

Legal analysis - feasibility study of an EU legislative act banning new fossil fuel projects

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EXECUTIVE SUMMARY

INTRODUCTION

When confronted with the disastrous climate impacts around the globe and the rapidly shrinking carbon budget left to still stand a chance to limit global heating to 1.5°C and thus stop the climate crisis from further escalating, sufficient measures are needed to rapidly cut global greenhouse gas emissions and reach carbon neutrality as fast as possible.

Fossil fuels – coal, oil and gas – are by far the largest contributor to the global climate crisis, accounting for over 75% of global greenhouse gas emissions and nearly 90% of all CO₂ emissions. Therefore, the step we most urgently need to take is stopping fossil fuel expansion, and phasing them out for good.

Policies focusing solely on reducing demand for fossil fuels have been insufficient to reduce global greenhouse gas emissions in line with the 1.5°C scenario, and supply-side policies are gaining more and more foothold. Research shows that there is no room for new fossil fuel projects within a 1.5°C compatible carbon budget. The Greenpeace European Unit has therefore sought legal advice on the feasibility of an EU-wide ban on all new fossil fuel projects.

“Fossil fuel projects” must then be understood as including fossil fuels exploration and extraction; fossil fuels transport and storage infrastructures (e.g. pipelines and liquified “natural” gas terminals) and fossil fuels use e.g. for electricity generation.

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

Expert opinions from international and European authorities (the Intergovernmental Panel on Climate Change (IPCC), the European Environment Agency (EEA), or the European Scientific Advisory Board on Climate Change (ESABCC)) all confirm the serious threat represented by the climate crisis at European and global level, with fossil fuels as the main cause - and their phase out the priority.

By adopting the United Nations Framework Convention on Climate Change (UNFCCC) and, on its basis, the 2015 Paris Agreement, the international community has committed to reduce greenhouse gas emissions with the aim to limit global heating to 1.5°C.

Acting on the basis of the competences conferred to it by the Treaty on the Functioning of the European Union (TFEU), the EU became a party of the 2015 Paris Agreement and committed to reach climate neutrality by 2050, together with its Member States. However, scientific evidence from the IPCC and the EEA shows that the legal measures adopted by the EU so far, and their national implementation, are insufficient to ensure the EU meets its international commitments.

It is therefore appropriate to consider the adoption of additional measures, especially in view of accelerating the phase out of fossil fuels emissions. Among these measures, the most urgent is an EU ban on all new fossil fuels projects. The legal analysis developed by Greenpeace's European Unit in collaboration with Prof. Dr. Doerte Fouquet explores the feasibility and elements of such an act.

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

Article 5 TEU states that 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.

PROPORTIONALITY

The ban is necessary and appropriate for the EU to address its current climate policy's shortcomings, particularly in view of achieving the goal of climate neutrality by 2050 and ensuring consistency with the EU NDC pathway. The ban is also justified by the need to align EU climate action with the general duty to protect fundamental rights enshrined in the European Convention on Human Rights and in the EU Charter of Fundamental Rights. Emerging case-law at international and Member States level confirms that the EU has a duty to act to protect its citizens from the impacts of the climate crisis.

SUBSIDIARITY

The ban addresses an issue that concerns the EU as a whole (the compliance with the EU commitments under the Paris Agreement) and, as such, requires a uniform response at EU level, rather than a fragmented State-by-State one. An EU-wide ban also maintains a level playing field between EU Member States, and prevents a race to the bottom in the context of the fossil-fuel phase out.

CONFERRAL & LEGAL BASIS

Legislative precedents in EU climate action, specific case-law of the CJEU and the internal practice of the EU legislators indicate that the EU is competent to adopt legislation to ban new fossil fuels projects in its territory. In view of its aim and content, this legislation would have its correct legal basis in Article 192(1)TFEU (environmental/climate policy) and could be approved following the ordinary legislative procedure.

PART III - ELEMENTS OF A BAN ON NEW FOSSIL FUEL PROJECTS

The ban would most likely be a **Regulation** (rather than a Directive) as it is an act of general application, binding in its entirety and directly applicable in all Member States. 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”. It should set out 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 the climate crisis.

The Regulation should then clearly spell out the **main legal obligations** it creates for Member States and EU individuals, in this case a prohibition: *“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”*. The **scope** would be clearly defined in the annex listing the projects covered by the ban and the **application in time** would be clarified through a strict limit on retroactive application. An ambitious **review clause** should be included, to allow for an extension of the ban.

The Regulation should address **other EU law** instruments which may need to be repealed. This would likely be the case of the complementary Climate Delegated Act under the Taxonomy Regulation, as it qualified fossil gas (and nuclear) generation as *“sustainable”* for the purpose of the EU taxonomy, subject to compliance with a series of technical screening criteria.

Additionally, the Regulation should address the **risks linked to investor-to-state arbitration** such as Bilateral Investment Treaties (BITs) and by the Energy Charter Treaty (ECT) and ways to mitigate them, in particular by carefully defining its application in time.