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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

Subject: Proposal for a Regulation on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942 - Appropriate legal basis

I. INTRODUCTION

1. At a meeting of the Working Party on Energy on 28 April 2022, some delegations asked whether Article 194 (2) TFEU, the legal basis proposed by the Commission for its proposal for a Regulation on methane emissions reduction in the energy sector² (the proposed Regulation), was appropriate and sufficient, taking into account the strong environmental aspects, or whether Article 192(1) TFEU, the environmental legal basis, would be more appropriate. This note reproduces the oral intervention of the representative of the Council Legal Service.

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² [15063 2021 REV 1](#), [15063 2021 REV1 COR1](#), [15063 2021 ADD1](#), [15063 2021 ADD2](#), [15063 2021 ADD3](#)

2. According to well-established case law, the legal basis of a Union act does not depend on an institution's understanding of 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.³ If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whilst the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.⁴ Only exceptionally, if it is established that the act simultaneously pursues a number of objectives that are inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases⁵, unless these legal bases prescribe procedures which are incompatible with each other.⁶

II. AIM AND CONTENT OF THE PROPOSED REGULATION

3. As regards the aim of the proposed Regulation, the explanatory memorandum sets the context explaining that '*[t]he proposal builds on the Union's 2030 Climate Target Plan and its impact assessment. The Climate Target Plan showed, on the basis of modelled scenarios, that achievement of an increased climate target of at least 55% net greenhouse gas emissions reduction in 2030 is feasible and would enable a smooth trajectory to climate neutrality in 2050. It also highlights the need to step-up reductions in methane emissions.*' (emphasis added) (p. 2)

³ Judgment of 11 June 1991, *Commission v Council* ('Titanium dioxide'), [C-300/89](#), [EU:C:1991:244](#), [paragraph 10](#).

⁴ *Ibid.* paragraph 30 and judgment of 22 October 2013, *Commission v Council*, [C-137/12](#), [EU:C:2013:675](#), paragraph 53 and case-law cited.

⁵ Judgment '*Titanium dioxide*', C-300/89, cited above, paragraphs 13 and 17; judgment of 23 February 1999, *Parliament v Council*, [C-42/97](#), [EU:C:1999:81](#), paragraph 38; Opinion of the Court of 6 December 2001; ('*Cartagena Protocol*'), [2/00](#); [EU:C:2001:664](#); paragraph 23; judgment of 10 January 2006, *Commission v Council* ('*Rotterdam Convention*'), [C-94/03](#), [EU:C:2006:2](#) and judgment of 10 January 2006, *Commission v Parliament and Council*, [C-178/03](#), [EU:C:2006:4](#), paragraphs 36 and 43.

⁶ Judgment '*Titanium dioxide*', C-300/89, cited above, paragraphs 17-21.

4. It also indicates that *‘[t]he Intergovernmental Panel on Climate Change (IPCC) notes that deep reductions in methane emissions must be achieved by 2030 for the world to stay below the 1.5°C (or even the 2°C) 2050 global temperature target. The most recent IPCC report underlines the role of methane as one of the main greenhouse gases responsible for climate change. The report outlines that methane levels are at an all-time high and well above the emission levels compatible with limiting warming to 1.5°C. There is thus a need for a sharp, rapid and sustained reduction in methane emissions to slow down global warming and improve air quality. It is important to note that the report concludes that the increase of methane in the atmosphere is the result of human activity and that fossil fuels have been a large contributor to the growth in methane emissions at least since 2007, alongside agriculture (mainly livestock) and wastewater. The 2030 Climate Target Plan’s impact assessment indicates that in the EU the most cost effective methane emission savings can be achieved in the energy sector.’* (emphasis added) (p. 1)
5. According to the explanatory memorandum (page 2, subparagraph 2), *‘[t]he general objective of the Regulation is, in the context of the functioning of the internal market for energy and while ensuring security of supply in the Union, to preserve and improve the environment by reducing methane emissions from fossil energy produced or consumed in the Union.’* (emphasis added)
6. The recitals of the proposed Regulation reflect this aim. Recital 1 explains that *‘[m]ethane, the main component of natural gas, is second only to carbon dioxide in its overall contribution to climate change and is responsible for approximately a third of current warming.’* Consequently, as expressed in recital 68, the objective of this Regulation is *‘the accurate measurement, reporting, verification and the reduction of methane emissions in the energy sector’*.

7. A great number of other recitals, albeit some more directly than others, bespeak environmental concerns:
- recital 3: *‘According to recent estimates by the United Nations Environment Programme and the Climate and Clean Air Coalition, methane emission reductions of 45% by 2030, based on available targeted measures and additional measures in line with the United Nations (‘UN’) priority development goals, could avoid 0.3°C of global warming by 2045.’*
 - recital 6: *‘Methane emissions are included in the scope of the Union greenhouse gas reduction targets for 2030 set out in the European Climate Law and the binding national emission reduction targets under Regulation (EU) 2018/842. However, there is currently no Union level legal framework setting out specific measures for the reduction of anthropogenic methane emissions in the energy sector. In addition, whilst Directive 2010/75 on industrial emissions covers methane emissions from the refining of mineral oil and gas, it does not cover other activities in the energy sector.’*
 - recital 18: *‘As party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, the Union is required to provide annually an inventory report of anthropogenic greenhouse gas emissions constituting an aggregate of the Member States’ national greenhouse gas inventories, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC).’*
 - recital 20: *‘Country data reported pursuant to UNFCCC reporting provisions is submitted to the UNFCCC secretariat according to different tiers of reporting in line with the IPCC guidelines. In this context, the IPCC generally suggests using higher tier methods for those emission sources which have a significant influence on a country’s total inventory of greenhouse gases in terms of absolute level, trend or uncertainty.’*

– recital 26: ‘*This Regulation builds on the OGMP 2.0 framework insofar as it meets the criteria referred to in Recitals 24 and 25, to contribute towards the collection of reliable and robust data that would form a sufficient basis for monitoring methane emissions and if necessary to build additional action to further curb methane emissions.*’

– recital 52: ‘*Global warming effects caused by methane emissions are cross-border*’.

8. In terms of content, the proposed Regulation lays down rules for the accurate measurement, reporting and verification of methane emission in the energy sector in the Union, for the abatement of those emissions through mandatory leak detection and repair surveys and restrictions on venting and flaring, and for ensuring transparency on methane emissions related to fossil energy imported into the Union. As regards the material scope, the proposed Regulation applies to methane emissions in the oil, gas and coal sectors. (Article 1 ‘Subject matter and scope’).
9. The proposed Regulation builds on the three pillars of the Commission's Communication on an EU strategy to reduce methane emissions⁷:
- a) It imposes measurement, reporting and verification (MRV) obligations on all sources of methane emissions in the EU energy sector components (Articles 12, 20 and 25) under their operations.
 - b) It imposes obligations to mitigate and monitor methane emissions (Articles 13, 21 and 26):
 - EU operators are to conduct frequent leak detection and repair surveys of all relevant components under their operations (Article 14(1) to (3));
 - Obligation to repair immediately or as soon as possible (Article 14(4));

⁷ [COM\(2020\)633](#)

- Obligation to continuously monitor leaky components (Article 14(5) to (7));
 - Ban on venting and routine flaring, except in exceptional circumstances (Articles 15 to 17, 22, 23 and 26(2));
 - Obligation on Member States to develop and implement mitigation plans for inactive wells and immediate reduction of emissions through mandatory leak detection and repair and a ban on venting and flaring (Articles 18 and 26).
- c) It puts forward various instruments for improving information on methane emissions relating to imported fossil energy:
- Obligation for importers to provide information on monitoring, reporting and verification and mitigation measures [Chapter 6, Art 27];
 - Methane transparency database for information on exporting countries' international reporting obligations [Chapter 6, Article 28];
 - International Methane Emissions Observatory [Chapter 2, Article 10];
 - Global monitoring tool to show the magnitude, recurrence and location of methane emitters [Chapter 6, Article 29];
 - Bilateral dialogues with fossil energy producing countries showing higher methane emissions [Chapter 6, Article 29].

10. According to its aim and content, as they appear from its actual wording, the proposed Regulation is thus concerned with a reduction in methane emissions in the energy sector across the Union owing to the impact of these methane emissions on climate, in particular in the context of the climate emergency and the Union's climate neutrality target.

III. LEGAL ASSESSMENT

11. It results from the analysis in paragraphs 3 to 10 above that the proposed Regulation is intended to contribute to reducing methane emissions in the energy sector and to participating in the fight against climate change, in particular in the context of the climate emergency and the Union's climate neutrality target. It is therefore clear that the predominant purpose of the proposed Regulation is to contribute to combating climate change, which is one of the main objectives of environmental policy under Article 191 TFEU.
12. The environmental legal basis, Article 192(1) TFEU, is the main legal basis for deciding on the action to be taken by the Union in order to achieve the objectives referred to in Article 191 TFEU, i.e. 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. As stated by the Court of Justice, Article 192(1) TFEU '*seeks to give the European Union a role in the preservation of the environment and the fight against climate change*'⁸.
13. While it is undisputed that imposing obligations on Member States to measure, monitor, mitigate and improve information on methane emissions may have an effect on the functioning of the internal energy market, nonetheless, the fact remains that the specific aim of the proposed Regulation is to enable the European Union to pursue the goal of combating climate change and reaching climate neutrality, based on the fact that methane is second only to carbon dioxide in its overall contribution to climate change and is responsible for approximately a third of current global warming. It cannot be inferred from the fact that the proposed Regulation is limited to the energy sector, or that it has an effect on the energy market, that it can automatically be regarded as an energy policy measure within the meaning of Article 194 TFEU⁹.

⁸ Judgment of 21 June 2018, C-5/16, *Poland v European Parliament and Council*, EU:C:2018:483, paragraph 43.

⁹ In the same vein, see the reasoning of the Court of Justice in its judgment of 6 May 2014, *Commission v Parliament and Council*, [C- 43/12](#), EU:C:2014:298.

14. The examination of the aim and content of the proposed Regulation undertaken above confirms that the obligations on monitoring, reporting and mitigating provide the means to pursue the objective of combating climate change. Therefore, the correct and sufficient legal basis for the proposed Regulation is Article 192(1) TFEU, as both its aim and content relate primarily to EU environmental policy objectives. In this regard, it is also noted that the proposed Regulation does not prevent Member States from going further in pursuing environmental protection objectives, pursuant to Article 193 TFEU¹⁰.
15. However, the Commission has based the proposed Regulation on Article 194(2) TFEU. That provision constitutes a legal basis for measures necessary to achieve the energy policy objectives set out in Article 194(1) which reads:

‘In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.’

16. The explanatory memorandum justifies the use of Article 194 TFEU at page 5 as follows:

‘The legal basis of this initiative is Article 194(2) of the Treaty on the Functioning of the European Union (TFEU), which empowers the Union to establish the measures necessary to achieve the objectives of the Union with regard to policy on energy. The proposal concerns the energy sector only and it contributes to the Union’s energy policy objectives as outlined in Article 194(1), in particular the functioning of the energy market by harmonizing monitoring, reporting and abatement rules on methane, which contributes to preserve and improve the environment.’

17. The justification of the choice of legal basis given in the explanatory memorandum is twofold: first, the proposal would ensure the functioning of the energy market under Article 194(1)(a) by harmonising monitoring, reporting and abatement rules on methane and, second, it is limited to the energy sector.

¹⁰ See for example recital 33, which refers to minimum harmonization.

18. As regards the first justification, it should be pointed out that there is no reference to the functioning of the energy market in any recital or Article of the proposed Regulation. The only reference to a cross-border dimension is in recital 52, according to which ‘[g]lobal warming effects caused by methane emissions are cross-border’. On the contrary, it appears from the analysis of its aim and content that the proposal addresses reductions of methane emissions in the context of climate change. Its effects on the functioning of the internal energy market are ancillary.

19. It is true that Article 34 of the proposed Regulation amends Article 15 of [Regulation \(EU\) 2019/942¹¹](#) on ACER, which is based on Article 194(2) TFEU, by adding the following paragraph 5:

‘5. Every three years ACER shall establish and make publicly available a set of indicators and corresponding reference values for the comparison of unit investment costs linked to measurement, reporting and abatement of methane emissions for comparable projects. It shall issue recommendations on indicators and reference values for unit investment costs for complying with the obligations under [this Regulation] pursuant to Article 3 of [this Regulation]’.

This provision mirrors Article 3 of the proposed Regulation which requires regulatory authorities to take into account the costs incurred and investments made to comply with the obligations under the proposed Regulation when fixing or approving transmission or distribution tariffs or the methodologies.

20. However, these provisions, which determine how to finance the costs linked to the measures to be taken in order to reduce methane emissions, are ancillary and do not require a specific energy legal basis.

¹¹ OJ L 158, 14.6.2019, p. 22–53.

21. As regards the second justification, although the measures themselves indeed pertain to the energy sector, it remains that the main aim of the proposal is to contribute to the fight against climate change by reducing methane emissions in the oil, gas and coal sectors. The fact that the content of the measures relates to energy is inherent to the nature of the fight against climate change, which requires action in a range of areas to ensure a reduction of gas emissions. Systematically using or adding, in such cases, the legal bases relevant to the policy area touched upon would render the environmental legal basis, and more specifically the objective of the fight against climate change, devoid of purpose¹². This is the position already taken by the Council Legal Service as regards the Social Climate Fund¹³.
22. In line with this reasoning, paragraph 2 of Article 194 TFEU indicates that this provision is to be used as a legal basis ‘*without prejudice to the application of other provisions of the Treaties*’.
23. In this context, it is worth noting that the Union rules on Monitoring, Reporting and Verification of CO₂ emissions in the maritime sector, Regulation (EU) 2015/757¹⁴, were adopted on the basis of Article 192(1) concerning environmental policy. Although they only relate to the maritime sector, those rules were not adopted using the transport legal basis found in Article 100(2) TFEU.

¹² See, in a similar sense, Opinion 2/00, ‘*Cartagena Protocol*’, cited above, paragraph 40, ‘*The Commission’s interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy. It should be noted that environmental policy is expressly referred to in Article 3(1)(l) EC, in the same way as the common commercial policy, to which reference is made in Article 3(1)(b)*’.

¹³ See footnote 25 in the Opinion of the Council Legal Service, doc. ST 7007/22.

¹⁴ OJ L 123, 19.5.2015, p. 55.

24. It follows that Article 194(2) TFEU, proposed by the Commission, is not the correct legal basis for the proposed Regulation. Since the proposed Regulation pursues a predominantly environmental aim and does not simultaneously pursue a number of inextricably linked objectives, without one being secondary and indirect in relation to another, the use of Article 192(1) TFEU is sufficient and no other legal basis is necessary.

IV. CONCLUSIONS

25. In conclusion, the Council Legal Service is of the opinion that:
1. The proposed Regulation is a measure to achieve the environmental objectives set out in Article 191 TFEU, in particular that of preserving, protecting and improving the quality of the environment and of combating climate change;
 2. the proposed Regulation is thus an environmental measure that covers methane emissions in the energy sector and the correct and sufficient legal basis for its adoption is Article 192(1) TFEU.
 3. Article 194(2) TFEU, proposed by the Commission, is not the correct legal basis for the proposed Regulation.