yearbook of International Economic Law, vol 6. Springer, Cham. https://doi.org/10.1007/978-3-030-04366-7_2.

23 Declaration: "Declaration by the Union made in accordance with Article 20(3) of the Paris Agreement (...) The European Union declares that, in accordance with the Treaty on the Functioning of the European Union, and in particular Article 191 and Article 192(1) thereof, it is competent to enter into international agreements, and to implement the obligations resulting therefrom, which contribute to the pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change (...) The European Union will continue to provide information, on a regular basis on any substantial modifications in the extent of its competence, in accordance with Article 20(3) of the Agreement"; see United Nations, Treaties Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en#EndDec

24 Primary law refers to the EU Treaties (the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)) that lay down the legal framework of the EU. Secondary legislation in EU law constitutes the body of law (such as Regulations and Directives) that is derived from the principles and the objectives set out in the EU Treaties.

25 Pursuant to Article 216(1) TFEU, the Union may conclude an agreement with third countries or international organisations where the EU Treaties so provide, or where the conclusion of an agreement is necessary to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties. Following Article 216(2) TFEU, agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. However international agreements do not generally prevail over EU primary law in the event of a conflict between them (see CJEU, Judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, Kadi).

26 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018.

27 Regulation 2021/1119/EU of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality, OJ L 243, 9.7.2021.

The EU Climate Law gives effect to the Union's commitments under the PA. It expressly recognises the need for GHG emissions to be reduced and for global warming to be limited to 1.5°C.[28] Article 2 establishes a binding objective of climate neutrality in the Union by 2050, in pursuit of the Long Term Temperature Goal (LTTG) set out in Article 2(1)(a) of the Paris Agreement.[29] In Article 4, a binding Union target is established of a net domestic reduction in GHG emissions for 2030: at least 55% compared to 1990 levels.[30]

The contents of the EU Climate Law are outlined in greater detail in the following sections of this analysis. For the purpose of this section, it is necessary to highlight that the main feature of the law is that it prescribes a net emissions reduction in the EU of at least 55% by 2030 and climate neutrality by 2050 at the latest.

The EU's support for, and endorsement of, the 1.5°C goal is further illustrated by the Council Conclusions on Climate and Energy Diplomacy of 9 March 2023, which state that: *"The EU is determined to engage and work with partners worldwide through our Climate and Energy Diplomacy: to implement the Paris Agreement [and] to limit the global temperature increase to 1.5°C compared to pre-industrial levels", and which call "on all countries, and in particular on all major emitters and G20 members, to redouble their efforts to adopt and implement ambitious, 1.5°C-compatible climate and energy policies".*[31]

The EU institutions took other significant steps towards the achievement of the PA's 1.5°C goal, notably including a recent Commission proposal for a 2040 target, whereby net emissions would be reduced by 90%, and which would require a reduction of fossil fuels by 80%.[32] However, as shown in the following section, the laws and policies currently in place are proving to be insufficient to ensure that the EU will successfully meet its targets under the PA.

4. SHORTCOMINGS OF EU ACTIONS IN LIGHT OF THE ESCALATING CLIMATE CRISIS AND INCREASED CLIMATE FRAGILITY

As recognised in the IPCC 2023 Synthesis Report, policies and laws addressing climate mitigation have consistently expanded in recent years. Yet: *"Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C."*[33] Indeed: *"There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions".*

According to the report: *"A substantial 'emissions gap' exists between global GHG emissions in 2030 associated with the implementation of NDCs announced prior to COP26 and those associated with modelled mitigation pathways that limit warming to 1.5°C (>50%) with no or limited overshoot or limit warming to 2°C (>67%) assuming immediate action [...]. This would make it likely that warming will exceed 1.5°C during the 21st century [...]."*[34]

It logically follows from that premise that: *"Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards [...] Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years".*[35]

28 See recital (8) and Article 1 of the EU Climate Law.

29 Recitals (19)-(21) set out the EU's actions and commitments under the Paris Agreement, recording the Union's objective to achieve climate neutrality by 2050 in line with the Paris Agreement and the need for that objective to be pursued by all Member States collectively, with measures at Union level constituting an important part of the measures needed to achieve that objective. Recital (19) records that the EU has itself submitted both nationally determined contributions and long-term low greenhouse gas emission development strategy to the UN.

30 Recital (26) records the Commission's assessment of the need to achieve its target for greenhouse gas emission reduction and, in particular, the need to reduce gas emissions, by 2030.

31 Council conclusions 7248/23 on Climate and Energy Diplomacy of 9 March 2023, "Bolstering EU climate and energy diplomacy in a critical decade", para 20.

32 Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, "Securing our future", COM(2024)63 of 6 February 2024.

33 IPCC (2023), A.4, page 10.

34 Id., A.4.3, page 11.

35 IPCC (2023), B1, page 14.

At EU level, the analysis and assessments carried out by the EEA and by the European Commission mirror the IPCC findings at international level.[36]

In its 2023 report on *"Trends and projections in Europe"*, the EEA assessed the effects of policy and measures currently in place across Europe, as well as the additional measures that are currently planned. The EEA found that those measures would leave, in the best-case scenario, a deficit of seven percentage points to reach the EU 2030 emissions reduction target (55%). In the worst-case scenario proposed by Member States, emissions reduction across Europe would be limited to 41% (i.e. 14 percentage points below the target).[37]

The European Commission reached a similar conclusion in its recent EU-wide assessment of the draft updated National Energy and Climate Plans (NECP). According to the Commission, the GHG reduction trajectory *"identified in the draft updated NECPs of the Member States is expected to fall short of reaching climate neutrality in 2050. While GHG emissions in the EU have fallen by 32.5% since 1990, the analysis of the projected GHG emissions in the draft updated NECPs highlights the need for a change of pace"*.[38] The emissions reduction until 2030 now needs to proceed at almost triple the average annual reduction achieved over the last decade.[39]

The Commission and the International Energy Agency (IEA) accept that deep and rapid reductions in the use of oil and fossil gas are necessary to comply with the LTTG: in 2020, the Commission analysed the changes in energy use that would be necessary for the Union to reduce its GHG emissions by 55% by 2030, which is the reduction mandated by the EU Climate Law. The Commission found that the 55% target would require a reduction in oil and gas by more than 30% and 25% respectively.[40]

The IEA modelled the reductions in emissions necessary to achieve climate neutrality by 2050[41] – the goal also set by the European Climate Law. Climate neutrality would require a reduction in the share of electricity generated by fossil fuels (including but not limited to fossil gas) from 61% in 2020, to 25% in 2030 and then less than 1% by 2040.[42] Electricity generation is particularly important in this regard: the IEA found that for net zero emissions to be realised by 2050, CO_2 emissions from electricity generation must *"fall to zero in aggregate in advanced economies in the 2030s"* (and in emerging/developing economies *"around 2040"*).[43] The same report states that no new gas explorations are possible globally if these goals are to be met.[44]

5. INTERIM CONCLUSIONS

Climate change poses actual, real and tangible threats to human life and wellbeing, and to planetary health. As the fastest-warming continent in the world, Europe is significantly exposed to climate change-related hazards.

By adopting the UNFCCC and, on its basis, the 2015 Paris Agreement, the international community has set the foundations for a legal framework to ensure that climate change mitigation takes place within a time frame that can contain average temperatures increases to 1.5°C.

36 Conclusions on the insufficiency of EU and Member States are also reached in the Special Report 18/2023 of the European Court of Auditors, "EU Climate and Energy Targets – 2020 Targets Achieved, but little Indication that Actions to Reach the 2030 Targets will be Sufficient". https://www.eca.europa.eu/en/publications?ref=SR-2023-18.

37 EEA, Trends and projection in Europe 2023, EEA Report 07/2023, page 8.

38 COM(2023)796 , Explanatory Memorandum to COM(2023)796 – EU-wide assessment of the draft updated National Energy and Climate Plans An important step towards the more ambitious 2030 energy and climate objectives under the European Green Deal and RePowerEU, 18 December 2023.

39 Baron, R., OECD, Energy Transition after the Paris Agreement: Policy and Corporate Challenges, (2016).

40 See COM(2020) 562 final, Sec. 3, page 9.

41 International Energy Agency (IEA), Net Zero by 2050, a Roadmap for the Global Energy Sector, revised version (October 2021).

42 IEA, Ibid, Figure 2.18.

43 IEA, Ibid, Section 3.4.1, page 114.

44 "No new oil and gas fields approved for development", IEA, Ibid, page 20.

Acting on the basis of the competences conferred to it by the TFEU, the EU has become a party of the 2015 Paris Agreement, and undertaken and endorsed the international obligation to reach climate neutrality by 2050, together with its Member States.

However, scientific evidence shows that the legal measures thus far adopted by the EU, and their national implementation, are insufficient to ensure that the EU can comply with its international commitments.

It is therefore appropriate to consider the adoption of additional measures, especially in view of accelerating the phase out of fossil fuel emissions.

The next part of this analysis will therefore focus on the legal rationale and requirements for the adoption of an EU law to ban new fossil fuel projects. In particular, it will address its justification in light of the principles of proportionality and subsidiarity, and will elaborate on the appropriate legal basis for such legislation.

PART II: AN EU BAN ON NEW FOSSIL FUEL PROJECTS – COMPETENCE, PROPORTIONALITY, SUBSIDIARITY AND LEGAL BASIS

1. INTRODUCTION

The following sections of this analysis assess, in light of the factual and legal background outlined in the previous part, the possibility for the EU to enact a ban on new fossil fuel projects.

The Treaty of Lisbon clarified the distribution of competences between the EU and its Member States. Articles 2 to 6 TFEU contains a systematisation of EU competences according to categories and subject matter areas. These provisions list policy areas of exclusive competence of the Union (Article 3), the areas of competences shared with the Member States (Article 4) and areas in which the Union competences are restricted to supporting, coordinating or taking supplementary action (Article 6).

Shared competences are first defined under Article 4(1) TFEU through a negative formula: the competences conferred by the Treaty that do not fall within the sphere of exclusive competence, nor within the sphere of complementary competence are shared competences. Shared competences are those areas where the EU and its Member States are able to legislate and adopt legally binding acts, but the Member States are only allowed to act as long as the EU has not exercised the competence in question.

Under Article 4(2) TFEU, environment (4(2)(e)) and energy (4(2)(i)) are both considered as shared competences. The clarity of the distribution of powers depends on how precisely the competences and the relevant rules in the relevant policy areas are formulated.[45]

Article 5 of the Treaty on the European Union (TEU) sets out the general principles for the content and form of EU actions and for the exercise of Union competences. In the areas of shared competences, the adoption of EU secondary legislation must follow the principles of conferral, proportionality and subsidiarity.[46]

45 See Craig P, & de Búrca G, EU law: Text, Cases and Materials, Oxford University Press, 2015, page 973.

46 For a general overview of these principles see: Biondi, A. (2012). Subsidiarity in the Courtroom. In A. Biondi, P. Eeckhout, & S. Ripley (Eds.), EU law after Lisbon Oxford University Press; Sauter W. Proportionality in EU Law: A Balancing Act? Cambridge Yearbook of European Legal Studies. 2013;15:439-466.

According to Article 5(1) TEU, while the limits of Union competences are governed by the principle of conferral, the use of these competences is governed by the principles of subsidiarity and proportionality. The **principle of conferral** is expressed in Article 5(2) TEU, stating that: "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein". This provision also makes it clear that competences not conferred upon the Union in the Treaties remain with the Member States.

Article 5(3) TEU sets out the **principle of subsidiarity** that must be used to determine at which level (EU or national) action should be taken, in areas which do not fall within EU exclusive competence. According to this principle, in shared competence areas, the Union must act "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

According to the **principle of proportionality** (Article 5(5) TEU) when the Union exercises its power to legislate, the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties.

It follows from the above provisions that, in order to determine whether it is feasible for the EU to enact a ban on new fossil fuel projects in the Union, it is necessary to clarify:

A. That the EU has the competence to enact such a ban;
B. That objectives of such a ban cannot be achieved at Member State level, requiring instead EU action;
C. That a ban would be an appropriate and proportionate action, in view of achieving the Treaties objectives that it pursues.

The following sections will approach the compliance of the ban with Article 5 TEU in reverse order:

- At the outset, on the basis of factual and scientific evidence, it will be established that action to curb the production and use of fossil fuels is **necessary and appropriate** to achieve the goals of the 2015 Paris Agreement and of EU environmental law. The appropriateness of the ban will also be further discussed in light of emerging case-law on the protection of fundamental rights at international and domestic levels.
- Secondly, the analysis will submit that an EU ban on new fossil fuels projects would be consistent with the principle of subsidiarity. In particular, it will argue that solutions based on available legal instruments, such as the EIA and SEA Directives, would not guarantee the achievement of the objective that is pursued by the EU ban.
- Finally, the analysis will establish that an EU ban on new fossil fuel projects would fall within the limits of the competences conferred upon the Union by the Treaties and it will identify the appropriate legal basis (and adoption procedure) for the ban.

2. THE PROPORTIONALITY OF AN EU BAN ON NEW FOSSIL FUEL PROJECTS

In order to comply with the proportionality principle, EU acts must be justified in light of the achievement of a clearly defined Treaty objective and must not go beyond what is necessary for its achievement.[47] As shown in the following subsections, a ban on new fossil fuels projects in the EU would be fully in line with the environmental objectives set out in the Treaties and in international law, and would be necessary in view of the protection of fundamental rights.

2.1 NECESSITY OF A BAN IN VIEW OF THE ACHIEVEMENT OF CLIMATE NEUTRALITY GOALS AND LIMITING GLOBAL WARMING TO 1.5°C

As mentioned above, the EU is currently not on track towards climate neutrality, and the legal and policy measures in place significantly fall short of meeting the targets set by the EU for 2030, as well as the climate neutrality goal set for 2050.[48]

Several scientific and institutional sources, including the IPCC, the EU and the International Energy Agency (IEA), point out the need to rapidly curb fossil fuel production and consumption.

The 2018 IPCC's Special Report on Global Warming of 1.5°C emphasises the importance of rapidly and significantly reducing carbon emissions pre-2030 for keeping 1.5°C within reach. The IPCC comes to the conclusion that in order to limit global warming to 1.5°C, global carbon emissions need to decline by 45% from 2010 levels by 2030 and reach net zero around 2050.[49]

Further evidence points to the incompatibility of new fossil fuel energy projects with limiting global warming to 1.5°C and achieving net zero emissions. An EU ban on new fossil fuel projects would therefore be an appropriate and indispensable measure to keep global average temperature increase within the 1.5°C threshold and to meet the greenhouse gas emissions reductions and climate-neutrality targets set out in international and EU law.

47 In accordance with the CJEU's case-law, the relevance and impact of the principle of proportionality for the validity of an act can vary significantly, depending on the degree of discretion that the Treaty grants to the institution adopting the act. In the seminal Fedesa case, the Court stated that: "The principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the provision of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued". Crucially, in the subsequent paragraph of the judgment, the Court qualified the principle by adding that: "With regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by (...) the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue". CJEU, Judgment of 13 November 1990, Case C-331/88, R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa, para 13 and 14. The principles defined by the CJEU in Fedesa would apply, beyond doubt, to legislative decisions taken by the European Parliament and the Council in the field of climate change. Therefore, the assessment of the proportionality of an EU ban such as the one discussed here should have regard to its appropriateness. In view of the broad margin of political discretion that the Treaty confers to the EU legislature, the ban would be considered as disproportionate only if its adoption would result from a manifest error of appreciation.

48 It is important to note that the emissions reductions target that the EU has set for 2030 and its objective to become carbon neutral by 2050 is already not in line with the level of greenhouse gas reductions needed from industrialised countries like the EU's Member States in order to limit global warming to 1.5°C. See: Climate Action Tracker, https://climateactiontracker.org/countries/eu/.

49 IPCC (2018): Special Report on Global Warming of 1.5°C. Summary for Policymakers. https://www.ipcc.ch/sr15/chapter/spm/.

- The 2021 IPCC's Physical Science Basis Report qualifies emissions from extracted fossil fuels as the root cause of climate change, contributing up to 91% of all anthropogenic CO_2 emissions.[50]
- Accordingly, the 2023 IPCC's Sixth Assessment Report concludes that *"greatly reduced"* fossil fuel use would be *"fundamental"* to limiting global warming and warns that existing fossil fuel infrastructure is already sufficient to breach the 1.5°C limit.[51] While warning that currently-implemented 2030 pathway NDCs would result in projected emissions that lead to 3.2°C of warming, with a range of 2.2°C to 3.5°C,[52] the report underlines the urgency of near-term integrated climate action and describes *"a rapidly narrowing window of opportunity to enable climate resilient development"*.[53] The report also points out that: *"Large contributions to emissions reductions with costs less than USD 20 per tonne of CO_2 equivalent come from solar and wind energy, energy efficiency improvements, and methane emissions reductions (coal mining, oil and gas, waste) (medium confidence)"*.[54]
- On 13 December 2023, at the conclusion of the COP 28 meeting, United Nations Secretary-General António Guterres stated that: *"The phase-out of fossil fuels is essential and inevitable"*, adding that limiting global heating to 1.5°C "will be impossible without the phase out of all fossil fuels".[55] The UN Secretary-General's statement has a solid factual basis: on the one hand, around 90% of CO_2 emissions and 40% of methane emissions are caused by the combustion of fossil fuels. On the other hand, at global level, governments are planning to produce more than double the amount of fossil fuels in 2030 than would be consistent with 1.5°C, and more than triple in 2050.[56] Nonetheless, the UNFCCC's synthesis report's recommendation outlines especially: *"A rapid reduction of the world economy's reliance on fossil fuels towards clean energy is central for reaching global net zero CO_2 and GHG emissions. To achieve rapid reductions in emissions, the phase-out of unabated fossil fuels is required and should be undertaken responsibly, including through socially inclusive phase-out plans developed as part of just transitions"*.[57]
- The European Scientific Advisory Board on Climate Change in 2023 outlined the necessity for a near-to-complete decarbonisation of the EU power sector by 2040, with a phase-out of electricity generation from coal by 2030, and of unabated gas-fired generation by 2040.[58] Still, according to the Commission's 2023 EU-wide assessment, whereas *"some Member States are already coal free and several have committed to phase out coal by 2030"*, others, including Germany, plan to use solid fossil fuels well beyond 2030.[59] Furthermore, *"natural gas still accounted for 24% of the EU's primary energy mix in 2021"* and *"oil remains the main energy source in the EU, representing 34% of the primary energy mix in 2021"*.[60]

50 IPCC AR6 WGI Physical Science Basis 2021, Full report, pages 676, 687-688.

51 IPCC, Summary for Policymakers, page 19. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pages 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001.

52 IPCC, Ibid, page 22.

53 IPCC, Ibid, page 25.

54 IPCC, Ibid page 28.

55 https://unsdg.un.org/latest/stories/cop28-ends-call-%E2%80%98transition-away%E2%80%99-fossil-fuels-un-chief-says-phaseout-inevitable.

56 Kaupa, C., Is It Still Permissible Under EU Law to Issue New Permits for Oil and Gas Extraction? (April 29 2024), VU University Amsterdam Legal Studies Paper Series Forthcoming, available at SSRN: https://ssrn.com/abstract=4810867. The author refers to Dhakal S. et al, Emissions Trends and Drivers, in Pathak M. et al (eds), Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the IPCC Sixth Assessment Report (IPCC 2022) 215, 265-266, and Stockholm Environment Institute (SEI) et al, The Production Gap: Phasing down or Phasing up? Top Fossil Fuel Producers Plan Even More Extraction despite Climate Promises (2023).

57 UNFCCC Subsidiary Body for Scientific and Technological Advice, 95th session , Technical Dialogue of the first global stocktake– synthesis report by the co-facilitators on the technical dialogue SB/2023/9; 8. 9. 2023, Nr. 119, page 21 - https://unfccc.int/sites/default/files/resource/sb2023_09_adv.pdf.

58 European Scientific Advisory Board on Climate Change, Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030-2050, page 11. Arguably, however, the full phase-out of fossil gas and the decarbonisation of the EU power sector should be achieved by 2035. See: https://www.transportenvironment.org/uploads/files/2024-01-30-Joint-letter-on-fossil-fuel-phase-out.pdf and https://ember-climate.org/insights/research/new-generation/.

59 COM(2023)796 , Explanatory Memorandum to COM(2023)796, page 7.

60 Ibid, pages 12 and 13.

- The IEA emphasised, in two reports respectively from 2021 and 2023,[61] that to achieve net-zero emissions by 2050 and stay within the 1.5°C limit, no new investments in fossil fuel extraction projects are needed. In particular, in the latest version of its 2023 Net Zero Roadmap, the IEA calls for *"well-designed policies, such as the early retirement or repurposing of coal-fired power plants, that are key to facilitate declines in fossil fuel demand and create additional room for clean energy production to expand"*.[62]
- The United Nations Environment Programme's (UNEP) *"Production Gap Report 2023"* titled *"Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises"*, finds that governments plan to produce around 110% more fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C, and 69% more than would be consistent with 2°C. UNEP comes to the conclusion that: *"Both global CO_2 emissions and fossil fuel production need to peak and swiftly decline to keep the Paris Agreement's temperature goal within reach"*.[63]
- A study from 2022 by the Tyndall Centre for Climate Change Research finds that the current and planned use of fossil fuels exceeds the emission budgets, arguing that no new fossil fuel energy projects should be approved. One of the conclusions of the study is that *"there is no practical emission space within the IPCC's carbon budget for a 50% chance of 1.5°C for any nation to develop any new production facilities of any kind, whether coal mines, oil wells or gas terminals."*[64]
- In the same vein, the International Institute for Sustainable Development (IISD) concludes in its 2022 report that there is a *"large consensus across multiple modelled climate energy pathways"* that *"developing (...) new oil and gas fields is incompatible with limiting warming to 1.5C"*.[65]
- A study by Welsby et al, published in Nature in 2021, used *"a global energy systems model to assess the amount of fossil fuels that would need to be left in the ground, regionally and globally, to allow for a 50% probability of limiting warming to 1.5 °C. By 2050"*.[66] It found that *"nearly 60% of oil and fossil methane gas, and 90% of coal must remain unextracted to keep within a 1.5 °C carbon budget"*. The same study estimates that *"oil and gas production must decline globally by 3% each year until 2050. This implies that most regions must reach peak production now or during the next decade, rendering many operational and planned fossil-fuel projects unviable"*. Remarkably, the authors point out that they *"probably present an underestimate of the production changes required, because a greater than 50% probability of limiting warming to 1.5 °C requires more carbon to stay in the ground and because of uncertainties around the timely deployment of negative emission technologies at scale"*.
- A study from Lamboll et al. came to the conclusion that – as of January 2023 – there were less than 250 gigatonnes of carbon dioxide left in the global carbon budget for a 50% chance of limiting warming to 1.5°C, again emphasising the urgency for rapid reduction of carbon emissions and thus of limiting fossil fuel use fast.[67]
- And lastly, in a recent report by Green et al. published in 2024 and titled "No New Fossil Fuel Projects: The Norm We Need", the authors once again conclude that existing fossil fuel projects and infrastructure are already sufficient to meet energy demand under scenarios aligned with the Paris Agreement's 1.5°C target while the planet transitions to renewable energy. This means that new fossil fuel projects are neither necessary nor compatible with limiting global warming to 1.5°C.[68]

61 IEA (2021): Net Zero by 2050: A Roadmap for the Global Energy Sector, https://www.iea.org/reports/net-zero-by-2050; IEA (2023): Net Zero Roadmap, https://www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach.

62 IEA (2023): Net Zero Roadmap, page 13.

63 UNEP (2023): Production Gap Report 2023, Executive Summary, page 3, https://productiongap.org/wp-content/uploads/2023/11/PGR2023_ExecSum_web.pdf.

64 Calverley, D. and Anderson, K. (2022), Phaseout pathways for fossil fuel production within Paris-compliant carbon budgets, Tyndall Centre for Climate Change Research , University of Manchester, page 6.

65 International Institute for Sustainable Development (IISD) (2022): Navigating Energy Transitions: Mapping the road to 1.5°C. The report also addresses Europe's energy needs, particularly in light of the war in Ukraine. It argues that Europe can meet its gas demand without relying on new gas infrastructure or Russian gas by accelerating the adoption of renewable energy, energy efficiency and electrification.

66 Welsby, D., Price, J., Pye, S. et al. Unextractable fossil fuels in a 1.5 °C world. Nature 597, 230-234 (2021). https://doi.org/10.1038/s41586-021-03821-8.

67 Lamboll, R.D., Nicholls, Z.R.J., Smith, C.J. et al. Assessing the size and uncertainty of remaining carbon budgets. Nat. Clim. Chang. 13, 1360-1367 (2023). https://www.nature.com/Articles/s41558-023-01848-5.

68 Green et al. (2024): No New Fossil Fuel Projects: The Norm We Need, Link: https://www.science.org/stoken/author-tokens/ST-1888/full.

2.2 CONSISTENCY OF A BAN WITH THE EU NDC PATHWAY

The evolution of the EU's commitments under the PA shows that a legislative ban on new fossil fuel projects would be appropriate and consistent with the pathway that the EU has undertaken with a view to achieving the 1.5°C goal.

In March 2015, Latvia – which at that time held the Presidency of the Council of the EU – and the EU Commission submitted to the UNFCCC on behalf of the European Union and its 28 Member States their *"intended Nationally Determined Contribution"* (INDC or NDC). It is important for this analysis that no doubts can be raised as to the clear legal commitment of the EU and its Member States: *"The EU and its 28 Member States are fully committed to the UNFCCC negotiating process with a view to adopting a global legally binding agreement applicable to all Parties at the Paris Conference in December 2015 in line with the below 2°C objective"*. The Commitment is introduced as follows: *"The EU and its Member States wish to communicate the following INDC. The EU and its Member States are committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990, to be fulfilled jointly, as set out in the conclusions by the European Council of October 2014"*.[68]

This first NDC was followed in December 2020 by the first update of the NDC, since the PA entered into force. The EU Council and the European Commission endorsed the binding objective of achieving a climate-neutral EU by 2050, in line with the PA. On 5 March 2020, the EU Council adopted a long-term low greenhouse gas emissions development strategy of the EU and its Member States, reflecting this climate neutrality objective and submitted this to the UNFCCC Secretariat.[69]

In the update, the EU describes its policies and instruments since the first NDC. It contains inter alia policies for addressing emissions from aviation, the Directive on enhancing cost-effective emissions reduction and low-carbon investments, its regulation on binding annual greenhouse gas emissions reductions and new binding targets for the reduction of CO_2 emissions from road transport.[70]

The NDC does not reflect on fossil use in power stations or provide any description of policies concerning fossil exploration and exploitation, apart from the emissions reduction targets and policies. However, it contains the announcement that the European Council, on 11 December 2020, *"invited the Commission to assess how all economic sectors can best contribute to the 2030 target and to make the necessary proposals. As part of the European Green Deal, a new EU Strategy on Adaptation to Climate Change will also be presented by the European Commission in 2021"*.[71]

In October 2023, and after approval by the Council of the EU, an updated NDC was introduced which aimed at paving the way ahead for the UN Climate Summit in Dubai. According to the Council declaration, the EU's updated NDC submission *"was prepared in light of the adoption of all the essential elements of the 'Fit for 55' legislative package, which will result in the EU cutting its net greenhouse gas (GHG) emissions by at least 55% by 2030 (compared to 1990 levels). Through the updated NDC, the EU and its Member States reiterate their commitment to this legally binding target"*.[72]

The Council stressed *"that the transition to a climate-neutral economy will require a global phase-out of unabated fossil fuels and a peak in their consumption in this decade. It highlights the importance of having the energy sector predominantly free of fossil fuels well before 2050, as well as of striving for a fully or predominantly decarbonised global power system in the 2030s, leaving no room for new coal power, since cost-effective emissions reduction measures are readily available. It also calls for a phase-out as soon as possible of fossil fuel subsidies which do not address energy poverty or just transition".*

68 See: https://unfccc.int/sites/default/files/LV-03-06-EU%20INDC.pdf.

69 See Update of the NDC of the European Union and its Member States of 17 December 2020 – https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf.

70 See for example Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011, OJ L 111, 25.4.2019; Regulation (EU) 2019/1242 of the European Parliament and of the Council of 20 June 2019 setting CO_2 emission performance standards for new heavy-duty vehicles and amending Regulations (EC) No 595/2009 and (EU) 2018/956 of the European Parliament and of the Council and Council Directive 96/53/EC, OJ L 198, 25.7.2019.

71 See Update of the NDC of the European Union and its Member States of 17 December 2020 – https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf.

72 Council of the EU, Press release, 16 October 2024, https://www.consilium.europa.eu/en/press/press-releases/2023/10/16/paris-agreement-council-submits-updated-ndc-on-behalf-of-eu-and-member-states/.

2.3 RELEVANCE OF DEVELOPMENTS IN INTERNATIONAL AND DOMESTIC CLIMATE LITIGATION AND HUMAN RIGHTS LAW

An EU legislative ban on new fossil fuel projects would be a necessary and adequate action also in view of ensuring the compliance of the EU and of its Member States with their respective duty to protect human rights, whose effective enjoyment is threatened by climate change.

2.3.1 THE PROTECTION OF HUMAN RIGHTS IN EU LAW: SOURCES

Article 6(1) of the Treaty on the European Union (TEU) states that: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".[73]

Furthermore, according to Article 6(3) TEU, *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"*.[74]

It follows from the two above-mentioned provisions that both the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), particularly as interpreted by the European Court for Human Rights (ECtHR), and the rulings of Member States' high jurisdictions, are relevant in view of determining the scope of the EU's duty to protect human rights from threats related to the climate crisis. Both are particularly important in the context of this analysis.

2.3.2 NATIONAL CASE-LAW RELATED TO HUMAN RIGHTS AND THE CLIMATE CRISIS

Important judicial trends are emerging at Member State level, from litigation focused on the duties of public authorities towards their citizens in the fields of climate mitigation and adaptation.[75] These are relevant for the purpose of Article 6(3) TEU, which relies on Member States' constitutional traditions to identify the scope of human rights protection under EU law.

- **Netherlands:** The *Urgenda* case was the first in which a court ordered a government to reduce greenhouse gas emissions based on a legal duty to prevent dangerous climate change.[76] This claim was initiated by a private foundation against the Dutch Government, on the grounds that the latter's failure to adequately reduce GHG emissions was inconsistent with the best available science and international consensus. On 20 December 2019, the Dutch Supreme Court found that the Dutch government has obligations to urgently and significantly reduce emissions to protect the right to life and the right to private and family life under Articles 2 and 8 of the European Convention on Human Rights. Consequently, it ordered the Dutch Government to reduce its GHG emissions by a minimum of 25% before 2020, compared to 1990 levels.

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73 It is important to bear in mind that, according to Article 37 of the Charter of Fundamental Rights of the European Union (EUChFR), "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". This Article and the centrality of the environment in EU policy is also echoed by Article 11 TFEU which provides that: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development".

74 With specific regard to the relation between the EUChFR and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), it is important to mention that, according to Article 52(3) EUChFR, "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Hence, notwithstanding the fact that the EU has not formally acceded to the ECHR and the two relevant legal systems remain separate, the case-law of the European Court of Human Rights has direct relevance for the interpretation of the ECHR in the EU legal system.

75 See Setzer J and Higham C (2024) Global Trends in Climate Change Litigation: 2024 Snapshot. London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf.

76 Supreme Court of the Netherlands, State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda (2019) ECLI:NL:HR:2019:2007. For a summary of the case see https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

The *Urgenda* case was a pivotal moment in climate litigation, triggering a cascade of similar legal domestic actions across Europe aimed at compelling governments to take stronger measures against climate change. While the Court of justice of the European Union (CJEU) has so far declined to accept direct legal challenges to EU climate legislation, citing procedural rather than substantive reasons.[77] EU national courts have followed with relevant judgments.

- **Germany:** Among these cases, the decision of the German Constitutional Court of 29 April 2021, in the *Neubauer* case, is of particular importance.[78] The Court found that Article 20a of the German Basic Law (the Constitution of the Federal Republic of Germany) *"not only obliges the legislature to protect the climate and aim towards achieving climate neutrality"* but *"also concerns how environmental burdens are spread out between different generations"'.*[79] For the first time in its jurisprudence, the Court held that the KSG (the Federal Climate change act) might have violated the fundamental freedoms of the complainants as protected by the German constitution on the grounds that this act offloads significant portions of the greenhouse gas reduction burdens onto the post-2030 period. More specifically, the Court considered that freedom might be jeopardised in an unconstitutional manner if the provisions of the Federal Climate change act *"were to allow overly generous amounts of CO_2 to be emitted in the near term, thereby offloading the necessary reduction burdens onto the future at the expense of future freedom".*[80] According to the judgement, *"respecting future freedom also requires initiating the transition to climate neutrality in good time"*[81] and *"further mitigation efforts might then be necessary at extremely short notice".*[82] Even more explicitly, the Constitutional Court made it clear that: *"It would be neither responsible nor realistic to initially allow CO_2-relevant behaviour to continue unabated but then to suddenly demand climate neutrality once the remaining budget had been completely exhausted. (…) Climate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity".*[83] The Court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022.

- **Belgium:** In the *Klimaatzaak* case, the Belgian judges recognised that public authorities have a positive obligation to protect human rights under Article 2 (right to life) and Article 8 (right to private and family life) ECHR. In June 2021, the Brussels Court of First Instance recognised the Belgian authorities' failure to set in place adequate climate mitigation efforts.[84] The Court acknowledged the harm to human rights potentially deriving from the climate emergency and affirmed the State's responsibility for safeguarding its citizens against adverse climate impacts. In November 2023, the Brussels Court of Appeal upheld the findings of the lower court, confirming that the public authorities had acted unlawfully by failing to achieve sufficient emissions reduction targets,[85] and obliged the Belgian authorities to reduce the overall level of Belgian territorial GHG emissions by at least 55% by 2030, compared to 1990 levels.[86]

- **France:** The State's failure to address the climate crisis with appropriate action was recognised by the French judiciary in 2021, following a lawsuit (*L'Affaire du Siècle or The Trial of the Century*), launched in 2019 by a coalition of NGOs. The Paris Administrative Court decided that the French government's failure to take adequate steps to address the climate crisis and its failure to implement international, European and national climate objectives breached national and international law, including human rights.[87]

77 See CJEU, Judgment of 25 March 2021, Case C-565/19 P., Armando Carvalho and Others v European Parliament and Council of the European Union.

78 German Federal Constitutional Court, Neubauer and Others v Germany [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20. A summary of the case is available at: https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/. For an English translation of the ruling: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210324_11817_order-1.pdf.

79 Para 193 of the Judgement (page 56 of the English translation).

80 Para 117 of the judgement (page 36 of the English translation).

81 See page 2 of the English translation and Para 248 of the Judgement (page 78 of the English translation).

82 Para 117 of the judgement (page 35 of the English translation).

83 Para 120 of the judgement (page 37 of the English translation).

84 Court of First Instance of Brussels, VZW Klimaatzaak v Kingdom of Belgium & Others (2021).

85 Court of Appeal of Brussels, VZW Klimaatzaak v Kingdom of Belgium & Others (2023). For a summary of the case, see https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/.

86 Court of Appeal of Brussels, Klimaatzaak (2023), page 158.

87 For the text of the judgement, see:
https://laffairedusiecle.net/wp-content/uploads/2021/02/20210203-Jugement-Affaire-du-Sie%CC%80cle.pdf

- **Norway:** In November 2023, Greenpeace Nordic and Young Friends of the Earth Norway took the Norwegian State to court, arguing that the approvals of three new oil and gas fields violate the Constitution, European Economic Area (EEA) law and Norway's international human rights commitments. In its judgement of 18 January 2024,[88] the Oslo District Court established that the three oil and gas fields were approved on an illegal basis and that production had to be stopped immediately. The Court found that the impact assessments of the three oil and gas fields' global climate effects were inadequate or non-existent. The Court's decision confirmed that combust emissions from the oil fields would have effects on the global climate, on people and the planet, and must be considered indirect climate impacts within the meaning of the EIA Directive.[89]

2.3.3 THE EUROPEAN COURT OF HUMAN RIGHTS AND THE KLIMASENIORINNEN CASE

The *Klimaseniorinnen* case was the first instance of climate change litigation decided by the European Court of Human Rights (ECtHR).[90] In its groundbreaking ruling of 9 April 2024, the ECtHR found that a state's failure to meet its past GHG emission reduction targets, as well to quantify, through a carbon budget or otherwise, future national GHG emissions limitations, constitutes a breach of the fundamental rights guaranteed by Article 8 ECHR. The *KlimaSeniorinnen* decision is set to influence future climate litigation and shape global discussions on environmental responsibility and human rights.[91]

More specifically, the ECtHR found that, under Article 8 ECHR (nominally protecting the right to respect for private and family life, but interpreted extensively to encompass a right to environmental protection), States have a positive obligation to:

- Adopt, and effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change;[92] and;
- Put in place *"the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights"*.[93]

Based on the Court's findings on the science, and informed by States' obligations under the Paris Agreement, the Court held that:

- *"Effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner"*.[94]
- In view of principles of inter-generational equity, and *"to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation."* (emphasis added).[95]

88 Oslo District Court, 18 January 2024, TOSL-2023-99330. A certified translation is available at https://www.greenpeace.org/static/planet4-norway-stateless/2024/07/bcba5dd8-final-greenpeace-nordic-and-nature-and-youth-norway-v.-the-norwegian-government-represented-by-the-ministry-of-energy-23-099330tvi-tosl-05-18.01.2024-oslo-district-1.pdf. This case is currently under appeal (24-036810ASD-BORG/02). The question of the validity claim has been referred to the EFTA Court for an advisory opinion.

89 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Text with EEA relevance, OJ L 124, 25.4.2014.

90 Verein Klimaseniorinnen Schweiz and Others v. Switzerland. For the official text of the judgement, see https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20240409_Application-no.-5360020_judgment-1.pdf.

91 See Setzer J. and Higham C., Ibid, page 1: "KlimaSeniorinnen and ors. v. Switzerland is likely to lead to the filing of further cases".

92 Verein Klimaseniorinnen, para 545.

93 Ibid, para 546.

94 Ibid, para 548.

95 Ibid, para 549.

Article 8 ECHR is mirrored by Article 7 EUChFR. As explained above, in light of Article 52(3) EUChFR, the application of Article 8 ECHR in the Klimaseniorinnen case has direct relevance for the interpretation of fundamental environmental rights under EU law and, in particular, of Article 37 EUChFR.[96]

On the basis of the case-law quoted above, and in light of the provisions of Article 6 TEU and 52(3) of the EChFR, it can be reasonably argued that:

(i) The EU institutions are obliged to protect fundamental human rights from harm that would derive from climate change, and;

(ii) That in order to comply with the rights protected by the EU Charter and by the European Convention on Human Rights, the said institutions are entitled to adopt a legislative act to ban new fossil fuel projects in the EU, seeing that, without such act, the EU would fail to meet its current GHG emission targets and to achieve net carbon neutrality, as mandated by the 2015 Paris Agreement and its implementing measures.

3. COMPLIANCE OF THE ENVISAGED EU BAN WITH THE PRINCIPLE OF SUBSIDIARITY

Pursuant to Article 5(3) TEU, *"In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"*.

Several considerations support the consistency of an EU-wide ban on new fossil fuel projects with the subsidiarity principle:

- Firstly, it must be considered that the envisaged ban would have the primary aim of ensuring that the EU, as a whole, meets its obligations and targets under the PA and the EU Climate Law. The current regulatory framework, which essentially relies on the adequacy of national commitments incorporated in the NECPs, has proven to be insufficient to keep the Union on the appropriate path to emissions reductions. Action at EU level seems therefore appropriate. Climate change is by definition a trans-boundary challenge and coordinated action at Union level is needed to effectively supplement and reinforce national policies;[97]
- Secondly, action at EU level would have the advantage of preserving, to the largest extent possible, a level playing field between the various national energy systems. If decisions were to be left to national authorities, some Member States may be reluctant to enact a fossil fuel ban due to concerns over the competitiveness of national industries;
- Finally, there is the possibility that a ban on new fossil fuel projects could be achieved at national level via the application of EU legislation in force, such as the Environmental Impact Assessment and the Strategic Environmental Assessment Directives.[98] A recent study highlighted that, were these instruments to be applied properly, and with limited and strict exceptions, Member States' authorities should deny approval to new fossil fuel (extraction) projects and hold incompatible with EU law.[99] The same study, however, clearly shows that the success of this approach would largely depend on the willingness of national authorities to correctly and strictly apply the EIA and SEA Directives and, in case of failure on

96 See, above, footnote 71.

97 See in this regard Recital 40 of the EU Climate Law: "Since the objective of this Regulation, namely to achieve climate neutrality in the Union by 2050, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity".

98 Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011], OJ L 26, 28.1.2012 (EIA Directive) and Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001 (SEA Directive).

99 Kaupa P., Is it still permissible under EU law to issue new permits for oil and gas extraction?, in Review of European, Comparative & International Environmental Law, 2024, page 236. https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12556.

their part, on the decision of national courts and of the Commission to enforce these directives against national authorities. Either way, this approach would be aleatory, time consuming and lead to a potential fragmentation along national systems.

In light of the foregoing, it seems reasonable to consider that Member States acting independently would not be able to reach the same outcome that the EU legislator could achieve by adopting an EU-wide ban on new fossil fuel projects.

4. LEGAL BASIS FOR AN EU WIDE BAN ON NEW FOSSIL FUEL PROJECTS

4.1 INTRODUCTION: THE PRINCIPLE OF CONFERRAL AND THE CHOICE OF THE LEGAL BASIS

Under the principle of conferral, outlined under Article 5(1) TEU: *"The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein".* Competences not conferred upon the Union in the Treaties remain with the Member States. This means that the EU can only adopt a legislative ban on new fossil fuel projects if the Treaties confers it the powers to do so.

Furthermore, for EU acts to be valid, they must be adopted on the basis of, and in accordance with, the appropriate Treaty provision (the *"legal basis"*). The legal basis is a fundamental element of any EU binding measures and is particularly important for legislative acts.[100]

This is because, depending on the chosen legal basis, the approval of a legislative act can be subject to different legislative procedures, entailing different conditions for approval in the EU Council (qualified majority versus unanimity) and a more or less incisive role of the European Parliament (as in the case of the ordinary legislative procedure with respect to the consultation procedure).[101]

Given the implications of the choice of the legal basis for the EU decision-making process, the CJEU has developed extensive case-law to guide the legislators. The main principle emerging from the CJEU's jurisprudence is that: *"The choice of legal basis for a European Union measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure"* (emphasis added).[102] If the Treaties contain several options for the adoption of an EU measure, the more specific legal basis must be chosen.[103]

Since an EU-wide legislative ban on new fossil fuel projects would impinge on different areas of the Union's competence (climate and environment, on the one hand, and energy, on the other), and given that for each of these areas the TFEU foresees a specific legal basis, it is appropriate to carry out an in-depth assessment of the possible options, with a view to identifying the relevant Treaty provision that can serve as a foundation for the ban.

100 On the legal basis for adopting EU acts, see: Engel A., The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation, Springer 2018, 75-98.

101 The ordinary legislative procedure (Articles 289 and 294 TFEU) is the one used by default for the adoption of EU legislation. This procedure starts with a legislative initiative by the European Commission and requires the agreement of the Council and of the Parliament for the approval of the relevant legislative act. The Council acts by qualified majority. By contrast, the special legislative procedure requires unanimity in the Council and this is usually reserved for politically delicate subject matters.

102 CJEU, Judgment of 6 May 2014, Case C-43/12, Commission v European Parliament and Council, para 29 and Judgment of 6 September 2012, Case C-490/10, European Parliament v Council of the European Union, para 44.

103 CJEU, Judgment of 6 September 2012, Case C-490/10, European Parliament v Council of the European Union, para 44; Judgment of 6 November 2008, C-155/07, Parliament v Council, para 34; Judgment of 11 June 1991, C-300/89, Commission v Council, para 10; Judgment of 29 April 2004, C-338/01, Commission v Council, paras 54 and 60; Judgment of 20 May 2008, C-91/05, Commission v Council, para 106; and Judgment of 26 January 2006, C-533/03, Commission v Council, para 45.

4.2 POTENTIALLY RELEVANT LEGAL BASES

In the following subsections, we will demonstrate that the European Union has the power to adopt the proposed ban based on its competence in the field of environmental policy, as established under Articles 191 and 192 TFEU. To substantiate this conclusion, we will examine the relevant Treaty provisions concerning EU competence in both environmental and energy matters. Additionally, we will analyse pertinent CJEU case law and the practices of EU institutions, particularly regarding the selection of the appropriate legal basis for enacting legislation in the area of climate change. Through this comprehensive examination, we will show that the EU is empowered to implement the ban within the scope of its environmental policy objectives.

The legal bases potentially applicable to the envisaged legislative ban are outlined below:

A) ENVIRONMENTAL COMPETENCE

Article 192(1) TFEU confers on the European Parliament and on the Council the competence to adopt measures in order to achieve the objectives of the EU environmental policy, listed in Article 191 TFEU.[104] One of the objectives listed in Article 191 is *"promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change"*.

Legislative measures foreseen based on Article 192(1) TFEU are to be adopted in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions. This legislative procedure gives the Parliament and the Council equal weight, hence ensuring the highest level of democratic participation in the decision-making process. It also foresees that the Council deliberations shall be taken by a qualified majority, thereby excluding the case that a single Member State may impose a veto on a measure that has otherwise the support of the European Parliament and of a large majority of EU countries.

The principle of subsidiarity could limit legislative action of the EU, given that the competence on environmental policy (including on climate change) is shared between the EU and its Member States and therefore both may adopt legally binding acts. However, the Member States can do so only where the EU has not exercised its competence or has explicitly ceased to do so.[105]

B) COMPETENCE FOR ENVIRONMENTAL MEASURES WITH SIGNIFICANT IMPLICATIONS FOR ENERGY POLICY

Article 192(2)(c) TFEU provides for a specific legal basis for, among others, environmental measures *"significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply"*.[106] In accordance with this provision, the measures described above are adopted by the Council acting unanimously, in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. The Council, acting by unanimity on a proposal by the Commission, can decide to make the ordinary legislative procedure applicable.

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104 Article 192(1) TFEU reads as follows: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191". The objectives listed in Article 191 TFEU are "preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change".

105 See https://climate.ec.europa.eu/eu-action/eu-competences-field-climate-action_en.

106 Article 192(2)(c) TFEU reads: "By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: [...] (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

The special procedure in Article 192(2)(c) TFEU may significantly weaken the role of the European Parliament, which loses the status of co-legislator and only has a right to consultation, and confers on individual Member States a veto power.

However, given the fact that it introduces a derogation from the general rule in Article 191(1), *"Article 192(2)(c) TFEU is to be interpreted strictly, especially since an efficient modern environment policy cannot ignore energy questions"*.[107]

C) COMPETENCE FOR ENERGY POLICY MEASURES

Article 194(1) TFEU established a shared competence for areas of energy policy. Under this legal basis, *with regard for the need to preserve and improve the environment*,[108] the European Parliament and the Council can act, following the ordinary legislative procedure, to adopt measures that pursue the following objectives:

(a) To ensure the functioning of the energy market;

(b) To ensure security of energy supply in the Union;

(c) To promote energy efficiency and energy saving, and the development of new and renewable forms of energy; and

(d) To promote the interconnection of energy networks.

In principle, on the basis of Article 194(2) TFEU, Member States maintain the right to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of energy supply.[109]

However, the EU co-legislators can limit this right and adopt the measures that they see necessary to pursue a climate or environmental objective, even if these measures significantly affect a Member State's choice between different energy sources and the general structure of its energy supply.

The EU institutions can do so by referring to on Article 192(2)(c) TFEU which, as we have seen, is a special procedure that requires a unanimous decision by the Council and, most importantly, is triggered only when the impact on Member States' energy policies is *significant*, which, in accordance with the CJEU case-law, is a particularly high threshold.[110]

As the CJEU has clarified, Member States cannot invoke the use of 194 TFEU as a legal basis when the EU institutions adopt, on the basis of Article 192 TFEU, acts that pursue a climate policy objective.[111]

107 CJEU, Opinion of Advocate General Mengozzi of 30 November 2017, Case C-5/16, Poland v Parliament and Council, para 25.

108 On the relevance of this reference in Article 194(1) to the need to preserve and improve the environment as a guiding principle that must infer the Union policy on energy, see Kaschny L. Energy Justice and the Principles of Article 194(1) TFEU Governing EU Energy Policy, Transnational Environmental Law, 2023; 12(2), page 285.

109 Several analyses on the scope of Article 194(2) were published: inter alia see: Johnston A. and Van der Marel E., Ad Lucem? Interpreting the New EU Energy Provision, and in Particular the Meaning of Article 194(2) TFEU (2013) 22(5) EEELR 181, 183-4; Haraldsdóttir K., The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU (2014) 23(6) EEELR 208;09.

110 Huhta K., The scope of State sovereignty under Article 194(2) TFEU and the evolution of EU competences in the energy sector, International and Comparative Law Quarterly, 2021, page 999.

111 CJEU, Judgment of 7 March 2013, case T-370/11, Republic of Poland v European Commission, para 13. In this case, Poland invoked Article 194(2) to annul a Commission decision determining common rules for harmonised free allocation of emissions allowances. The Court rejected the claim on the grounds that the contested decision was adopted on the basis of Article 192 in the area of environmental policy, and could therefore be subject to the limitations provided under that Article, but not to those laid down in Article 194(2).

4.3 THE LEGAL BASIS OF THE EU CLIMATE MEASURES CURRENTLY IN FORCE

An overview of the main EU legislative acts adopted in view of implementing EU climate policy[112] reveals that Article 192(1) TFEU has been consistently considered as the suitable legal basis, irrespective of the foreseeable impacts of those acts on Member States' choice between different energy sources and the general structure of their energy supply.

The sole relevant exception is the Renewable Energy Directive, a piece of legislation was adopted on multiple legal bases. However, notwithstanding its clear and direct aim to regulate national energy mixes and the significance of the renewable energy targets that it imposes on Member States, it did not require the use of Article 192(2) TFEU.

A) THE EUROPEAN CLIMATE LAW

The PA has triggered serious legislative work in the European Union and a quite encouraging turnaround in climate-related legislation under the Green Deal during the legislative term that ended in June 2024.

In view of meeting its commitments under the PA, on 12 December 2019 the European Council endorsed the objective of EU climate neutrality by 2050. In the political guidelines for the next European Commission, a 'European Green Deal' was announced, which paved the way for the adoption of the European Climate Law: acting on a proposal by the EU Commission, the EU legislators adopted in co-decision this law in the form of an EU Regulation, with the aim of fulfilling the PA objectives and of making Europe the *"world's first climate-neutral continent by 2050".* [113]

Indeed, the European Climate Law sets a legally binding target of reducing net emissions by at least 55% by 2030 compared to 1990 and reaching net zero greenhouse gas emissions by 2050. As the Commission indicates, both the *"EU Institutions and the Member States are bound to take the necessary measures at EU and national level to meet the target, taking into account the importance of promoting fairness and solidarity among Member States"*.[114]

As further illustrated by the European Commission, the European Climate Law (CL) includes:

- A 2030 climate target of at least 55% reduction of net emissions of greenhouse gases as compared to 1990, with clarity on the contribution of emission reductions and removals;
- The recognition of the need to enhance the EU's carbon sink through a more ambitious LULUCF Regulation, for which the Commission made a proposal in July 2021, and which entered into force in May 2023;
- A process for setting a 2040 climate target, considering an indicative greenhouse gas budget for 2030-2050 to be published by the Commission;
- A commitment to negative emissions after 2050;
- The establishment of a European Scientific Advisory Board on Climate Change, that will provide independent scientific advice;

112 Other relevant legislative measures in the field of the EU Climate policy that we have not considered in our analysis on the suitable legal basis include: Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC[2003], OJ L 275, 25.10.2003 (Emissions Trading Directive); Regulation 2018/841/EU of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018], OJ L 156, 19.6.2018 (LULUCF Regulation). Directive 2023/1791/EU of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023], OJ L 231, 20.9.2023 (Energy Efficiency Directive). Except for the Energy Efficiency Directive, all these measures are based on Article 192(1) TFEU.

113 Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021. For an overview of the EU climate legislation, see Misonne D., Peeters, M., (2022). The European Union and its rule-creating force on the European continent for moving to climate neutrality by 2050 at the latest. In L. Reins, & J. Verschuuren (Eds.), Research handbook on climate mitigation law (2 ed., pages 59-102). Edward Elgar Publishing.

114 See European Commission, Climate Action, https://climate.ec.europa.eu/eu-action/european-climate-law_en#:~:text=The%20Climate%20Law%20includes%3A,of%20emission%20reductions%20and%20removals.

- Stronger provisions on adaptation to climate change;
- Strong coherence across Union policies with the objective of climate neutrality;
- A commitment to engage with sectors to prepare sector-specific roadmaps charting the path to climate neutrality in different areas of the economy.

The law aims to ensure that all EU policies contribute to this goal of achieving climate neutrality and that all sectors of the economy and society *"play their part"*.[115]

Under Article 6 CL, the Commission has the mandate to assess and adapt the European climate instruments framework with a view to reaching the PA goals. In particular, Article 6 (3)CL provides that if, on the basis on the assessments referred to in paragraphs 1 and 2 , the Commission finds *"that Union measures are inconsistent with the climate-neutrality objective set out in Article 2(1) or inconsistent with ensuring progress on adaptation as referred to in Article 5, or that the progress towards that climate-neutrality objective or on adaptation as referred to in Article 5 is insufficient, it shall take the necessary measures in accordance with the Treaties"*.

It is clear that, in light of the decarbonisation objectives that it sets for the EU, the European Climate Law has direct repercussions on Member States' ability to choose between different energy sources and for the general structure of their energy supply.

Indeed, the transition to climate neutrality requires changes across the entire policy spectrum and a collective effort of all sectors of the economy and society, as highlighted in the European Green Deal. All relevant Union legislation and policies need to be consistent with, and contribute to, the fulfilment of the climate-neutrality objective while respecting a level playing field, and the Climate Law invites the Commission, for that purpose, to examine whether this requires an adjustment of the existing rules.[116]

Yet, the European Climate Law is based on Article 192(1) TFEU and not on Article 192(2): arguably, the EU legislator has considered that the law did not produce any significant impact on the choice between different energy sources and on the structures of national energy supplies. On this basis, the European Climate Law has been adopted following the ordinary legislative procedure.

B) THE EUROPEAN CLIMATE LAW'S PRECURSORS

The European Climate Law's precursor, adopted under the Kyoto Protocol[117] framework, was the EU Regulation on GHG monitoring and reporting mechanisms.[118] Like the EU Climate Law, the said Regulation was based on Article 192(1) TFEU.

Likewise, the approval of the Kyoto Protocol to the UNFCCC on behalf of the (then) European Community, made by Council Decision 2002/358/EC[119]was based on the relevant provisions of the Treaty establishing the European Community (TEC) and on the then key Article under Title XX (Environment) of the Treaty establishing the European Community, Article 175(1) TEC, which later became Article 192(1) TFEU.

None of these regulations and decisions referred in any way to the special provisions of Article 192(2)(c) (or to Article 175(2)(c), which was its precursor in the TEC).

115 See Ibid, EU Commission.

116 EU Climate Law, Recital 26: "In addition, the Commission should, by 30 June 2021, assess how the relevant Union legislation implementing the Union 2030 climate target would need to be amended in order to achieve such net emission reductions. In view of this, the Commission has announced a revision of the relevant climate and energy legislation which will be adopted in a package covering, inter alia, renewables, energy efficiency, land use, energy taxation, CO_2 emission performance standards for light-duty vehicles, effort sharing and the EU ETS".

117 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998 https://unfccc.int/resource/docs/convkp/kpeng.pdf

118 Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union levels relevant to climate change and repealing Decision No 280/2004/EC, OJ L 165, 18.6.2013.

119 Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002.

C) EU CLIMATE LEGISLATION ADOPTED AFTER THE EUROPEAN CLIMATE LAW

Following the publication of the EU Climate Law, the EU issued several of the legislative acts announced under Recital 26 CL.[120] The following outlines just a few which are pertinent to this analysis.

Performance standards for cars and commercial light vehicles

Following the EU Climate Law, the EU legislators adopted Regulation (EU) 2023/851.[121] This Regulation is often labelled as a banning legislation on internal combustion engines beyond 2035. In light of the relevance of the transport sector in terms of energy (and fossil fuel) consumption and of the ensuing implications for the structure of Member States' energy sources and supply, the Commission (or the Council) could have considered a referral to Article 194(2) or to Article 192(2) TFEU as applicable legal basis. Nonetheless, the EU ban on the internal combustion engine is based exclusively on Article 192(1) TFEU.

The Regulation refers to the EU Climate Law and the PA[122] and underlines, as does the EU Climate Law, that all *"sectors of the economy are expected to contribute to achieving those emissions reductions",* including the road transport sector.

The transport sector is the only sector where emissions have been on the rise since 1990. This includes road transport by light-duty and heavy-duty vehicles, which together account for over 70% of total transport emissions. To achieve climate neutrality, a 90% reduction in transport emissions is needed by 2050.[123] The measures set out in this Regulation are necessary as part of a coherent and consistent framework that is indispensable for achieving the overall objective of the Union to reduce net greenhouse gas emissions, as well as to reduce the Union's dependence on imported fossil fuels.[124] The Regulation aims to prepare the industry, and to ensure time for preparation of a change in their fleets.[125]

These considerations would apply, in exactly the same way, to an EU legislation to ban new fossil fuel projects and would therefore support the use of Article 192(1) TFEU as the appropriate legal basis. Investors in fossil fuel projects and the industry itself would be forewarned that the investment case for these projects will be closed.

The Effort Sharing Regulation

As its title clearly suggests, the Effort Sharing Regulation of 19 April 2023[126], on binding annual greenhouse gas emissions, sets to contribute to climate action and to meet commitments under the PA and under the European Climate Law. It *"establishes for each EU Member State a national target for the reduction of greenhouse gas emission by 2030 in the following sectors: domestic transport (excluding aviation), buildings, agriculture, small industry and waste. In total, the emissions covered by the Effort Sharing Regulation account for almost 60% of total domestic EU emissions".*[127]

120 For an overview of the legislative proposals of the Fit for 55 package, see also de Sadeleer, N. (2023). Environmental Law in the EU: A Pathway Toward the Green Transition. In: Garcia, M.d.G., Cortês, A. (eds) Blue Planet Law. Sustainable Development Goals Series. Springer, Cham. https://doi.org/10.1007/978-3-031-24888-7_2.

121 Regulation (EU) 2023/851 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2019/631 as regards strengthening the CO_2 emission performance standards for new passenger cars and new light commercial vehicles in line with the Union's increased climate ambition, OJ L 110, 25.04.2023.

122 See recital 6 of Regulation (EU) 2023/851.

123 Ibid.

124 See recital 8 of Regulation (EU) 2023/851.

125 See recital 21 of Regulation (EU) 2023/851.

126 Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111, 26.4.2023.

127 https://climate.ec.europa.eu/eu-action/effort-sharing-member-states-emission-targets/effort-sharing-2021-2030-targets-and-flexibilities_en.

Undeniably, this Regulation will have implications for energy consumption and, consequently, for the structure of Member States' energy supply. Yet, arguably in consideration of its direct link with the achievement of the EU climate goals, the Regulation is based on Article 192(1) and not on Article 192(2) TFEU.

The Renewable Energy Directives

Since 2001, the EU has adopted several legislative acts to promote the development of renewable energy and its increased use in Member States' energy mixes. These directives have been adopted using different legal bases, including Article 192(1) TFEU, Article 114 TFEU (which is the standard legal basis for internal market legislation) and Article 194 TFEU.

However, and notwithstanding the increasingly relevant impact that these legislative acts have had on national energy systems, they have never been based on Article 192(2) and, accordingly, their approval has never been subject to the unanimous approval of Member States.

In particular:

- The first and second Renewable Energy Directives,[128] adopted respectively in 2001 and 2009, were based on Article 175(1) TEC (now 192(1) TFEU), and therefore considered part of the EU environmental acquis. The 2009 Directive also relied on Article 95 TEC (now 114 TFEU) for the part related to biofuels.
- The third Renewable Energy Directive[129], adopted in 2018, was part of the *Clean energy for all Europeans package*[130] (also the Winter Package), together with the Energy Union Governance Regulation.[131] These instruments in the field of the EU energy policy were both adopted under Article 194(2) TFEU.

  The third Renewable Energy Directive requires Member States to achieve a minimum share of energy from renewable sources in the EU's final consumption. The objectives of the Paris Agreement and the related EU climate targets require Member States to substantially increase their usage of renewables and, in turn, to decrease their reliance on fossil fuel-based energy sources. This has substantial effects on both Member States' ability to choose between different energy sources and on their structure of energy supply. However, Member States have never referred to the second sentence of Article 194(2) TFEU[132] as an obstacle to the adoption of the Directive in accordance with the ordinary legislative procedure.

The most recent version of the Renewable Energy Directive was adopted on 18 October 2023.[133] Despite being explicitly mentioned under the Climate Law as a legislation to be adjusted to the climate quests under the PA and the Climate Law itself, it is based on multiple legal bases: Articles 114, 192(1) and 194(2) TFEU.

128 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009.

129 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018.

130 https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en.

131 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ L 328, 21.12.2018.

132 Huhta K. Ibid, page 1006.

133 Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023.

In its "explanatory memorandum" of 14 July 2021, the Commission outlined that the proposal was based primarily on Article 194(2) TFEU, *"which provides the legal basis for proposing measures to develop new and renewable forms of energy, one of the goals of the Union's energy policy, set out in Article 194(1)(c) TFEU. REDII, which will be amended by this proposal, was also adopted under Article 194(2) TFEU in 2018. Article 114 TFEU, the internal market legal base, is added in order to amend Directive 98/70/EC on fuel quality, which is based on that Article"*.[134]

Further into the legislative process, the European Parliament and the Council decided to reintroduce a reference to Article 192(1) TFEU, which, as pointed out above, was already mentioned as the legal basis of the 2001 and 2009 Renewables Directives.

The reintroduction of a reference to Article 192(1) TFEU is consistent with the subject matter and with the goals of the Directive which, already in Recital 1, refers to the context of the European Green Deal and to the Climate Law, and underlines that: *"The Union's climate neutrality objective requires a just energy transition which leaves no territory or citizen behind, an increase in energy efficiency and significantly higher shares of energy from renewable sources in an integrated energy system"*.[135]

For the purpose of this analysis, it is important to bear in mind that, whereas the direct and immediate links with the EU energy policy and with the objectives of Article 194 TFEU may explain the recourse to this legal basis, neither the co-legislators nor the Commission considered that the renewable energy targets set out in the Directive (42.5 to 45% of the Union's gross final energy consumption) were sufficient to trigger the recourse to the special procedure under Article 192(2)(c) TFEU and therefore to deviate from the ordinary legislative procedure.

4.4 THE RELATION BETWEEN ARTICLES 192(1) AND 194(2) TFEU IN CJEU CASE-LAW AND SUBSEQUENT INSTITUTIONAL PRACTICE

A recent relevant decision by the Court of Justice of the European Union on the choice of the correct legal basis for EU climate legislation validates the approach that the EU legislators followed thus far, and confirms that any legislation with the EU climate neutrality goals as its aim and content should be based on Article 192(1) TFEU, even if this legislation may indirectly affect Member States' choice between different energy sources and the mix of their energy supply.

A) THE "ETS ALLOWANCES" CASE

In January 2016, Poland introduced an action under Article 263 TFEU[136] for annulment of an EU decision establishing the market stability reserve for the EU greenhouse gas emissions trading scheme.[137]

134 EU Commission Proposal for a Directive of the European Parliament and of the Council, amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, Brussels, 14.7.2021 COM(2021) 557 final 2021/0218(COD) – Explanatory Memorandum.

135 The multiple legal basis for the RED II could be understood as the remnant of hard conflicts over the years in the Council and with the European Parliament on the question of legally binding targets for renewable energies in the Member States, which had been the case under the former Renewable Energy Directive 2001/77/EC but has been abandoned in later amendments, and with the introduction of the first Governance Regulation in the light of EU level-only binding targets, aiming to balance the different ambitions of Member States in order to reach the overall binding EU target. Directive 2001/77/EC was based on Article 175 (1) TEC only, then corresponding to Article 192(1) TFEU. One could foresee that further amendments to the Renewable Energy Directive might well refer back to Article 192(1) TFEU.

136 CJEU, Judgement of 21 June 2018, Case C-5/16, Poland v Parliament and Council.

137 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015, concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emissions trading scheme and amending Directive 2003/87/EC, OJ L 264, 9.10.2015. The said Decision was proposed by the Commission on 22 January 2014 (COM (2014) 20 final) to remedy an imbalance in the supply and demand of ETS allowances. Prior to the proposal, in November 2012, the Commission had issued a report on the state of the European carbon market in 2012 according to which, at the beginning of the third ETS trading period, such structural imbalance could have reached around two billion allowances (COM(2012) 652 final).

In its annulment plea, Poland claimed that the contested decision infringed Article 192(1) TFEU, read in conjunction with point (c) of the first subparagraph of Article 192(2) TFEU, in that it was adopted in accordance with the ordinary legislative procedure although it constituted a measure significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply within the meaning of the latter provision. According to Poland, the decision should have been based on the first subparagraph of Article 192(2) TFEU, and therefore it should have been adopted by unanimous decision of the Council.[138]

The Court rejected the plea. It outlined again that the choice of the legal basis for an EU measure *"must rest on objective factors amenable to judicial review, which include, inter alia, the aim and content of that measure...)".*[139]

Following the Council's argument, the Court stated that Article 192(2) TFEU must be read in conjunction with Article 191 TFEU, which seeks to give the European Union a role in the preservation of the environment and the fight against climate change, in particular by establishing and executing international agreements to that end.[140]

The CJEU considered that the legislation at stake, even if it affected the energy sector of the Member States, was correctly adopted with the ordinary legislative procedure, as required by Article 192(1) TFEU. According to the CJEU, the measures taken for the aim of fighting climate change necessarily affect the energy sector of Member States. A broad interpretation of point (c) of the first subparagraph of Article 192(2) TFEU[141] *"would risk having the effect of making recourse to the special legislative procedure, which the Treaty FEU intended as an exception, into the general rule".*[142] Such a deviating conclusion *"is irreconcilable with the Court's case-law, according to which provisions that are exceptions to principles must be interpreted strictly".* [143]

In conclusion, the Court underlines, that point (c) of the first subparagraph of Article 192(2) TFEU can form the legal basis of an EU measure *"only if it follows from the aim and content of that measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State"*[144] (emphasis added). According to the Court, it could not be inferred that this was the aim and primary outcome of the contested market stability reserve.

This Court precedent further strengthens the argument that the correct legal basis for a possible EU ban on new fossil fuel project would be Article 192(1) TFEU, particularly taking into account its climate protection aims and its direct links with the international commitments taken by the EU under the 2015 Paris Agreement and the decarbonisation goals under the EU Climate Law. Thus, the said ban could be adopted by the European Parliament and by the Council following the ordinary legislative procedure.

It follows from the *ETS Allowances* case that Member States can invoke the second sentence of Article 194(2) TFEU (and hence trigger the application of the special procedure in Article 192(2)) only if the main purpose and primary outcome of the EU measure is to impact Member States' energy sovereignty.[145]

Accordingly, the limitation of EU competences laid out in Article 194(2) TFEU does not affect the pursuit of the EU's environmental and climate policy objectives and the EU is empowered to adopt the necessary measures, such as the ban under discussion, using Article 192(1) as the legal basis, since their focus is addressing the climate crisis, rather than affecting Member States' energy rights.

An impact on the energy mix, even if significant, is not per se sufficient to activate the sovereignty clause in favour of the Member States. Otherwise, there would be hardly anything left of the EU's powers in terms of climate protection. This was certainly not the intention of the Treaty of Lisbon.[146]

138 CJEU, Judgement of 21 June 2018, Case C-5/16, Poland v Parliament and Council, para 24.

139 CJEU, Ibid, para 38 (with reference to CJEU, Judgment of 30 January 2001, C-36/98, Spain v Council, paras 58 and 59, and Judgment of 11 June 2014, C 377/12, Commission v Council, para 34 and the case-law cited).

140 CJEU, Ibid, para 43.

141 To recall: Article 192(2) TFEU reads: "... (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply".

142 CJEU , Ibid, para 44.

143 CJEU, Ibid, para 45, and the case-law cited.

144 CJEU, Ibid, para 46.

145 Huhta K., Ibid, page 1008.

146 Fehling M., Energy Transition in the European Union and its Member States: Interpreting Federal Competence Allocation in the Light of the Paris Agreement, Transnational Environmental Law, 2021; 10(2), page 345.

B) THE EU INSTITUTIONS' CLARITY ON THE LEGAL BASIS OF CLIMATE ACTS – THE METHANE EMISSIONS REGULATION

It is remarkable that the ruling of the CJEU discussed above was recently upheld by the Council and the European Parliament's Committee on Legal Affairs (JURI) during the legislative procedure for a Regulation on methane emissions reduction in the energy sector.[147]

In December 2023, the chairs of the European Parliament Committees on Environment, Public Health and Food Safety (ENVI) and on Industry, Research and Energy (ITRE) asked the JURI Committee to provide an opinion on appropriateness of Article 192(1) TFEU as the sole legal basis for the above Regulation.

Interestingly, the European Commission had initially based the proposal on Article 194(2) TFEU. In their joint report, the ENVI and ITRE Committees decided not to amend the legal basis and even when the EP voted in plenary, the legal basis remained unchanged. It was the Council which, under its responsibility, chose Article 192(1) TFEU as the sole legal basis.

The Council, in view of the proposed methane emissions Regulation, underlined that: *"The legal basis reflects the main purpose of the text, to reduce methane emissions in the energy sector and to participate in the fight against climate change, through mitigation, measurement, reporting and verification obligations".*[148]

During inter-institutional negotiations, an agreement was found on the change of legal basis. The JURI committee seconded this change to Article 192(1) TFEU.

In its opinion, the JURI committee reflected on the established EU case-law and underlined that: *"The legal basis of a Union act does not depend on an institution's conviction as to the objective pursued but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure. The legal basis for an act must be determined having regard to its own aim and content".*[149]

Concerning the impact on the energy sector, the conclusion of JURI is coherent with the CJEU's approach: *"It is true that the proposal is limited to emissions from the energy sector and that the obligations provided for would have an impact on the operators in that sector. However, it would appear it would only be an ancillary effect. Although the proposal is limited to the energy sector, the fact remains that its main aim is to contribute to the fight against climate change by reducing methane emissions. In other words, the limitation to the energy sector is unable to change the centre of gravity of the proposed act and its main environmental objective, which consists in the reduction of methane emissions to fight climate change and to help achieve the Union's climate neutrality target".*[150] It follows that for JURI, in line with the Council view, Article 192(1) TFEU *"was the appropriate legal basis for the proposal".*[151] The Regulation has indeed been adopted on that legal basis, and following the ordinary legislative procedure, on 27 May 2024.[152]

147 Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942 (COM(2021)0805) JURI file C9-0467/2021 – 2021/0423(COD)).

148 See the Opinion of the Committee on Legal Affairs of 24 January 2024 sent to the ENVI and ITRE Committees, AL\1296492EN.docx PE758.222v02-00, available at https://www.europarl.europa.eu/doceo/document/JURI-AL-758222_EN.pdf.

149 Ibid, page 4. Reference is given to the following EU case-law: CJEU, Judgment of the Court of 11 June 1991, Case C-300/89, Commission v Council ("Titanium dioxide"), para 10; Judgment of 8 September 2009, Case C-411/06, Commission v Parliament and Council, para 45; Judgment of 28 June 1994, Case C-187/93, Parliament v Council, para 28. See also CJEU, Judgment of 8 September 2009, Case C-411/06, Commission v Parliament and Council ("Shipments of waste"), para 77, and Judgment of 18 December 2014, Case C-81/13, UK v Council, para 36.

150 Opinion of the Committee on Legal Affairs of 24 January 2024, sent to the ENVI and ITRE Committees, page 7.

151 Ibid, page 8.

152 Regulation (EU) 2024/1787 of the European Parliament and of the Council of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation (EU) 2019/942, OJ L, 2024/1787, 15.7.2024.

4.5 ARTICLE 192(1) IS THE ADEQUATE LEGAL BASIS

Bearing in mind the aim and content of a potential EU ban on new fossil fuel projects (i.e. ensuring that the EU meets its obligations under the PA and its domestic emissions reduction goals), the objective of combating climate change under Article 191 TFEU, the legislator's practice on the choice of legal basis for EU climate legislation, as well as the relevant CJEU's case-law, it is submitted that the appropriate legal basis for the said EU ban would be Article 192(1) TFEU. Accordingly, the said ban could be adopted following the ordinary legislative procedure set out in Article 294 TFEU.

Indeed, the aim of the measure would be to support the achievement of the EU climate goals, as defined in the European Climate Law, in line with the objective under Article 191 TFEU of promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

The measure would have an impact on Member States' energy supply. However, the measure would not seek – as a primary outcome – to regulate the energy sector. Indeed, the energy policy implications would be secondary to the climate policy ones.

In addition, its scope being limited to future projects, the measure would not amount to a full ban on any Member State's fossil fuel-based activities and projects. Therefore, it would not affect *"a Member State's choice between different energy sources and the general structure of its energy supply"* in a way so significant as to trigger the application of the special procedure under Article 192(2) TFEU. All EU Member States have agreed to the Paris Agreement and they have consequently given implicit consent to a regulatory policy at EU level that increasingly turns away from fossil fuels and shifts the energy mix towards renewables.[153]

5. INTERIM CONCLUSIONS

In accordance with Article 5 TFEU, all legislative measures adopted by the EU institutions must comply with the general principles of conferral, proportionality and subsidiarity.

Furthermore, EU measures must be adopted on the basis of the appropriate Treaty provision (the *"legal basis"*). Indeed, the choice of the legal basis determines the legislative procedure to be followed for the adoption of an EU act and has a role in shaping the extent, limits and objectives of EU competencies.

The analysis carried out in the previous sections clarifies that an EU ban on new fossil fuel projects would be consistent with Article 5 TFEU.

- The ban would be a necessary and appropriate tool for the EU to address the shortcomings of its current climate policy, particularly with a view to achieving the goal of climate neutrality by 2050 and ensuring consistency with the EU NDC pathway; the ban would also be justified by the need to align EU climate action with the general duty, incumbent on the EU and Member States' institutions, to protect fundamental rights enshrined in the European Convention on Human Rights and in the European Charter of Fundamental Rights. Emerging case-law at international and Member State levels confirms that the EU has a duty to act to protect its citizens from the consequences of climate change.
- A ban at EU level would be consistent with the principle of subsidiarity: it would address an issue that concerns the EU as a whole (the compliance with the EU commitments under the Paris Agreement) and that, for that reason, requires a uniform response at EU level, rather than a fragmented State-by-State one. Furthermore, an EU-wide ban would preserve the level playing field between EU countries and prevent a race to the bottom in the context of the fossil-fuel phase out.
- The EU is competent to adopt legislation to ban new fossil fuel projects in its territory. In consideration of its aim and content, this legislation would have its correct legal basis in Article 192(1) TFEU and could be approved following the ordinary legislative procedure. The correctness of the legal basis indicated above can be inferred from legislative precedents in EU climate action, from specific case-law of the CJEU and from the internal practice of the EU legislators.

153 Fehling M. Ibid, page 352.

PART III: ELEMENTS FOR AN EU BAN ON NEW FOSSIL FUEL PROJECTS

1. INTRODUCTION

This part of the analysis describes a possible approach for the preparation of an EU legislative act to ban new fossil fuel projects in the EU.

Since the issues of EU competence and of the appropriate legal basis have already been discussed and resolved, in the previous part, the following sections will succinctly deal with the following issues:

- The form of the legislative act;
- Subject matter and objectives;
- Main obligation;
- Scope;
- Application in time;
- Review clause;
- Relation with other EU law instruments (notably, the EU taxonomy);
- Risks linked to investor-to-state arbitration and on ways to mitigate them.

2. FORM OF THE ACT

Article 192(1) TFEU empowers the European Parliament and the Council, using the ordinary legislative procedure, *"to decide what action is to be taken by the Union in order to achieve the [environmental] objectives referred to in Article 191"*.

This provision, however, does not give any specific instructions as to the kind of act that EU legislators should choose in view of enacting the ban. Article 288 TFEU, however, specifies that: *"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions"*.

EU legislative acts usually take the form of a regulation or a directive. Decisions are generally used for acts of individual scope and are not appropriate for general and abstract measures such as the envisaged ban. Recommendations and opinions are non-binding acts and are not legislative in nature.

It is therefore important to briefly examine the difference between directives and regulations, with a view to identifying the better option for the envisaged ban.

In accordance with Article 288(3) TFEU, *"directives shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*.

This means that, as a matter of principle, directives must be transposed in national law in order to be fully applicable. The legislator will normally set the deadline for the transposition of a directive into national legal systems.

Within that deadline, which is usually set two years after its entry into force, Member States must each pass a law to transpose and implement the directive. This process often entails the amendment of existing national laws. Member States are required to notify the transposition measures to the European Commission: this allows the EU executive's task to supervise the implementation of EU law into national legal systems and to commence, if necessary, infringement proceedings against Member States that fail to comply with their obligations. These proceedings usually take several years to complete.

Choosing a directive as the instrument to incorporate the ban would therefore mean that the banning legislation may potentially take several years to be fully and uniformly effective in the EU. This would be inconsistent with the need to address the urgency of a fossil fuel ban.

On the other hand, following Article 288(2) TFEU, regulations are acts of general application that are binding in their entirety and directly applicable in all Member States. In other words, regulations have the same legal strength as a national law, without the government being obliged to transpose them in national legislation. This means that they can also be fully enforced before national courts, notably in cases involving individuals or companies as both actors and defendants.

In light of the above, it seems reasonable to assume that the preferable instrument for the envisaged EU ban on new fossil fuel projects could be a regulation and not a directive.

3. SUBJECT MATTER AND OBJECTIVES

The subject matter and objectives of a legislative act can often be assumed by its provisions. However, in the case of EU legislative acts, it is appropriate to clearly spell these elements out in one of the opening provisions (normally the first one or two Articles).

As we have seen above (part II, section 4) the stated aim and subject of a measure are the primary elements that come into consideration when the appropriateness of the chosen legal basis is considered. Furthermore, the interpretation and application of the ban's provisions can be influenced, in case of doubt, by its identified objectives (e.g. when uncertainty exists on the inclusion of a certain type of project or activity).

Therefore, the regulation should expressly refer to the following subject matter (*"prohibiting certain activities involving the extraction, production, transportation, distribution and use of fossil fuels in the EU"*) and to the following objectives:

1. Ensuring the EU's compliance with its international commitments under the 2015 Paris Agreement and the relevant EU legislation on climate change, such as the EU Climate Law;
2. Contribute to the Union's efforts *"to limit the temperature increase to 1.5°C above pre-industrial levels"*;
3. Facilitate the achievement of full decarbonisation of the EU's economy by promoting the rapid transition away from the use of fossil fuels;
4. Contribute to the protection of the fundamental right to a clean, healthy and sustainable environment and to the other rights that are under threat due to climate change.[154]

4. MAIN OBLIGATIONS, SCOPE AND APPLICATION IN TIME

The regulation should clearly spell out the main legal obligations that it creates for Member States and EU individuals (i.e. natural and legal persons, public and private). In the specific case, the main obligation would consist of a prohibition of a number of project types and activities, whose common characteristic is that they involve the extraction, production, transportation, distribution and use of fossil fuels in the EU.

154 On 28 July 2022, the United Nations General Assembly adopted a landmark resolution 76/300 (A/RES/76/300) recognising the human right to a clean, healthy and sustainable environment. In its February 2023 conclusions on EU priorities in UN human rights fora, the Council of the European Union states that it will continue to support measures to address the impact of climate change, the loss of biodiversity and environmental degradation on the full enjoyment of all human rights and support at international and regional levels discussions advancing the human right to a clean, healthy and sustainable environment. In a recommendation on human rights and the protection of the environment, adopted in 2022, the Council of Europe calls on its Member States to actively consider recognising, at national level, the right to a clean, healthy and sustainable environment as a human right (CM/Rec(2022)20).

The activities concretely envisaged in this law, and which define its scope, can be separately listed in a different provision or in an annex to the regulation.

The Regulation should be marked *"Text with EEA relevance"* when published in the EU's Official Journal. This marking can generally be taken as an indication that the act should be considered for incorporation into the European Economic Area (EEA) Agreement. This would set the basis for the application of Regulation in the EFTA States that are also part of the EEA (Iceland, Liechtenstein and Norway). While not being Member States of the EU, these states are legally bound by the EEA agreement.

It is also necessary for the law to clearly indicate the date from which it will start to apply (normally, the date of the entry into force of the Regulation) and the activities and projects that might be exempt from its prohibition *ratione temporis*, i.e. on account of the time in which they were approved or started.

4.1 PROHIBITION

Concretely, the law could read as follows:

"1. In accordance with the provisions of this regulation, the projects listed in Annex I, shall not be authorised in the EU, to the extent that they involve, or may involve, the extraction, production, transportation, distribution and use of fossil fuels".

4.2 SCOPE

Annex I would contain a list of these projects and activities. Referring to the terminology used in the EIA and SEA Directives could prove particularly useful, for reasons of legal certainty.

The following is a non-exhaustive list of the projects that could be listed in Annex I:

- Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of coal or bituminous shale;
- Thermal power stations and other combustion installations operating with fossil fuels;
- Extraction of petroleum and fossil gas for commercial purposes;
- Pipelines with a diameter of more than 800 mm and a length of more than 40 km for the transport of gas or oil;
- Surface industrial installations for the extraction of coal, petroleum, fossil gas and ores, as well as bituminous shale;
- Industrial installations using fossil fuels for the production of electricity, steam and hot water;
- Industrial installations for carrying gas, steam and hot water;
- Surface storage of fossil gas;
- Underground storage of combustible gases;
- Surface storage of fossil fuels;
- Industrial briquetting of coal and lignite;
- Oil and gas pipeline installations;
- Installations for the storage of petroleum [with a capacity to be determined].

4.3 APPLICATION IN TIME

The prohibition should apply to all project types that are included in the Annex. For reasons of legal certainty, however, the law should contain provisions that limit its retroactive application.

These provisions could read as follows:

"For reasons of legal certainty, paragraph 1 does not apply to the projects listed in Annex I, when the following conditions are met:

- *The authority that, under the applicable law of a Member State has the competence to authorise the project, has granted consent before the entry into force of this regulation;*
- *The consent is in line with all applicable Union and national law provisions;*
- *The developer has started implementing the investment in the project before the entry into force of this regulation".*

5. REVIEW CLAUSE

The approach described in the previous sections, whereby all fossil fuel projects are prohibited with the exception of those that were authorised and implemented before the entry into force of the regulation, could present a significant advantage in view of a possible phase out of existing fossil fuel-based projects in the future.

Indeed, the new regulation would establish the principle that all fossil fuel projects are incompatible with the climate objectives of the EU, but that the prohibition only applies to future ones.

This does not preclude the possibility that, in future, the EU legislator may carry out a review of existing fossil fuel infrastructure and opt for a paced phase-out, based on objective criteria to be defined on the basis of an impact assessment.

For this purpose, the new law could contain a review clause with the following text:

"No later than ...[five years after the date of entry into force of this Regulation], the Commission shall present an impact assessment accompanied, if appropriate, by a legislative proposal to reduce the scope of the projects to which the prohibition set out in this Regulation does not apply. The assessment shall determine the conditions under which authorisations for the projects listed in Annex I should be maintained, prohibited or revoked, with a view to contributing to the decarbonisation objectives of the EU. The review shall include an assessment of the impact of the specific projects, or of categories of projects, on the overall GHG emissions of the EU".

6. RELATION WITH OTHER EU LAW INSTRUMENTS (NOTABLY, THE EU TAXONOMY)

As for any new piece of EU legislation, the new Regulation should be made to operate in coordination with other sources of EU law. The EU legislator, and in particular the European Commission, should see that any legislative measure that would conflict with the EU ban should be expressly repealed, particularly when this could cause legal uncertainty.

An obvious candidate for repeal would be the complementary Climate Delegated Act, adopted by the Commission on the basis of the Taxonomy Regulation.[155] This Delegated Act controversially qualified (nuclear and) fossil gas generation as *"sustainable"* for the purpose of the EU taxonomy, subject to compliance with a series of technical screening criteria.

According to the European Scientific Advisory Board on Climate Change (ESABCC), the delegated act constitutes an example of the ambiguous stance of the EU on the role of fossil gas *"leading to costly infrastructural and institutional lock-ins, and delayed fossil fuel phase-out".*[156]

155 Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities (Text with EEA relevance) C/2022/631, OJ L 188, 15.7.2022.

156 See the report of the European Scientific Advisory Board on Climate Change, Towards EU climate neutrality: progress, policy gaps and opportunities, 18 January 2024, pages 59-60.

Maintaining the delegated act in force would lead to the paradoxical situation whereby the EU recognises the need to prevent further harm from fossil fuel emissions, while at the same time qualifying activities that add to these emissions as sustainable (thus undermining future efforts towards a fossil fuel phase-out).

7. MITIGATION OF RISKS FROM "INVESTORS TO STATE ARBITRATION" SYSTEMS (BITS AND THE ECT)

The phasing out of fossil fuels via legislative or regulatory measures entails a certain risk to trigger claims by the fossil industry against the state enacting those measures.

The most common vehicle for such claims, in past instances, has been represented by Bilateral Investment Treaties (BITs) and by the Energy Charter Treaty (ECT).[157] The key aspect of BITs and the ECT is that these instruments provide for a dispute resolution mechanism, often executed within the framework of the International Centre for Settlement of Investment Disputes under the ICSID Convention of the World Bank in Washington.[158]

The EU and the Member States have, in recent years, taken measures to limit the occurrence of state-to-state investment disputes between private parties established in one EU Member State and the authority of another Member State (this possibility was created by the existence of so-called "intra-EU BITs" and by the ECT).

The CJEU in several instances (notably in the *Achmea*[159] and *Komstroy*[160] rulings and in its opinion on the compatibility of CETA with EU law[161]) clarified that "intra-EU BITs" are not compatible with EU law and that international agreements providing investment arbitration mechanisms against the EU and the Member States are only acceptable to the extent that they do not limit the freedom of the EU to regulate in the public interest.

- In the Achmea case, the CJEU ruled that *"Articles 267 and 344 TFEU must be interpreted as* **precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal** *whose jurisdiction that Member State has undertaken to accept"* (emphasis added), as such proceedings would limit the ability of Member States' courts to interpret and apply EU law, thereby compromising the integrity of the EU judicial system.
- The CJEU further developed its case-law in the Komstroy case, in which it ruled that Article 26(2)(c) ECT *"must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State".*[162] This view of non-enforceability is supported by a further recent CJEU ruling of September 2022, where the CJEU seconded the view of non-enforceability.[163]

157 The Energy Charter Treaty (ECT) is a multilateral agreement focused on the energy sector. It was founded in 1994 to facilitate international cooperation and provide a framework for investment protection, trade, and dispute resolution within the energy field. The ECT contains provisions on investment protection, trade and transit in energy materials and products, and dispute settlement mechanisms. The ECT also sets up a framework for international cooperation in the energy field between its 54 Contracting Parties. The European Union at present still is a contracting member, together with Euratom, as were 26 EU Member States (as of 8 May 2023), as well as Japan, Switzerland, Türkiye and most countries from the Western Balkans and the former USSR, with the exception of Russia and Belarus.

158 For a statistical overview of ECT cases by the ECT Secretariat (up to 2020 as most recent publication) see https://www.energycharter.org/fileadmin/DocumentsMedia/News/Statistics_Cases_under_the_Energy_Charter_Treaty_as_of_1_June_2020.pdf: "As of 1 June 2020, the Secretariat is aware of 130 investment arbitration cases instituted under the Energy Charter Treaty (sometimes invoked together with a bilateral investment Treaty). Since parties to investment arbitration under Article 26 ECT are not obliged to notify the Secretariat of the existence or substance of their dispute, some awards (and even the existence of some proceedings) remain confidential...."

159 CJEU, Judgement of 6 March 2018, Case C-284/16, Slowakische Republik v Achmea BV (Achmea case).

160 CJEU, Judgement of 2 September 2021, Case C-741/19, République de Moldavie v Komstroy LLC.

161 CJEU, Opinion 1/17 of 30 April 2019.

162 CJEU, Case C-741/19, Ibid, para 66.

163 CJEU, Order of 21 September 2022, Case C-333/19, DA v Romanian Air Traffic Services Administration (Romatsa) and Others, and FC and Others v Romanian Air Traffic Services Administration (Romatsa) and Others. The order concluded (para 44): "EU law, in particular Articles 267 and 344 TFEU, must be interpreted as meaning that a court of a Member State ruling on the enforcement of the arbitral award which was the subject of Commission Decision (EU) 2015/1470 of 30 March 2015 on State Aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013, is required to set aside that award and, therefore, may not in any case proceed with its enforcement in order to enable its beneficiaries to obtain the payment of damages which it awarded them".

- Finally, in the *CETA* Opinion, the CJEU clarified the limits within which investment arbitration agreements can be compatible with the EU legal system. The Court stated that parties must take care to ensure that arbitration tribunals have no jurisdiction to call into question the choices democratically made within a party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.[164] It also ruled that: *"If the Union were to enter into an international agreement capable of having the consequence that the Union — or a Member State in the course of implementing EU law — has to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established, in accordance with the EU constitutional framework, by the EU institutions, it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework"*.[165]

These CJEU decisions clearly defined the perimeter within which investor-to-state arbitration can be acceptable (and therefore enforceable) in the EU legal framework. Following these interventions, both the EU and the Member States have taken steps to greatly reduce the potential negative impact of investment arbitration cases. In particular:

- In 2020, the Member States concluded an agreement for the termination of Bilateral Investment Treaties between them;[166]
- Individual Member States (France, Germany, Italy and Poland) first and then the EU (on 27 June 2024) decided to withdraw from the ECT;[167]
- Following the withdrawal from the ECT, the Member States, the EU and Euratom therefore decided to reach an agreement to clarify *"for the benefit of courts and arbitral tribunals, that the arbitration clause provided in the ECT does not apply in the relations between an EU investor and an EU Member State"*.[168] The Member States and the Union further agreed to accompany the closing of negotiations on the agreement with a specific declaration on the legal consequences of the *Komstroy* judgement and a common understanding on the non-applicability of Article 26 of the ECT as a basis for intra-EU arbitration proceedings.[169] The declaration is effective as of its signature on 26 June 2024 and will be published in the Official Journal of the EU. This inter se agreement is now subject to internal procedures leading to its signature and entry into force.

164 CJEU, Opinion 1/17 of 30 April 2019, para 160.

165 Ibid, para 150.

166 https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en.

167 https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/.

168 https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513.

169 Declaration on the legal consequences of the judgement of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings, full text available at 740e62fc-a0d1-4a5b-9d00-01357802c307_en (europa.eu). On Article 36 ECT and Article 47 ECT: "For greater certainty, the signatories declare that in accordance with the common understanding expressed in paragraphs 1 and 2, and without prejudice thereto, Article 26 of the Energy Charter Treaty does not apply as a basis for intra-EU arbitration proceedings and that, in that respect, Article 47(3) of the Energy Charter Treaty will not produce legal effects in intra-EU relations".

Yet, a certain level of residual risk exists, linked in particular to the withdrawal clause in Article 47(3) ECT,[170] to the aggressiveness of fossil fuel companies,[171] as well as from ICSID arbitrators, to accept the boundaries set out by the CJEU for the Union's legal system.[172]

These risks, however, can be adequately mitigated by the EU legislators and Member States by:

1. Enacting the EU ban on new fossil fuel-based projects in the form of a regulation (as explained in section 2, above): thus placing the EU as a whole, instead of individual Member States, as a resistant in case of abusive actions by fossil fuel companies;
2. Ensuring that the EU ban does not, at least in its initial form, apply retroactively: this would ensure that no investment currently protected by the ECT sunset clause would fall in the scope of the regulation (as explained in Section 4.3, above);
3. Taking action at international level to structurally address potential remaining conflicts between fossil fuel phase-out measures, and international and domestic climate obligations.

170 According to Article 47(3), the provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

171 After having decided in favour of an end of coal-fired power plants by 2029, the Netherlands in 2021 were taken to the ICSID Tribunal under the ECT rules by German utilities RWE RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4) and Uniper each applying for around 2.5 billion EUR. The Netherlands fought back immediately with an inadmissibility claim before the Higher Regional Court of Cologne, Germany, on 11 May 2021. On 1 September 2022, the Court declared both ICSID arbitral claims inadmissible pursuant to section 1032 (2) of the German Code of Civil Procedure, which provides that: "Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings". The Higher Regional Court found the arbitral clause of the ECT incompatible with EU law and thus invalid in intra-EU arbitrations, following above CJEU rulings. See: The Netherlands v. RWE and Uniper (Anti-Arbitration Injunctions) - Climate Change Litigation (climatecasechart.com). After the German Tribunal's judgment, both utilities in 2023 withdrew their claims against the Netherlands under ICSID rules. The cases therefore were closed by the Tribunals, thus not on initiative and decision of the Tribunals. Almost three years before the final exit of the United Kingdom from the EU, in 2017 the British-based oil and gas company Rockhopper issued a claim against Italy for its legislation banning exploration and exploitation of oil concessions in the Adriatic coast due to environmental concerns. Despite Italy's defence of non-applicability of ECT rules for intra EU -disputes, the Tribunal dismissed this argument and the CJEU rulings and in August 2022 issued an order to pay compensation of EUR 184,000,00.00 (pre-tax) and EUR 6,675,391 for decommissioning costs, plus costs of legal counsel, fees etc. in the order of GBP 3,500,000.00. See: Rockhopper v. Italy, Final Award, 23 Aug 2022 (jusmundi.com).

172 In its interim decision in the proceeding (ARB/12/12), the ICSID arbitration court invested with the Vattenfall v. Germany case rejected Germany's request to acknowledge the CJEU Achmea ruling and to decline its jurisdiction.