

# REPORT ON EXTENSION OF PROVISIONS UNDER THE REGULATION ON METHANE EMISSIONS IN THE ENERGY SECTOR OUTSIDE EU BORDERS

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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the Climate Action Network Europe.

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# EXECUTIVE SUMMARY

Considering the power of methane as a greenhouse gas, its emissions pose a major threat to the environment. The European Commission has published a proposal for Regulation aiming to regulate and reduce methane emissions (the 'proposal for Methane Regulation'). It envisaged three types of measures: Measurement, Reporting and Verification (MRV); Leak Detection and Repair (LDAR); and a Ban on Routine Venting and Flaring (BRVF). Since a fair share of overall methane emissions occur outside of EU borders, to ensure the Proposal's effectiveness, non-EU operators should also be obliged to comply with the limitations stated therein. This report, therefore, aims to analyse the legal feasibility of applying the Methane Emissions Proposal's standards and requirements to operators outside the EU.

To pursue the aim of this report, different measures were analysed:

## Option 1: Legal and regulatory measures

The jurisprudence of the Court of Justice of the EU (CJEU) has already clarified EU jurisdiction to request compliance with EU climate legislation to aircraft operators established outside the EU for flights departing from and arriving at EU airports. This jurisprudence stated that such legislation **does not breach the sovereignty principle** since those aircrafts are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU.<sup>1</sup> This criterion of having a **sufficient link** with the Member State or EU territory concerned is known as the principle of territorial link.<sup>2</sup> This conclusion is applicable to a measure proposing the extension of the provisions under the proposal for Methane Regulation as well as to a measure based on a new provision establishing a methane emissions standard. In both cases the sufficient territorial link principle is fulfilled because the gas is sold and consumed in EU territory.

Similarly, the **World Trade Organisation's (WTO) rules are not an obstacle** for the application of the measures proposed in the Methane Regulation proposal to operators outside the EU. Under the WTO rules, the establishment of trade restrictions or conditions imposed on operators outside the EU introducing products into the EU market should not be discriminatory or a disguised restriction of international trade. The proposal for Methane Regulation that is equally applicable to operators inside the EU and operators outside the EU introducing a product in the EU, respects these principles.

The current proposal for Methane Regulation establishes an information duty on methane emissions for importers of fossil fuels from outside of the EU, but does not require MRV, LDAR and BRVF. Drawing inspiration from other European regulations, this document concludes that **extending these measures to operators outside the EU would require amending Article 1(3) of the proposal** for Methane Regulation. Enforcement of these measures would, however, require additional measures.

The second option would be to introduce a new provision in the proposal for Methane Regulation **establishing a cap on methane emissions**. We suggested adding a new paragraph under Article 13 to the proposal for Methane Regulation, which would allow emissions of up to 0.20 % for domestic and imported gas sold and consumed in the EU.

Concerning the enforcement of MRV requirements and in particular the verification of the emission, we analysed different ways through which the extension of the Methane Regulation proposal's measures to operators outside the EU could be enforced. While the International Methane Emissions Observatory (IMEO) is proposed by the Commission as the body responsible for the verification of methane emissions, its link to the OGMP 2.0 and its member companies and countries raise the question of its independence as a verification body.

Another option draws inspiration from the Official Controls Regulation, which **grants the Commission competence to act as an independent verifier of compliance with EU requirements by third countries** who establish systems of control and enforcement of private operators.

1. Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, paragraph 125

2. Opinion of Advocate General Kokott in the case C-366/10, paragraphs 154 & 156

Enforcement of the MRV, LDAR and BRVF measures through inspections and controls could be inspired by the EU Timber Regulation's due diligence. While possible, this due diligence system raises some challenges, namely, variations in rigour of reports, difficulties in validating information and lack of clarity regarding the obligations of operators and competent authorities.

Finally, verification, inspections and controls through Voluntary Partnership Agreements (VPAs) was considered as a system for developing enforcement actions. **Agreements with key countries exporting methane emitting oil and gas to the EU would define the responsibilities of the exporting country to enforce obligations** for measuring, verifying and reporting methane emissions and to establish and develop a solid national system to ensure implementation compliance and control. Based on such a solid system and once compliance is verified, the **competent authorities will grant a licence to export**. For these purposes, establishing a parallel with the VPAs under the Forest Law Enforcement, Governance and Trade Regulation (FLEGT) pointed to the conclusion that this would be a plausible option.

## Option 2: Contractual measures

This option encompasses complementary contracts in which the operator, as a contracting party, would be based outside of the EU. It is argued that while the proposal for Methane Regulation would be the legal basis for the extension of the obligations to operators outside the EU, **the operational contracts would further define the process and requirements of the parties** giving it more legal certainty. Similar systems are seen, for instance, under the Basel Convention and the Waste Shipment Regulation. While a possible option, it should be noted that gas contracts are tendentially long-term, which entails that the complementary contracts should be binding between the parties for shorter periods.

Concerning penalties, it was concluded that these would need to be adjusted to the specific nature of the gas contracts. Fines and payments were deemed more adequate than seizure of the gas.

Moreover, it would also be useful to introduce provisions on financial securities in the proposal for Methane Regulation, aiming to complement and ease the imposition of fines. It was noted, however, that adoption of these rules is challenging given their nature.

## Enforcement measures

The penalties contained in the proposal for Methane Regulation were discussed in order to explore the extent to which they would be effective in promoting emission reduction. It was concluded that **the penalty system established by the proposal for Methane Regulation is quite complete** and linked to the actual damage caused to the environment, but **could be complemented with more precise types of sanctions to quantify it and adjust the penalty**. The system under the EU Timber Regulation was identified as being challenging, as it is difficult to quantify the concrete impact caused by methane emissions in the environment. A more suitable system would be **linked to a cap of the methane emissions** which would enable quantifying the fine in relation to the amount of excess. This is the system in force under the CO<sub>2</sub> emission performance standards for cars and vans Regulation. Moreover, it was suggested that, similar to the system under the F-Gas Regulation, a 200 % reduction on the allocated quota for the period subsequent to the registered overflow would be imposed.

Seizure of goods and withdrawal of the licence to trade were also analysed as penalty measures. It was concluded that these options could affect energy security and would also affect the relationship with the few traders of gas, given the current circumstances where Russia is already excluded.

**Penalties listed under the new re-cast Environmental Crime Directive were considered for these purposes**. While some of the provisions contained therein were not applicable due to the nature of the trade activity and of the emissions (namely: imprisonment; obligation to reinstate the environment within a given time period; temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions), some of the additional options mentioned in this new law were considered suitable ((criminal and administrative) fines; disqualification from directing establishments used for committing the offence; national or EU-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied; and obligation of companies to install due diligence schemes for enhancing compliance with environmental standards).

# 1. METHODOLOGY

## 1.1 Project objective

Methane (CH<sub>4</sub>) is a potent greenhouse gas and its reduction is a prerequisite for limiting global warming to 1.5°C.<sup>3</sup> Yearly emissions of this gas have been estimated at around 570 million tonnes (Mt)<sup>4</sup> (of which 60% is anthropogenic). There are three sectors that are credited for the highest emissions of CH<sub>4</sub>: agriculture, waste management and the energy sector, which alone accounts for 32% of global influx of CH<sub>4</sub> into the atmosphere.

One tonne of methane has a global warming potential comparable to ~83 tonnes of CO<sub>2</sub> in a 20-year time perspective and ~30 tonnes of CO<sub>2</sub> in a 100-year time perspective.<sup>5</sup> Methane is assumed to account for about 0.5 degrees (in the run up to 2050) and 0.8 degrees (in the long run) of temperature increase globally.<sup>6</sup> It also has adverse effects on human health, contributing to the formation of ozone in the troposphere, a source of many respiratory diseases.<sup>7</sup> Reducing human-caused methane emissions is one of the most cost-effective strategies to slow down climate change as methane disappears from the atmosphere relatively quickly, in about 10 to 15 years.

Taking into consideration that deployment of already available technologies could avoid around that 50–80% of CH<sub>4</sub> emissions from fossil fuels significantly reducing emissions from the energy sector,<sup>8</sup> restriction of avoidable methane emissions became one of the objectives of the EU policy. Considering also that such measures can be taken at negative or low costs, as per the global methane assessment, in October 2020 the European Commission published a Methane Strategy in which it committed itself to deliver legislative proposal aiming at curbing methane emissions.<sup>9</sup> This initiative was followed by a Proposal for a Regulation on methane emissions reduction in the energy sector<sup>10</sup> (the Methane Regulation Proposal). It was, however, decided to limit the scope of the emissions abatement measures envisaged under the Proposal to emissions from energy infrastructure within the EU.

It is estimated that anthropogenic emissions of CH<sub>4</sub> in the EU account for merely 6 % of EU-consumption-induced release of methane into the atmosphere.<sup>11</sup> However, consumption taking place in the EU causes significant levels of methane emissions outside of the EU.<sup>12</sup> For this reason and in order to achieve a measurable and significant abatement of the emissions, the scope of the Methane Regulation should include upstream methane emissions caused by non-EU operators.

3. Masson-Delmotte, V., Zhai, P., Pörtner, H.-O., Roberts, D., Skea, J., Shukla, P.R., Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, IPCC, 2018, available at: <https://www.ipcc.ch/sr15/chapter/spm/>, accessed on: 14 July 2022.

4. Please note that it was widely agreed upon that emissions are estimated using outdated emission factors that in turn are used in relatively simple calculations to estimate methane emissions. These estimates are largely divorced from the realities of actual operations. See <https://www.iea.org/reports/methane-tracker-2020>, accessed on: 13 July 2022.

5. <https://www.ercevolution.energy/ipcc-sixth-assessment-report/>

6. Ibid., annex: methane factsheet p. 1.

7. Kasprzak M., Jones D., Drugi Bełchatów, Metan kopalniany w Polsce, available at: <https://ember-climate.org/app/uploads/2022/01/Polish-Polands-Second-Belchatow.pdf>, accessed on: 14 July 2022.

8. IPCC Sixth Assessment Report (Summary for Policymakers) available at: [https://report.ipcc.ch/ar6wg3/pdf/IPCC\\_AR6\\_WGIII\\_HheadlineStatements.pdf](https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_HheadlineStatements.pdf), accessed on: 14 July 2022.

9. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 663 final, available at: [https://ec.europa.eu/energy/sites/ener/files/eu\\_methane\\_strategy.pdf](https://ec.europa.eu/energy/sites/ener/files/eu_methane_strategy.pdf), accessed on 27 July 2022.

10. 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) 805 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A805%3AFIN>, accessed on 27 July 2022.

11. Commission staff working document impact assessment report Accompanying the 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, SWD(2021) 459 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021SC0459>, accessed on 27 July 2022.

12. Ibid.

The objective of this study is to examine to what extent measures envisaged under the Methane Regulation proposal could be extended to gas operators outside of the EU to prompt their emissions reduction potential. It should also consider if additional EU legislation would be needed to achieve the emissions reduction objective.

The study analyses the following hypothetical options:

- **Option 1: Legal and regulatory measures**
  - for the extension of the scope of measures envisaged in the Methane Regulation proposal (MRV, LDAR or BRVF) with regard to fossil gas consumed in the EU;
  - for the establishment of other conditions in the placement of goods on the EU market.
- **Option 2: Contractual measures** setting obligations under gas purchase contracts.
- **Option 3: Other options**, including market-based mechanisms.

It will examine the conditions under which EU environmental norms can have extraterritorial reach – having particular regard to the following questions:

- How can it be ensured that operators located outside of EU borders across the fossil gas supply comply with LDAR, BRVF, and MRV obligations that the proposal for a methane regulation places on those operators located within EU borders?
- Would that require additional EU legislation? If so, what would that legislation need to entail?
- Could it be done by obliging EU-based gas buyers or shippers to add these requirements to their contracts? and
- For either case (legislation or contractual) – how can this be verified and enforced, including sanctions for non-compliance? Are there other means of ensuring compliance?

## 1.2 Desk research: key references and information sources

In assessing each one of these options, the research team will review already existing European regulatory frameworks that have an extra-territorial effect (either directly or indirectly) and take into consideration case law of the Court of Justice of the European Union as well as the World Trade Organization where appropriate. For each of the available options, it will also address the question of the enforceability of such requirements as well as other legal instruments and solutions that would lead to similarly satisfactory effects.

In addition to the above, extensive literature reviews of scientific articles, legal textbooks and peer-reviewed legal journals, along with grey literature from international organisations, think-tanks and Non-Governmental organisations will also be considered.

## 2. INTRODUCTION

### 2.1 The supply chain of the EU Fossil Gas Industry

Gas is a fossil fuel which emits both carbon dioxide and methane, the latter across the entire supply chain.<sup>13</sup> Despite political declarations for the phasing out of fossil fuels and the advancement to cleaner energy sources,<sup>14</sup> the fact remains that Europe's transition to carbon neutrality still depends on fossil fuels and particularly gas. Whereas CO<sub>2</sub> emissions typically occur during the combustion of fuels or during industrial processes at well-identified points, methane emissions are identified as leakages that occur while gas is being transported through the pipeline, and can occur along the entire supply chain. As a result, they are more difficult to measure and accurately quantify, leading to substantial uncertainty about current emissions levels.<sup>15</sup>

Europe has a strong dependency on foreign energy sources. Evidence shows that the EU's energy dependency rate (i.e. the proportion of energy that an economy must import) was equal to 58 %, <sup>16</sup> essentially meaning that more than half of the EU's energy needs were met by net imports. This dependency is an increasing trend, which albeit a temporary halt due to the COVID-19 crisis, continues making natural gas the second largest imported energy product in the EU, 2.9 % higher than in 2010.<sup>17</sup> In fact, in 2020, over three quarters of the EU's imports of natural gas came from Russia (43 %). The remaining imports came from Norway (21 %), Algeria (8 %) and Qatar (5 %). Given the situation with the current war in Ukraine, imports from these countries will increase. As possible disruptions of gas supplies from Russia are envisaged in the near future, the EU is also preparing for a coordinated demand-reduction of gas due to the instability of supplies, aiming for a 15 % reduction of natural gas demand by winter 2022.<sup>18</sup>

The EU has been taking measures to reduce the dependency on Russian Gas through the REPowerEU initiative.<sup>19</sup> REPowerEU is a plan which aims to rapidly reduce the dependency on Russian fossil fuels and thus accelerate the green transition. Having been adopted on 18 May, this plan seeks to fulfill its target through three courses of action: *'...energy savings, diversification of energy supplies, and accelerated roll-out of renewable energy to replace fossil fuels in homes, industry and power generation.'*<sup>20</sup> It should be noted that a set of policies and measures have been challenged and are considered by stakeholders as incoherent with the EU's climate objectives set under the REPowerEU supporting diversification of gas imports in order to move away from Russian gas. The delegated act developing the Taxonomy Regulation to cover labelling fossil gas as green or the currently revised gas package<sup>21</sup> not taking into account the need for reducing fossil gas consumption in the EU, and finally the methane regulation ignoring methane leaks from imported gas are all examples of existing regulatory barriers to the Green Deal objectives and the Paris Agreement targets. If the EU is to limit temperature increase to 1.5°C, fossil gas needs to be phased out from the EU's energy sector by 2035.<sup>22</sup> Despite efforts made, there is still a high level of dependency in place throughout Europe.

13. Press release on EU fossil gas manifesto for a 2035 phase out available at: <https://caneurope.org/20-organisations-release-eu-fossil-gas-manifesto-2035-phase-out/>, accessed on 27 July 2022.

14. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6682](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6682)

15. European Commission, Impact Assessment Report Accompanying the 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, 2021

16. European Commission, Impact Assessment Report Accompanying the 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, 2021

17. Overview on energy statistics, available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy\\_statistics\\_-\\_an\\_overview#Primary\\_energy\\_production](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy_statistics_-_an_overview#Primary_energy_production), accessed on 29 July 2022.

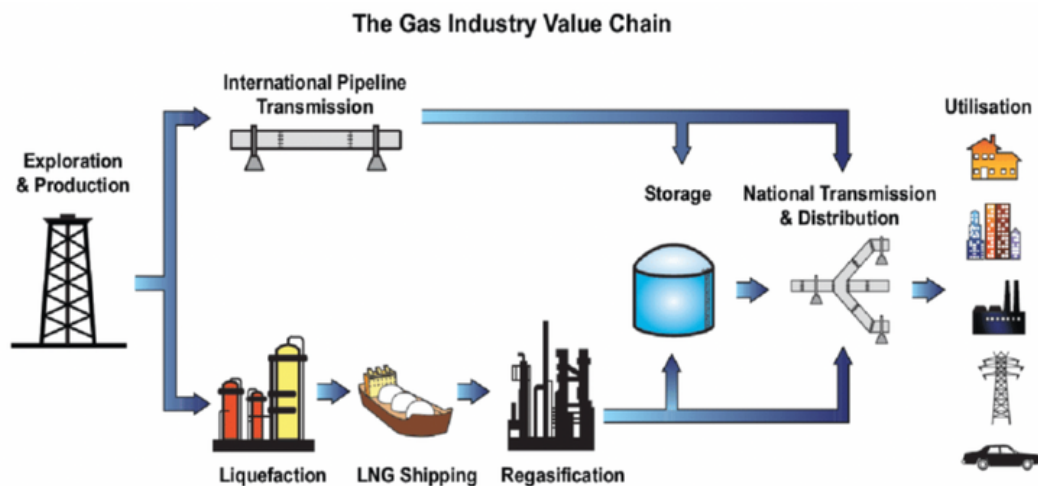
18. Proposal for a Council Regulation on coordinated demand reduction measures for gas, available at: <https://data.consilium.europa.eu/doc/document/ST-11625-2022-INIT/en/pdfm>, accessed on 27 July 2022.

19. Communication from the Commission to the European Parliament, the European Council, the Council, The European Economic and Social Committee and the Committee Of the Regions REPowerEU Plan, COM/2022/230 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN&qid=1653033742483>, accessed on 29 July 2022.

20. European Commission's press release on REPowerEU, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3131](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131), accessed on 02 August 2022.

21. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6682](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6682)

22. CAN Europe's position paper on fossil gas.



**Figure 1 The Gas Industry Value Chain** (source BSR Policy Briefing 1/2015: Natural gas revolution )

Gas travels around Europe through a complex pipeline system, with a few relevant suppliers. As mentioned above, not all gas is imported from Russia. Gas is transported in liquefied form (LNG), as this takes up a much smaller volume, thus facilitating its carriage, especially over long distances. Once the terminals are reached, the LNG must be sent to regasification stations, which are spread through Europe and transform the LNG into its gaseous form. There are currently 28 large-scale LNG import terminals in Europe (of which 24 are in EU Countries and therefore subject to EU Regulation) and eight small-scale LNG facilities (in Finland, Sweden, Germany, Norway and Gibraltar). These stations are spread throughout Europe and are designed to load, carry, and unload LNG. Considering the climate of instability around Europe due to Russia's invasion of Ukraine, Europe is planning to greatly increase the number of LNG stations. In fact, it is planning to install 25 new floating storage regasification units by the end of 2022.<sup>24</sup>

The Trans-European Networks for Energy (TEN-E) have assisted in the linking of energy infrastructure in EU Countries.<sup>25</sup> The TEN-E system sets out four gas corridors with the aim 'to work together to develop better connected energy networks and provides funding for new energy infrastructure'. Accordingly, TEN-E aims to further diversify routes of supply, increase short-term gas deliverability, establish connections and end isolations from specific suppliers across the EU.<sup>26</sup>

Almost half of the EU Member States have already been affected by reduced deliveries from Russia, due to the recent weaponisation of gas exports. Considering the risk of further shortages in gas supply, the European Commission proposed a new legislative tool on 20 July 2022, consisting of a new Council Regulation on Coordinated Demand Reduction Measures for Gas,<sup>27</sup> which was endorsed by the President of the European Commission on 26 July,<sup>28</sup> as well as a European Gas Demand Reduction Plan,<sup>29</sup> to reduce gas use in Europe by 15 % until next spring. According to that introduction:

*'The Plan focuses on substitution of gas with other fuels, and overall energy savings in all sectors. It aims to safeguard supply to households and essential users like hospitals, but also industries that are decisive for the provision of essential products and services to the economy, and for EU supply chains and competitiveness'.<sup>30</sup>*

23. An Overview of LNG Import Terminals in Europe, available at: [https://www.kslaw.com/attachments/000/006/010/original/LNG\\_in\\_Europe\\_2018\\_-\\_An\\_Overview\\_of\\_LNG\\_Import\\_Terminals\\_in\\_Europe.pdf?1530031152#:~:text=There%20are%20currently%2028%20large,Germany%2C%20Norway%20and%20Gibraltar](https://www.kslaw.com/attachments/000/006/010/original/LNG_in_Europe_2018_-_An_Overview_of_LNG_Import_Terminals_in_Europe.pdf?1530031152#:~:text=There%20are%20currently%2028%20large,Germany%2C%20Norway%20and%20Gibraltar), accessed on 2 August 2022.

24. <https://daily.energybulletin.org/2022/08/europe-rushing-to-install-new-lng-import-facilities/>

25. Regulation (EU) 2022/869 of 30 May 2022 on guidelines for trans-European energy infrastructure

26. Trans-European Networks for Energy

27. New Council Regulation on Coordinated Demand Reduction Measures for Gas, available at:

<https://data.consilium.europa.eu/doc/document/ST-11625-2022-INIT/en/pdf>, accessed on 2 August 2022.

28. Statement by the President of the European Commission, available at:

[https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement\\_22\\_4725/STATEMENT\\_22\\_4725\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_22_4725/STATEMENT_22_4725_EN.pdf), accessed on 2 August 2022.

29. Commission Communication "Save gas for a safe winter", COM (2022) 360 Final, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:55edf05c-08d0-11ed-b11c-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:55edf05c-08d0-11ed-b11c-01aa75ed71a1.0001.02/DOC_1&format=PDF), accessed on 2 August 2022.

30. Save Gas for a Safe Winter, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_4608](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4608).

The EU Energy Platform proposed in the REPowerEU was established on 7 April 2022 to secure the EU's energy supply at affordable prices in the current geopolitical context and to phase out our dependency on Russian gas. It is a voluntary coordination mechanism supporting the purchase of gas and hydrogen for the EU, pooling demand, coordinating infrastructure use, and negotiating with international partners.<sup>31</sup>

## 2.2 Historical context and EU initiatives to deal with methane emissions

Efforts to address methane emissions were initiated on international level. **The Oil & Gas Methane Partnership (OGMP)** was one of the first, joint international efforts towards implementation of monitoring and management for methane emissions. The OGMP was launched in 2014 by UNEP (United Nations Environmental Programme) and the Climate and Clean Air Coalition, and it provided companies from the oil and gas industry with a protocol facilitating management of emissions from their operations as well as a platform demonstrating their actual reduction efforts. A revised Framework of OGMP was proposed in 2020. The new scheme introduced 'gold standard' reporting requirements which expanded the scope of monitored sources and prioritised direct monitoring and measurement of emissions. The implementation of the revised approach has translated into significant improvement in quality and reliability of collected data.<sup>32</sup> Currently the OGMP is comprised of 82 members<sup>33</sup>, many of which operate in the EU as well as outside EU borders, but with notable imports in the EU common market.

The importance of reduction of greenhouse gas emissions was discussed at the forum of Leaders of the Group of 20 (G20), which took place in 2021 in Rome. Reduction of methane emissions was recognised in the post-forum declaration as '*one of the quickest, most feasible and most cost-effective ways to limit climate change and its impacts*'.<sup>34</sup>

The event led to the establishment of the **International Methane Emissions Observatory (IMEO)** as a contribution of the United Nation Environment Programme (UNEP). The IMEO was mandated to become the first independent body to collect, verify, and publish global data on methane emissions from the energy sector, which are subsequently utilised as a determinant for future action recommendations by the IMEO itself.

Finally, negotiations at COP26 which took place in November 2021 in Glasgow, resulted in the launch of the **Global Methane Pledge**.<sup>35</sup> Under the Pledge, 119 countries, including the majority of super emitters, have pledged to reduce global methane emissions by 30 % by 2030. Although the Pledge is not binding and sets a reduction target below scientific recommendations, this political compromise<sup>36</sup> is nonetheless a step towards more coordinated, international effort to reduce anthropogenic methane.<sup>37</sup>

In parallel, methane has become the subject of political and regulatory measures in the European Union. Under the Methane Strategy, the Commission committed to revising some pieces of legislation with a bearing on CH<sub>4</sub> emissions, notably the EU Emissions Trading System (ETS), the Effort Sharing Regulation (ESR), and Industrial Emissions Directive (IED). Additionally, the Commission<sup>37</sup> has announced the delivery of a legislative proposal tackling methane emissions from the energy sector. The proposal for a Regulation on methane emissions reduction in the energy sector was tabled by the Commission in December 2021. **However, methane emissions reduction obligations including MRV, LDAR or BVF, are not applied to non-EU entities.** This decision created mixed reactions among stakeholders and various EU bodies who consider that including upstream activities outside the EU would certainly be a positive impulse in addressing methane emissions, as it would incentivise third countries to adopt comparable regulations at national level in order to retain unfettered access to the EU's internal market.<sup>38</sup>

31. See: [https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform\\_en](https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en).

32. All information available here: <https://www.ccacoalition.org/en>, accessed on: 13 July 2022.

33. Information available at: [List-of-OGMP-2.0-member-companies\\_July\\_2022.pdf](#) ([ogmpartnership.com](https://ogmpartnership.com)), accessed on: 13 July 2022.

34. G20 Rome Leaders' Declaration, point 26, full text available at: <https://www.consilium.europa.eu/media/52730/g20-leaders-declaration-final.pdf>, accessed on: 12 July 2022.

35. Information available at: <https://www.ccacoalition.org/en/file/8210/download?token=VPYTyJ4z>, accessed on: 12 July 2022

36. Information available at: <https://ukcop26.org/cop26-presidency-outcomes-the-climate-pact/>, accessed on: 12 July 2022.

37. [Proposal](#) for a Regulation on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942.

38. NGO Policy recommendations on the upcoming legislation proposal to reduce anthropogenic methane emissions from the energy and petrochemical sectors.

# 3. THE PROPOSAL FOR REGULATION TO REDUCE METHANE EMISSIONS

## 3.1 Methane Emissions reduction measures within the EU

The Methane Regulation proposal envisaged three types of measures on oil and gas operators, notably:

- Measurement, Reporting, and Verification (**MRV**)<sup>39</sup>
- Leak detection and repair (**LDAR**)<sup>40</sup>
- Limits or ban on routine venting and flaring (**BRVF**)<sup>41</sup>

In relation to **MRV**, the relevant operators and (in case of non-operated assets), the undertakings,<sup>42</sup> are required to **measure the amount of methane emissions** with appropriate direct measurement of source-level methane emissions of operated and non-operated assets and complemented by measurements of site-level methane emissions (enabling assessment and verification of source level estimated aggregated by site) using quantification technologies. The results should be submitted through a series of reports to the competent authorities. Before submission, the reports should be assessed by independent **verifiers**.<sup>43</sup>

The Methane Strategy provides for a whole catalogue of requirements ensuring the independence and professionalism of **verifiers** within national accreditation bodies controlling emission reports similar to the existing ones within the framework of the ETS, including to the aviation and maritime sectors on the basis of Regulation (EC) No 765/2008.

The **reporting template** will be provided by an implementing act adopted by the Commission and will include information such as emission source type and location, data per detailed individual emission source type, and quantification methodologies employed to measure methane emissions. The reports should include the following information:

**Table 1: MRV provisions in accordance with the Methane Regulation**

Time since entry of the provisions into force	Measurement	Assets
12 months	Source level (emissions estimation based on generic, source-specific factors)	All sources
24 months	Source level (direct measurement / sampling for establishment of specific factors to be used in estimations)	Operated assets
36 months	Site level along with measures as in point 2	Operated assets
36 months	Source level (direct measurement / sampling for establishment of specific factors to be used in estimations)	Non-operated assets
48 months	Site level along with measures as in point 4.	Non-operated assets

39. Article 12 under Methane Regulation Proposal.

40. Article 14 under Methane Regulation Proposal.

41. Articles 15,16 and 17 under Methane Regulation Proposal.

42. In line with Article 2(16) of the Methane Regulation Proposal, undertaking shall 'mean a natural or legal person carrying out at least one of the following functions: upstream oil and fossil gas exploitation, exploration and production, fossil gas gathering and processing and gas transmission, distribution and underground storage, including LNG.'

43. Supplementing the above conditions, the Methane Strategy provides for criteria to ensure the independence and professional qualifications of verifiers - both in terms of ownership links and any other ties with operators that could influence the verifier's independence. The scope to be checked by the verifier covers issues of significance for the determination of final emissions such as sampling, choice of emission factors or use of the methodology.

The underlying concept is to first carry out measurements at source level and then to repeat this exercise at a later stage, but extended by additional site-level measurements. This is due to information deficiencies when it comes to all emission sources present at site level. A site level measurement can reveal inaccuracies by detecting other, previously unknown methane leaks (sources) and improve the reliability of the reported values.

**For LDAR**, the operators from the gas industry will have to submit a **leak detection and repair programme** (hereafter 'programme') to the competent authorities within three months from the date of entry into force of this Regulation. As a further step, which will have to be undertaken within six months from the date of entry into force of the Regulation, the operator will have to carry out a **leak detection and repair survey** (hereafter 'survey') of all relevant components, in line with the submitted programme. The survey is only allowed to be conducted with the use of devices which meet the detection standard of 500 PPM<sup>44</sup>. The survey will have to be performed on a regular basis - every three months following the first survey. The survey will also have to be followed up by a report produced no later than a month after, and which will have to be submitted to the competent national authority.

Every case of detection of emissions at the level of 500 PPM or above will trigger the **obligation to repair or replace the leaking component**. The repair or replacement will have to be performed no later than five days after the detection of the emissions (subject to exemptions for safety or technical considerations<sup>45</sup>). In the case of component repair (not replacement), the proposal for Regulation requires another survey to be carried out as soon as possible, but no later than 15 days after the repair. Detection of emissions below 500 PPMs requires another survey to be carried out no later than three months after the leak was detected.

**With regard to BRVF, venting and flaring will generally be prohibited**. Venting will however be allowed in cases of emergency or malfunction, although even in such scenarios the operator will need to demonstrate that flaring was not a feasible solution (as it would represent a risk for operations or personnel). Moreover, flaring may be allowed if the operator demonstrates that either re-injection, utilisation on-site, or dispatch of the methane to a market were not feasible. In both cases, a **notification** will have to be made to the competent authorities within 48 hours from the commencement of venting or flaring. The operator will also have a general obligation to prepare **quarterly reports**, which have to be made available on-line after submission to the competent authority.

State authorities will be competent to **verify operators' compliance** by carrying out **inspections** for this purpose. There are two types of inspections: routine and non-routine. Non-routine inspections are undertaken ad hoc as a result of complaints, occurrences of non-compliance, and repair / replacement of leaking components. Routine inspections will be carried out at least every two years, the first of which should take place within 18 months of the entry into force of the Regulation. After each inspection, a post-inspection report should be prepared, which should be submitted to the inspected party, and made available to the public within two months of the inspection. The documents will have to encompass notice of remedial actions in cases where serious breach was identified during the inspection activities.

➡ In case of violation of the above provisions by the operators or the responsible undertakings, the Methane Regulation proposal establishes an enforcement system, and its Article 30 requires the designation of **penalties that are 'effective, proportionate and dissuasive'**. Specifically it lists the acts and obligations for which lack of compliance will be subject to penalties, including violations of the MRV, LDAR and BRVF requirements. See section 6.

44. The minimum device sensitivity for detection of loss of methane from components of 500 parts per million or more.

45. The Regulation limits situations which can be deemed as falling within the scope of safety or technical considerations such as regarding safety of personnel and people in proximity of the leakage, or availability of replacement components.

46. However, if the inspection reveals a serious breach of provisions of the Regulation, the next routine inspection should take place within one year.

### 3.2 Proposed Methane emission reduction measures outside the EU

As previously mentioned, the proposal for Methane Regulation limits the scope of the emission abatement measures to operators based in the EU. In the Impact Assessment for the Methane Regulation proposal<sup>47</sup> it was stated that: ‘Given that coal, oil and fossil gas together make up 70% of the EU’s energy consumption and given that the EU is dependent on imports for 90% of its fossil gas consumption, such a set of measures could put EU energy security at risk’<sup>48</sup>.

This position was contested by the European Economic and Social Committee (EECS), which pointed out in its opinion that ‘most methane leakage happens outside the EU and for this reason, implementing and enforcing an **EU methane performance import standard** for gas imports is necessary’. The EECS stated that such standard should already be developed under this proposal for Regulation.<sup>49</sup> Furthermore, the inclusion of upstream methane emissions in the CO<sub>2</sub>-Pricing system should be considered<sup>49</sup>.

Furthermore, the European Parliament has adopted a Resolution stating that ‘... some non-EU countries have already introduced a ban on venting and flaring; calls on the Commission to propose legislation for the energy sector with binding rules on MRV, building on the methodology of the Oil and Gas Methane Partnership (OGMP) Framework 2.0 and mandatory LDAR<sup>50</sup>, including on imports, which should be built on best practices and applied right across the supply chain’<sup>51</sup>.

According to Article 2(3) of the Methane Regulation proposal, extraterritorial application of the obligations in relation to methane emissions occurring outside the EU is limited **to importer information requirements**, a methane transparency database, and the methane emitters monitoring tool.

Instead of the more stringent obligations included in Articles 12-17 of the Methane Regulation proposal in relation to MRV, LDAR and BRVF described above, under Article 27(1) importers will be obliged to submit until 31 December, an **annual report to competent authorities** of the importing Member State including the following information about the exporter<sup>52</sup>:

**Table 2: Information reported about the exporter under the Methane Regulation**

<b>General information</b>	Name and address of the exporter and producer. Country and regions: <ul style="list-style-type: none"><li>• where the energy was produced</li><li>• through which the energy was transported until placed on the EU market.</li></ul>
<b>Information on measurements and reporting</b>	Whether the exporter is undertaking measurement and reporting of its methane emissions. Whether it is in compliance with UNFCCC reporting requirements or in compliance with OGMP 2.0 standards. <sup>53</sup>
<b>Information on leak detection and repair</b>	Whether the exporter applies regulatory or voluntary measures to control its methane emissions, including measures such as leak detection and repair surveys*
<b>Information on restriction of venting and flaring</b>	whether the exporter applies regulatory or voluntary measures to control its methane emissions, including measures to control and restrict venting and flaring of methane*
*along with name of the entity that performed independent verification of the reports	

47. According to the Commission’s summary after stakeholder consultations, 65 % of responses backed the idea of imposing obligations on MRV, LDAR and venting and flaring equally on all actors in the oil and gas value chain for oil and gas consumed in the EU, including actors from outside the EU. Information available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021SC0459>, accessed on: 11 July 2022.

48. Commission staff working document impact assessment report Accompanying the 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, SWD(2021) 459 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021SC0459>, accessed on 27 July 2022.

49. **EEEC opinion:** Revision of the third energy package for gas and measures for methane emissions reduction TEN/762-EEEC-2021. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI\\_EEESC%3AEESC-2021-06401-AS](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_EEESC%3AEESC-2021-06401-AS) accessed on: 11 July 2022.

50. EP resolution of 21 October 2021 on an EU strategy to reduce methane emissions (2021/2006(INI))

51. Importers in line with Article 2(41) is understood to mean a natural or legal person established in the Union who, in the course of a commercial activity, places fossil energy from a third country on the Union market.

52. Exporter in line with definition included in Annex VII: “the contractual counterparty in each supply contract entered into by the importer for the delivery of fossil energy into the Union”.

53. United Nations Framework Convention on Climate Change (UNFCCC).

Failure of the importers to provide the information required in accordance with Article 27 and Annex VIII of the Methane Regulation proposal shall be subject **to national penalties**.

Information provided by the importers will be subsequently submitted by the Member States to the Commission by 30 June of the following year under **Article 27(2)**.

The Commission will establish and maintain a **methane transparency database** which should contain the information provided by Member States from the importers. The database will encompass a list of countries with the relevant information from the point of view of methane imports. The transparency database shall be available to the public on-line, free of charge and in English at least.

No later than by 31 December 2025, the Commission should propose amendments to the Methane Regulation aimed at strengthening the requirements applicable to importers ('where appropriate and based on the necessary evidence')<sup>54</sup>. These can include 'possible additional obligations, including mandatory measures such as methane emission standards or targets'.

➡ **Thus, the Commission seems to have left the path open for extending obligations on emissions outside the EU, but future measures would increase the regulatory burden on importers, rather than applying the rules to non-EU entities.**

54. Article 27 of the proposal for Methane Regulation

# 4. OPTION 1: LEGISLATIVE MEASURES TO APPLY THE METHANE REGULATION TO OPERATORS OUTSIDE THE EU

The first question to assess is whether and how the MRV, LDAR and BRVF measures could be applied to operators outside the EU exporting methane to the EU. This would mean modifying the current Methane Regulation proposal to impose on those operators outside the EU the obligation to:

- measure methane emissions and report about them;
- take measures to prevent and minimise methane emissions in their operations;
- establish a system of **verification of the emissions** measured before reporting them;
- submit a **leak detection and repair programme** to the competent authorities within three months from the date of entry into force of the Regulation.
- carry out a **leak detection and repair survey** (hereafter 'survey') of all relevant components in line with the submitted programme within six months of the entry into force of the Regulation and every three months following the first survey.
- ensure repair or replacement of the leaking component in case of detection of emissions.
- ensure venting and flaring is prohibited/banned with certain exceptions.
- submit a notification to the competent authorities within 48 hours of the commencement of venting or flaring within the exception cases.
- prepare quarterly reports on BRVF.

## 4.1 Can EU legislation on methane emissions reduction be applicable to operators outside the EU?

Imposing the above measures on operators outside the EU may have implications from the point of view of the International Public law principle of sovereignty and the World Trade Organization's rules (hereby 'WTO'). Based on the analysis developed in Annex 1 to this report on these two aspects, we have reached the following conclusions:

- The possibility of establishing these measures for operators outside the EU who trade a product to be placed on the EU market would inevitably entail extraterritorial implementation, which **might affect the public international law principle of state sovereignty**<sup>55</sup> by which States have the exclusive right to exercise supreme political authority over a defined territory and the people within that territory. This means that no State can have formal political authority over another sovereign State<sup>56</sup>. Therefore, no state can impose rules on other state territory, people or resources as this requires political authority.
- However, public international law recognises the **possibility of exercising state powers outside the territory** of a state while respecting the principle of sovereignty, which must also be respected by the EU. The CJEU has stated that there are situations in which EU law regulates activities that take place outside the territory of the Union, **as long as the effects of those regulated activities arise within the territory of the Union**.<sup>57</sup>

55. Sovereignty, Samantha Besson, available at: <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1472#>, accessed on 20 July 2022.

56. Beckman R., Butte D., (2019), Introduction to International Law, available at: <https://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/intlawintro.pdf>, accessed on 20 July 2022.

57. Case C-181/73, Haegeman v. Belgium paragraph 5, ECLI:EU:C:1974:41.

- The CJEU established that EU climate legislation that applies to aircraft operators established outside the EU for flights departing from and arriving at EU airports **does not breach the sovereignty principle** since those aircrafts are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU<sup>58</sup>. This criterion was expressed by Advocate General Kokott as having a **sufficient link** with the State or International organisation concerned. The principle of territorial link means that Directive 2008/101/EC does not contain any extraterritorial provisions as it is concerned solely with aircraft arrivals at and departures from aerodromes in the European Union<sup>59</sup>. Furthermore, the *'territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union. Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures.'*<sup>60</sup>
- Thus, in the case of the Methane Regulation proposal, the fact that methane gas is meant to enter the EU market (regardless of infrastructure ownership) would be a **'sufficient link'** justifying the application of EU law outside the territory of the Union. In addition, the traded gas is destined for consumption by final users from the EU. These two aspects justify the application of the provisions of the Methane Regulation proposal to operators outside the EU when trading gas into the EU.
- **This conclusion is applicable to a measure proposing the extension of the current provisions of the proposal for Methane Regulation**, or to a new provision establishing a methane emissions standard. In both cases, the sufficient link criterion is fulfilled because the gas is sold and consumed in EU territory. Similarly, **the WTO rules and procedures are not an obstacle for the application of the measures proposed in the Methane Regulation proposal** to operators outside the EU. Under the WTO rules, the establishment of trade restrictions or conditions on traded products or services is not allowed unless such measures would fall under the **Article XX exception** requiring:
  - that they are *'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, (...)'* and
  - that they are adopted for reasons of environment protection described as:
    - *'(b) necessary to protect human, animal or plant life or health; (...)*
    - *(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'*
- The design of the measures imposing requirements and obligations on operators outside the EU introducing products in the EU market should not be discriminatory or a disguised restriction of international trade. The proposal for Methane Regulation, which is equally applicable to operators inside the EU and operators outside the EU introducing a product in the EU, respects these principles.<sup>61</sup>
- In addition, in case C-366/10 related to the EU ETS, AG Kokott highlighted that the Court of Justice has consistently held that the WTO cannot be used as a benchmark against which the validity of acts of EU law can be reviewed, because of the nature and broad logic of the WTO rules and decisions. The Court's reasoning is essentially based on the great 'flexibility' of WTO law, which is designed for negotiated solutions and based on the principle of reciprocity.
- The **extraterritorial aspects of an EU measure** do not present any problem under WTO Law if, as in the US - Shrimp case, there is a **'jurisdictional nexus'** for the regulation.

## 4.2 Can the EU ensure Enforcement of measures applicable to operators outside the EU?

While the recognition by the CJEU of the EU's jurisdiction or competence to adopt legislation that has effects on operators established outside the EU but with a territorial link in the EU is indisputable, the enforcement of EU obligations to be complied with by those operators is more challenging.

58. Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, paragraph 125.

59. Opinion of Advocate General Kokott in the case C-366/10, paragraphs 154 & 156.

60. Idem.

61. Case C-366/10.

62. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm)

The model of competition law is relevant in considering the powers that the Union may have in relation to establishing provisions with a scope outside the EU and enforcing them. The issue of jurisdiction or territoriality of EU legislation to entities in countries outside the EU has been discussed under section 3.3. and Annex 1 where we refer to the CJEU ruling confirming that under competition law an agreement would be applicable to an entity established in a third country if **such an agreement has effects within the territory of the internal market.**<sup>63</sup>

In relation to **enforcement powers**, under Article 105 TFEU the Commission has recognised powers to investigate cases of suspected infringement of the Competitions principles established in Articles 101 and 102 TFEU. Should the Commission find that there has been an infringement, it has the competence to propose appropriate measures to bring it to an end. The Commission will state in a reasoned decision the infringement that is not brought to an end and may publish the decision with the measures the Member State needs to adopt to remedy the situation.

Under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 (now Articles 100 and 101 TFEU), the Commission has supplemented investigative powers described as:

- *'The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection. However, the powers refer to EU territory or territory in EU Member States.'*

As the EU has competence to legislate on energy policy based on Article 194 TFEU and the Commission has the power to ensure enforcement of EU legislation under Article 17 TEU, it should be possible to include a provision in the proposal for Methane Regulation recognising the Commission powers to ensure the implementation of the legislation of products entering the EU and having effects within the territory of the internal market such as investigation, inspection or interviews of persons with useful information. However, those enforcement actions can only be carried out within EU territory. Therefore, in the section below we suggest measures that can provide a framework for enforcing measures applied by operators outside the EU.

#### **4.3 Provisions needed to extend methane reduction obligations to operators outside the EU**

As explained in section 3.2., the current Methane Regulation proposal only includes an information obligation for importers of fossil fuels in relation to methane emissions from outside the EU. This obligation is based on the development of a transparency list of Union countries and companies exporting fossil energy to the Union, which should include information on their international reporting obligations on methane emissions feeding into a global monitoring tool to divulge the magnitude, recurrence and location of methane emitters globally.

This information obligation does not necessarily lead to methane emissions reduction from sources outside the EU. The MRV, LDAR and BRVF obligations on EU operators regarding methane emissions reduction could be applicable to operators outside the EU by introducing a modification in the Methane Regulation proposal extending Articles 12, 14, 15, 16 and 17 to them. This means introducing amendments to the proposed legislative act. However, the control and enforcement of the measures might require the adoption of additional measures.

The first option would be to introduce a provision clearly extending the scope of the Regulation to operators outside the EU trading the gas entering the EU market. This option would require the adoption of complementary provisions to ensure the enforcement of the measures proposed in the current Methane Regulation proposal when applicable to operators outside the EU. These measures are analysed in the sections below.

63. Kaleda S.L (2020), Zakres obowiązywania i stosowania prawa Unii, Źródła prawa Unii Europejskiej, available through Legalis on-line database at: <https://sip.legalis.pl/> accessed on 20 July 2022.

An option with a similar effect would be to introduce a provision in the Methane Regulation proposal to cap emissions for both domestic and imported gas sold and consumed in the EU by 2025<sup>64</sup>. This proposal would require MRV, LDAR and BRVF obligations to control and implement the emissions cap. This measure would also require the introduction of a provision in European Climate Law establishing, for example, a 75 % methane reduction target by 2030. Similarly, this option would require the adoption of complementary provisions for the enforcement of the MRV, LDAR and BRVF measures as proposed in the current Methane Regulation proposal when applicable to countries outside the EU.

In order to analyse the feasibility and efficiency of these options, we looked at existing EU measures that are similar and/or can be taken as models.

#### 4.3.1 Extending the scope of the Methane Regulation Proposal outside the EU

A first option to explore would be introducing in the Methane Regulation proposal a specific provision clearly establishing that the scope of the Regulation covers the methane emissions from both domestic and imported gas sold and consumed in the EU.

##### **Article 1(3) of the proposal for Regulation would therefore change as follows:**

1. This Regulation lays down rules for the accurate measurement, reporting and verification of methane emissions in the energy sector in the Union, as well as the abatement of those emissions, including through leak detection and repair surveys and restrictions on venting and flaring. This Regulation also lays down rules on tools ensuring transparency of methane emissions from imports of fossil energy into the Union.

2. This Regulation applies to:

(a) oil and fossil gas upstream exploration and production, fossil gas gathering and processing;

(b) gas transmission, distribution, underground storage and liquid gas (LNG) terminals operating with fossil and/or renewable (bio or synthetic) methane;

(c) operating underground and surface coalmines, closed and abandoned underground coal mines.

**3. This Regulation applies to methane emissions from both domestic and imported gas sold and consumed in the EU including those occurring outside the Union in relation to the gas that enters the EU market.**

This option would imply that MRV, LDAR and BRVF obligations for EU operators regarding methane emissions reduction could be applicable to operators outside the EU.

If we analyse similar provisions in other pieces of EU legislation, we see that there are examples where EU legislation applies outside the EU. We have already discussed in section 3.3 the ETS aviation Directive and the territoriality principle justifying jurisdiction.

The GDPR<sup>65</sup> is another example which establishes EU rules for the protection of data in the EU that are applicable outside the EU. Under Article 3(1) the Regulation applies to *'the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, **regardless of whether the processing takes place in the Union or not***'. While this provision allows the application and enforcement of the Regulation to third states, it still requires the existence of an element that connects to the EU – i.e. the controller and/or processor must still perform their activity in the EU for the Regulation to apply.

Concerning transfers of personal data to third states or international organisations, the GDPR is very incisive. In fact, Article 46(1) states these transfers are admissible, insofar as the controller or processor has provided *'the **appropriate safeguards** and **on condition that enforceable data subject rights and effective legal remedies** for data subjects are available*'. The GDPR allows for the transfer of personal data to take place through different mechanisms, namely, through an agreement (both a private contract or a binding instrument concluded between public authorities); binding corporate rules; standard data protection clauses, as adopted by the Commission or a supervisory authority (in the latter case, being requiring approval by the Commission); an approved code of conduct which would include binding and enforceable commitments of the controller or processor in the third country; and, an approved certification mechanism.

64. NGO Coalition position paper EU Methane Regulation, March 2022.

65. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504>, accessed on 20 July 2022.

However, while the applicability of the 'GDPR model' to the gas sector could be considered, there might be challenges to overcome for the control of the methane emissions reported, their accredited verification and enforcement of the necessary actions by operators.

Under the GDPR, European lawmakers sought to prevent those challenges with provisions targeting the **development of international cooperation between supervisory authorities, international organisations and the Commission**. In fact, Article 50(b) of the GDPR stipulates that appropriate steps should be taken in order to provide international '*mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange*'. The academic literature suggests that, in such cases, the assumption that the EU sets the standards of data protection in the EU and third countries has turned out to be **ineffective**.<sup>66</sup> This is due to the fact that the **enforcement of GDPR rules** for entities based outside of the EU depends on cooperation with a national law, as well as enforcement agencies and regulators. Moreover, one of the first proceedings of breach of GDPR by a UK-based data protection enforcement body was conducted in 2018 against a Canadian company.<sup>67</sup> There, it was assessed that possible sanctions encompassed seizure action for the collection of fines, but only if the company possessed any assets in the territory of the EU. Similar issues might apply concerning enforcement of the extension of the Methane Regulation proposal to upstream emissions. In the subsection below we discuss the possibility for the development of systems to strengthen control and enforcement.

Another example could be found in **Regulation (EU) 2019/631 setting CO2 emission performance standards** for new passenger cars and for new light commercial vehicles, and which is proposed to be revised by the Fit for 55 legislative package in order to apply more stringent standards.

Article 1 of the current Regulation (EU) 2019/631 establishes that:

- From 1 January 2020, this Regulation sets an EU fleet-wide target of 95g CO<sub>2</sub>/km for the average emissions of new passenger cars and an EU fleet-wide target of 147g CO<sub>2</sub>/km for the average emissions of new light commercial vehicles **registered in the Union**, as measured until 31 December 2020 in accordance with Regulation (EC) No 692/2008 together with Implementing Regulations (EU) 2017/1152 and (EU) 2017/1153, and from 1 January 2021 measured in accordance with Regulation (EU) 2017/1151.
- From 1 January 2025, the following EU fleet-wide targets shall apply:
  - for the average emissions of the new passenger car fleet, an EU fleet-wide target equal to a 15 % reduction of the target in 2021;
  - for the average emissions of the new light commercial vehicles fleet, an EU fleet-wide target equal to a 15 % reduction of the target in 2021.
- From 1 January 2025, a zero- and low-emission vehicle benchmark equal to a 15 % share of the respective fleets of new passenger cars and new light commercial vehicles shall apply.

The standards apply to all vehicles registered in the Union regardless of their place of manufacture. Therefore, imported cars need to comply with those standards when registering in the Union. This is confirmed by Article 2 of the Regulation establishing the scope being applied to motor vehicles, passenger cars and light commercial vehicles which are registered in the Union for the first time, and which have not previously been registered outside the Union.

Under this Regulation, the manufacturer is required to ensure that its average specific emissions of CO<sub>2</sub> do not exceed the relevant specific emissions targets and to report to the relevant authority and to the Commission. In this case, manufacturer refers to the person or body responsible to the approval authority for all aspects of the EC type-approval procedure in accordance with Directive 2007/46/EC and for ensuring conformity of production. The type-approval authorities verify compliance of those vehicle families for which they are responsible for the type-approval on the basis of an appropriate and representative vehicle sample. In this case, the manufacturer of those vehicle families would typically be in the EU, however the car could be produced or imported by the manufacturer.

66. Sakowska-Baryła M., Ogólne Rozporządzenie o Ochronie Danych Osobowych. Komentarz, available at: <https://sip.legalis.pl>, accessed on 28 July 2022.

67. Fine F, First UK GDPR Enforcement Action Is Against Canadian Firm with Apparently No EU Presence available at: <https://www.mondaq.com/uk/data-protection/764134/first-uk-gdpr-enforcement-action-is-against-canadian-firm-with-apparently-no-eu-presence>, accessed 25 July 2022.

Enforcement notice, available at: <https://ico.org.uk/media/2259362/r-letter-ico-to-aig-060718.pdf>, accessed on 25 July 2022.

According to Article 13(4) of Regulation (EU) 2018/858, 'For the purposes of EU type-approval of vehicles, systems, components and separate technical units, a manufacturer established outside the Union shall appoint a single representative established within the Union to represent the manufacturer before the approval authority. That manufacturer shall also appoint a single representative established within the Union for the purposes of market surveillance, who may be the same as the representative appointed for the purposes of EU type-approval.'<sup>68</sup>

This example reflects the territoriality principle and the compliance with WTO rules in terms of requirements for cars that respond to environmental objectives. In addition, the scheme is similar to the current proposal for Methane Regulation where the operator required to report to the relevant Member State which should report to the Commission is in the EU. However, the product may be imported.

#### 4.3.2 Methane emissions intensity limitation

The methane leakage measures within the Methane Regulation proposal do not define a limit on overall emissions. This option considers the introduction within the Methane Regulation proposal of a specific provision setting a cap on methane emissions. Stakeholders propose the introduction of a cap at 0.20 %<sup>69</sup> along the entire supply chain for both domestic and imported gas sold and consumed in the EU by 2025<sup>70</sup>. Stakeholders propose that this would be coupled with a 75 % methane reduction target by 2030 which should be introduced in the European Climate Law. The provision might take the following form:

##### **Mandatory methane performance standard**

##### **New provision in Article 13 of the proposal for Methane Regulation**

*The Union methane emissions shall not exceed 0.20 % along the entire supply chain for both domestic and imported gas sold and consumed in the EU by 2025.*

##### **European Climate Law**

*In order to reach the climate-neutrality objective set out in Article 2(1), the binding Union 2030 climate target shall be a domestic reduction of net 75 % methane gas emissions (emissions after deduction of removals) by 2030.*

The EU has competence to adopt this type of environmental measure so there is no barrier from that point of view. A methane emissions performance standard for gas products would work as other standards applied to carbon dioxide emissions in a number of EU instruments governing the internal energy market. A methane emissions performance standard would need to consider the whole supply chain of gas entering the EU and would therefore affect countries outside the EU. In order to ensure implementation of the methane cap MRV, LDAR and BRVF obligations regarding methane emissions reduction would be applicable to operators in the EU and outside the EU. Therefore, this measure has similar consequences to the one discussed in the section above. The difference is that this measure could be linked to an amendment to the European Climate Law.

#### 4.3.3 Measures to ensure enforcement of emission reduction measures applicable outside the EU

##### **Verification of emissions reported by operators in and outside the EU:**

Should the MRV, LDAR and BRVF obligations for EU operators regarding methane emissions reduction be applicable to operators outside the EU, it would require the establishment of a control and verification system of the emissions reported, similar to the one applied to EU operators.

68. Regulation (EU) 2018/858 of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC.

69. The 0.20% methane intensity threshold, defined as total methane emissions volume divided by marketed volume of natural gas, is a commonly-used benchmark from OGCI which is also observed by DSOs/TSOs. See Oil and Gas Climate Initiative Reporting Framework 3.3, October 2020, p. 15, <https://www.ogci.com/wp-content/uploads/2020/10/OGCI-Reporting-Framework-3.3-October-2020.pdf>.

70. Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality (European Climate Law).

The enforcement of these requirements would be critical. Site checks or audit examinations for the verification of the emissions outside the EU would not be easily accepted if done by verifiers with EU qualifications/accreditation unless they are recognised in countries outside the EU through international or bilateral agreements enabling them to enter and gather the information and control emission reports.

The Methane Regulation proposal refers to the **UNEP-led International Methane Emissions Observatory (IMEO)** as the body responsible for the verification of methane emissions data. One option would be to extend the IMEO competence of verifying emissions within the framework of the Methane Regulation proposal in non-EU countries. If Article 1 of the proposal for Methane Regulation is amended to expand its scope to operators outside the EU, the extension of the IMEO would be automatic.

The existing reporting scheme under **the Oil & Gas Methane Partnership (OGMP)** is linked to the IMEO as the independent verifier of methane emissions reported. The OGMP 2.0 is a voluntary initiative based on a protocol to help companies systematically manage and reduce methane emissions from upstream oil and gas operations. Governments, international organisations, non-government organisations, and the oil and gas industry collaborate through the OGMP to raise awareness and to responsibly address methane emissions. The OGMP offers a platform to help member companies demonstrate actual reductions to industry stakeholders. Over 80 companies with assets on five continents, representing a significant share of the world's oil and gas production, have joined the Partnership. OGMP 2.0 members also include operators of natural gas transmission and distribution pipelines, gas storage capacity and LNG terminals. About 15 % of global natural gas production is represented by the 10 OGMP member companies: BP, Ecopetrol, Eni, Equinor, Neptune Energy International SA, Pemex, PTT, Repsol, Shell, and Total.<sup>71</sup> Should the imported gas come from OGMP members, the role of the IMEO would be easily accepted by the companies to be checked and the countries where they are established.

While there is an advantage to the fact that the Commission is proposing a system with the IMEO as the verification body in the proposal for Methane Regulation, the fact that oil and gas production companies and countries are linked to the OGMP 2.0 Partnership and the IMEO raises questions about the independence of the IMEO as verification body.

Under the OGMP 2.0 Framework, the IMEO can initiate action towards reconciliation of the reported data in cases where major discrepancies are identified. Where reconciliation is not achieved, the Observatory may consider other actions to confirm emissions. This can take the form of independent measurements performed by the IMEO.<sup>72</sup> The IMEO solves the occurring predicaments directly with the reporting party, which seems to act as an independent body. Cooperation with state entities/authorities is excluded from the OGMP framework. Such a model of operation is feasible as it is rooted in an international agreement founding the OGMP.

The system could be easily repurposed for verification of monitoring of emissions occurring outside the EU borders, should the scope of the Methane Regulation proposal be expanded. It could also work within the current scope, should the IMEO be empowered to verify the reports from countries outside the EU. Since the IMEO is conferred with the competence to verify emissions under the Methane Regulation proposal, this would be the legal basis to require that private entities (whether or not members of OGMP) established in non-EU countries selling gas to the EU report methane emissions (at EU level or to OGMP) and accept the IMEO as the body responsible for verifying the emissions reported. As stated before, such a requirement would comply with WTO rules.

**The Global Methane Pledge**<sup>73</sup> is another initiative involving 119 countries which have committed to reducing global methane emissions by 30 % by 2030. Verification and control of emissions from those countries by the IMEO seems to be an acceptable solution.

- **The above option would be based on the amendment of Article 1(3) of the proposal for Methane Regulation expanding its scope to operators outside the EU. Since the Commission proposal is based on the verification carried out by the IMEO, the following legislative changes would also be needed:**

71. <https://globalmethane.org/challenge/ogmp.html>

72. Mineral Methane Initiative OGMP2.0 Framework, available at:

[http://oleladesarrollo.es/webun2020/themes/ogmp\\_theme/files/OGMP\\_20\\_Reporting\\_Framework.pdf](http://oleladesarrollo.es/webun2020/themes/ogmp_theme/files/OGMP_20_Reporting_Framework.pdf).

73. Information available at: <https://www.ccacoalition.org/en/file/8210/download?token=VPYTyJ4z>, accessed on: 12 July 2022.

**To add a new paragraph 6 under Article 8**  
**Verification activities and verification statement stating:**

*6. The same obligation shall apply to verifying methane emissions from both domestic and imported gas sold and consumed in the EU including those occurring outside the Union in relation to the gas that enters the EU market.*

- **Further, an amendment to Article 10 on the IMEO could be added as follows:**

**Article 10: International Methane Emissions Observatory**

7. Provided the interests of the Union are protected, the International Methane Emissions Observatory shall be attributed a verification role with respect to methane emissions data **from both domestic and imported gas and consumed in the EU, including emissions occurring outside the Union in relation to the gas that enters the EU market**, in particular with regard to the following tasks.

**Official Controls Regulation**

Another example that can be seen as a model which does not necessarily require direct intervention in the activities of private actors is the legislative solution proposed by the Official Controls Regulation.

Under **Regulation (EU) 2017/625 - Official Controls Regulation**<sup>74</sup> the Commission is granted the **competence to act as an independent verifier**. Unlike the IMEO, the Commission verifies compliance of national measures implemented in a given non-EU country but does not directly monitor private entities. The controls are based on an annual, and multiannual control programme, which is issued in the form of a Commission Implementing Act.

Under Article 120 of the Regulation (EU) 2017/625, the Commission experts may verify in particular:

• compliance or equivalence of third-country legislation	• official certification (including issuance of official certificates, labels, and attestation)	• capacity of the third country control system	• training of staff of the competent authority
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Under Regulation (EU) 2017/625, non-EU countries set national systems of pre-export controls carried out by them prior to exporting goods to the Union with a view to ensuring compliance with the requirements of the Regulation. The Commission would verify those non-EU country systems at a later stage on the basis of control programmes adopted through implementing acts.

The Commission controls defined in the programmes may include on-the-spot verifications, and the Commission experts can accompany the staff of the competent local authorities. The controls can involve participation of national experts from EU countries. In a post-control phase, the Commission prepares a draft report on the findings and addresses all shortcomings identified.

The above system could be successfully introduced within the Methane Regulation, recognising the responsibility of the co-operating states, on the basis of for example, an international agreement to set a national system ensuring compliance of its operators with the Methane Regulation proposal. Similarly to Regulation (EU) 2017/625, the Commission would approve verification schemes proposed by the third country and later on will perform regular audits to make sure that requirements are met. This system would be dependent on the agreement with the relevant countries and their authorities to accept cooperation with the EU through such a control mechanism on the methane emissions standards to oil and gas fossil fuel. This system is similar to the Voluntary Partnership Agreements under FLEGT and could be complementary to the due diligence mechanism. It requires amendments to the current proposal for Methane Regulation, complementing the extension of its scope under Article 1(3).

Based on the amendment under Article 1(3) discussed above, Article 10 could be amended as follows:

74. Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001 (Official Controls Regulation), (OJ L 095 7.4.2017, p. 1), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0625-20220128>.

## Article 10: International Methane Emissions Observatory

1. Provided the interest of the Union is protected, **the Commission** shall be attributed a verification role with respect to methane emissions data, in particular with regard to the following tasks:

- (a) aggregation of methane emissions data in accordance with appropriate statistical methods;
- (b) verification of methodologies and statistical processes employed by companies to quantify methane emissions data;
- (c) development of data aggregation and analysis methodologies in accordance with scientific and statistical good practice to ensure a higher level of accuracy of emission estimates, with appropriate characterisation of the uncertainty;
- (d) publication of aggregated company reported data by core source and by level of reporting, classified by operated and non-operated assets, in compliance with competition and confidentiality requirements;
- (e) reporting of findings on major discrepancies between data sources.

**NEW 1.bis. The Commission shall lay down cooperation agreements with the relevant third countries establishing the necessary arrangements between competent authorities and ensuring reciprocal access to information and timely exchange of information.**

2. **The Commission shall submit methane emissions data to** the International Methane Emissions Observatory **as an advisory body**, as made available to it by the competent authorities in accordance with this Regulation.

3. The information **produced by the Commission and the International Methane Emissions Observatory** shall be made available to the public and the Commission.

**NEW: 4. Commission experts may perform controls in third countries in order to:**

**(a) verify the compliance or equivalence of third-country legislation and systems, including official certification and the issuance of official licences to export oil and gas or official certificates or attestations, with the requirements laid down in this Regulation;**

**(b) verify the capacity of the third country emissions monitoring and control system to ensure that oil and gas exported to the Union comply with the relevant methane emissions requirements under this Regulation;**

**(c) collect information and data on emissions in relation to oil and gas exported to the Union.**

**5. The verification provided for in paragraph 1 shall have particular regard to:**

**(a) the legislation of the third country;**

**(b) the organisation of the third country's competent authorities, their powers and independence, the supervision to which they are subject and the authority they have to enforce the applicable legislation effectively;**

*(c) the training of staff of the competent authority of the third country in the performance of official controls ;*  
*(d) the resources including analytical, testing and diagnostic facilities available to competent authorities;*

*(e) the existence and operation of documented control procedures and control systems based on priorities.*

**6. In order to facilitate the efficiency and effectiveness of the controls provided for in paragraph 1, the Commission may, prior to performing such controls, request that the third country concerned provide:**

**(a) the necessary information referred to in Articles 12 to 27 of this Regulation; and**

**(b) where appropriate and necessary, the written records on the controls that its competent authorities perform.**

**7. The Commission may appoint experts from Member States to assist its own experts during the controls provided for in paragraph 1.**

This option would also require **an amendment to the current Article 27 of the proposal** for Methane Regulation on the importer requirements, deleting the reference to the data analysis role of the IMEO and allocating it to the Commission. In particular:

#### **Article 27: Importer requirement**

[...]

(3): By 31 December 2025, or earlier if the Commission considers that sufficient evidence is available, the Commission shall examine the application of this Article, considering in particular:

[...]

(b) **methane emissions data analysis by the Commission ;**

**This amendment would be consistent with Article 29** where the Commission is required to establish a global methane monitoring tool based on satellite data and input from certified data providers and services, including the Copernicus component of the EU Space programme.

The organisation of a system of cooperation with third countries will need to be further defined.

#### **Due diligence & inspections: Control of reported information by operators in and outside the EU:**

The proposal for Methane Regulation establishes an obligation for the importers to submit annually, information on the exporter and regarding oil and fossil gas in particular, whether the exporter takes measurement and reports on its methane emissions.<sup>75</sup> This must be accompanied by a copy of the latest report on methane emissions, including, where available, information on: emission source type and location, data per emission source, quantification methodologies to measure methane emissions, the list of entities with operational control of the non-operated assets and the share of ownership and methane emissions from non-operated assets multiplied by the share of ownership (Article 12(6)). The method of quantification (such as UNFCCC tiers or OGMP levels) employed in the reporting must be specified for each type of emission.

In this proposal, the importer bears the responsibility of requesting the operator outside the EU to measure and develop a report on the methane emissions.

75. Either independently or as part of commitments to report national GHG inventories in line with United Nations Framework Convention on Climate Change (UNFCCC) requirements, and whether it is in compliance with UNFCCC reporting requirements or in compliance with Oil and Gas Methane Partnership 2.0 standards.

Regarding oil and gas, the **importer** is requested in the proposal for Methane Regulation to report on whether the exporter applies regulatory or voluntary measures to control its methane emissions, including measures such as leak detection and repair surveys, or measures to control and restrict venting and flaring of methane. This must be accompanied by a description of such measures, including, where available, reports from leak detection and repair surveys and from venting and flaring events with respect to the last available calendar year. These reports should be submitted to the competent authorities of the importing EU Member State.

As we have mentioned, this system could go further, imposing on operators outside the EU compliance with MRV, LDAR and BRVF obligations in line with Articles 12 to 17 already applicable to operators in the EU.

The **enforcement** of methane emissions reduction measures is based on this reporting system where the direct obligation is on the importer, who will need to get the information from the exporting non-EU entities. Some parallels can be established with the system under **EU Timber Regulation (EUTR) of 20 October 2010** laying down the obligations of **operators** who place timber and timber **products on the EU market for the first time** should provide a **due diligence document** at the customs office of the country where the product is entering. This document aims to minimise the risk of placing illegally harvested timber in the EU market and should provide information about the sources and suppliers, which includes the proof of compliance with existing applicable legislation, the country of origin, species, and quantity,<sup>76</sup> insofar as all these elements are relevant in the determination of the imported goods' compliance with the EUTR.

The due diligence document needs to provide information on the exporter and on the compliance with the forest sustainable management requirements during the whole supply chain until reaching the EU. The **monitoring organisations** regularly evaluate the due diligence system, and their use by operators, taking action in cases of failure to comply. **Competent authorities** are responsible for carrying out checks to verify if operators comply with the requirements. The lack of monitoring organisations supporting the development of the due diligence as well as the difficulties in enforcing it (including at the customs level) are behind the challenges in implementation of the EUTR, which need to be considered when establishing the system in the Methane Regulation proposal.

This due diligence system implies a further burden on operators which<sup>77</sup> does not lead to a proper system of monitoring illegal logging and compliance with the EUTR's provisions. In fact, it has been pointed out that there are **variations in the rigour of<sup>78</sup> application** of the due diligence system (e.g. the number of performed checks and level of penalties). This is due to the flexibility in the system in force, which, under its recital 16, states '(...) operators (...) should take the appropriate steps in order to ascertain that illegally harvested timber and timber products derived from such<sup>79</sup> timber are not placed on the internal market', thus leaving a **margin of discretion for the said operators**.

In addition, difficulties arise in **validating** the information on supply chains, making it challenging to have **certainty in the information provided by exporting countries** – mostly so in countries where there is poor governance from the exporting country. Moreover, Article 6(1)(c) of the EUTR makes an exception for cases of 'negligible risk'. However, it does not define this concept. The high level of discretion is a challenge for the enforcement of the Regulation, as operators are therefore not aware of their obligations concerning due diligence.

Furthermore, the system differentiates between traders and operators. Traders within the EU are not obliged to perform due diligence; this is an obligation merely for operators entering timber and timber products in the EU market for the first time. The reasoning behind this decision was based on the fact that due diligence provisions pose as a burdensome process for traders and so the aim was to cut down unnecessary administrative costs for them. However, this is also the case for operators, who do have to comply with this obligation. In this sense, and from a practical standpoint, carrying out due diligence might pose a challenge for smaller operators who have less staff and overall means to ensure compliance.

76. See EUTR, recital 17.

77. [https://www.researchgate.net/figure/Problems-in-implementing-EUTR\\_fig5\\_287812960](https://www.researchgate.net/figure/Problems-in-implementing-EUTR_fig5_287812960)

78. <https://www.global-traceability.com/timber-forest-legality-in-2022-looking-ahead/>

79. <https://www.clientearth.org/media/1d4fadst/2015-11-25-the-eu-timber-regulation-due-diligence-obligation-an-appropriate-tool-ce-en.pdf>

80. <https://www.global-traceability.com/timber-forest-legality-in-2022-looking-ahead/>

81. [https://www.cifor.org/publications/pdf\\_files/articles/AObidzinski1402.pdf](https://www.cifor.org/publications/pdf_files/articles/AObidzinski1402.pdf)

82. Ibid.

The due diligence and reporting system already established in the current proposal for a Methane Regulation are very similar. In light of the above, the challenges of implementing due diligence within the EUTR should be taken into account. In particular, the reporting by importers should not be subject to such discretion and uncertainty, and ensuring the proper enforcement requires the establishment of appropriate mechanisms of verification on exporting countries/companies. Extending the requirement to collect details on the intermediary actors in the supply chain, as part of the due diligence, would also improve the system and would expedite the process of identifying potential illegalities.<sup>83</sup>

Those improvements should be taken into account in the Methane Regulation proposal whether MRV, LDAR and BRVF obligations are extended to operators outside the EU or the proposal stays as it is. In both cases, the monitoring of the reports provided by operators outside the EU would be critical for the functioning of the system. However, should MRV, LDAR and BRVF obligations be extended to operators outside the EU, the monitoring of compliance with emissions limits should be easier, as the proposal for Methane Regulation already proposes a due diligence and reporting system.

This option does not require further amendments to the current proposal for Methane Regulation additional to the extension of its MRV, LDAR and BRVF requirements to the operators outside the EU. However, it might be relevant to add a provision harmonising the information to be provided in the due diligence and clarifying the operators' obligations, including traders.

Another avenue is one that has been developed under the IUU Fishing system, which is based on national authorities' power to control and carry out inspections.

### **IUU Fishing Regulation**

The case of the **IUU Fishing Regulation** to prevent, deter and eliminate illegal, unreported and unregulated fishing<sup>84</sup> provides another interesting example of this type of monitoring mechanism.

- Under **Article 4**, an **effective scheme of inspections** in port for third country fishing vessels calling at the ports of Member States is maintained to prevent and eliminate IUU fishing. As the territoriality link is ensured, **inspections can be carried out in third country vessels** (territory).
- **Article 6** requires the master of the third country fishing vessel to notify the competent authorities of the EU Member State whose designated port or landing facilities they wish to use of specific information, accompanied by a validated catch certificate. **The information to be reported** includes vessel identification; designated port of destination and the purposes of the call, landing, or access to services; fishing authorisation; dates of the fishing trip; the quantities of each species retained on board or, where appropriate, a negative report; the zone or zones where the catch was made; the quantities for each species to be landed or transhipped.
- **Article 17** empowers **the EU Member States' competent authorities** to carry out all of the verifications they deem necessary to ensure that the provisions of this Regulation are correctly applied.

On that basis, the Methane Regulation proposal could introduce an obligation for operators outside the EU to notify the EU Member State competent authorities where the gas is entering, and provide information on the methane reduction measures and a verified emissions report. This might be an additional administrative burden if the importers are already collecting that information. Those rules, complementary to the importer's reporting obligations, would need to be clearly established in the Methane Regulation proposal to ensure that the operators entering the gas in the EU territory clearly understand the documents and information they need to provide and to whom when entering the EU.

The enforcement of these measures is possible given the link with the EU territory/market and therefore, inspections or verification as established in the current Methane Regulation proposal should be possible for operators delivering oil and gas in the EU market.

Finally, the EU alert system of non-compliance has been established, empowering the Commission to publish an alert notice warning operators and Member States to take the necessary measures in relation to the third countries concerned.

83. <https://www.clientearth.org/latest/latest-updates/news/eutr-newsletter-december-2021-february-2022/>

84. Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999.

However, this system might not be adequate for the proposal for Methane Regulation. The IUU system is based on Member State inspections on the vessels to detect illegal fishing given this is the way the fishing products enter in the EU. This is different to an EU approach of the legislation on emissions where the Commission ensures enforcement and the purchasing of the oil and gas produced outside the EU and entering the EU market is carried out at a Union level.

### **Control mechanisms through Partnership Agreements**

Another option would be to establish a system of Partnership Agreements with the key countries exporting methane to the EU, under which the monitoring of the means of measuring, verifying and reporting methane emissions is the responsibility of the exporting country, whose competent authorities will grant a licence once the conditions are verified. Only once the licence for trade is obtained and presented to the EU authorities can the methane enter the EU territory.

This is the system established under the FLEGT Regulation (EC) 2173/2005. Bilateral FLEGT Voluntary Partnership Agreements (VPAs) are established between the EU and exporting countries setting the applicable requirements and principles as well as the commitments and actions from both parties to halt trade of illegal timber. The VPAs define the legality assurance system, including effective supply chain controls, mechanisms for verifying compliance and independent audits. Once the VPA is agreed and the systems established, a licence scheme at partner country level is set, certifying the legality of the timber exported to the EU.

The negotiation of the bilateral FLEGT VPA is led by the European Commission based on the mandate from the Council of Ministers of the EU (as per Article 218 TFEU). EU Member States play a key role in supporting the negotiations and implementation. There are VPAs already signed with Ghana, the Republic of Congo, Cameroon, Indonesia, Central African Republic, Liberia and Vietnam. The EU has concluded negotiations and initiated VPAs with Honduras and Guyana. Negotiations are ongoing with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Laos, Malaysia and Thailand.

This option does not require fundamental amendments to the current proposal for Methane Regulation additional to the extension of its MRV, LDAR and BRVF requirements to operators outside the EU. However, it will be necessary to add a set of provisions establishing the requirements for the adoption of the VPAs and the content of the provisions that need to be complied with as well as the process and requirements in the countries outside the EU to ensure the inspections, the granting of licences and their enforcement.

#### 4.3.4 Summary table

In order to present more clearly the structure of the measures considered and their effectiveness in relation to achieving the objective of ensuring that emission reduction measures are applied to operators outside the EU, they can be summarised as follows:

Summary of legal measures to extend the Methane Regulation mitigation obligations to operators outside the EU and to enforce them

Measures on Methane emissions applied outside the EU	Enforcement measures			
	Verification	Due diligence	Inspections	Partnership agreements
Provision expanding the scope of the Methane Regulation	Methane Regulation: IMEO	EUTR	Official Controls Regulation	FLEGT
	Official Controls Regulation		IUU	
Methane Emissions Performance Standard	Official Controls Regulation	EUTR	N/A as emissions standards are enforced through verification	FLEGT

Effective

Medium effective

Low effective

## 5. OPTION 2: CONTRACTUAL OBLIGATIONS UNDER GAS PURCHASE CONTRACTS

This section analyses the possibility of ensuring that contractual provisions are the legal basis for imposing certain requirements under the Methane Regulation proposal on operators established in countries outside the EU that are trading gas with an operator/EU Member State/EU purchasing authority, and therefore the gas will enter into the EU market.

EU countries have agreed to purchase gas jointly at EU level through the EU Energy Purchase Platform. The EU could establish certain legal conditions regarding methane emissions reduction that would be reflected in the gas purchase contracts.

Existing systems and EU regulatory measures provide examples and arguments for the establishment of **contractual obligations for operators outside the EU** that will introduce a product in the EU market, rather than legislative measures as in option 1.

Although not common, some regulatory regimes require that contracting parties wishing to market a particular product, or to move waste are to be bound by a contract with specific provisions and obligations in addition to the more general commercial cooperation contracts. In practice, these contracts are concluded separately, alongside commercial cooperation contracts, so that the submission of documents to the relevant authorities does not entail disclosure of commercial secrets or cooperation terms. Usually, their content is strictly limited to the points required by the applicable law.

The **Basel Convention** on the control of transboundary movements of hazardous waste and its disposal requires, amongst other measures, international cooperation of authorities. Where an entity (the notifier) intends to ship waste, the consent of the country of dispatch, transit and destination must be obtained. The whole process of waste shipment should be monitored by competent environmental and custom authorities of the countries concerned.

At EU level, the **Waste Shipment Regulation (WSR)**<sup>85</sup> establishes the requirements for the transport or shipment of waste concerning EU territory (either as transit, shipping or destination). Under Article 4(4) of the WSR, waste shipment must be preceded by the conclusion of a contract between a notifier (entity sending waste) and the consignee (entity receiving waste). As also stipulated in Article 35(4) letter (b) the shipment may take place only if the contract between the notifier and consignee has been concluded and is effective.

The main function of these contracts is to ensure that the entity that is legally responsible for a given (waste) shipment can be held civilly liable to take the waste back or recover/dispose of it in cases where the shipment was not completed as intended or was carried out as an illegal shipment. This is due to the fact that waste management involves significant costs and has often been a considerable expense for authorities in the event of, for example, illegal dumping of waste, which has had to be dealt with at local level. The measure is in line with a fundamental principle of environmental law - the polluter pays principle.

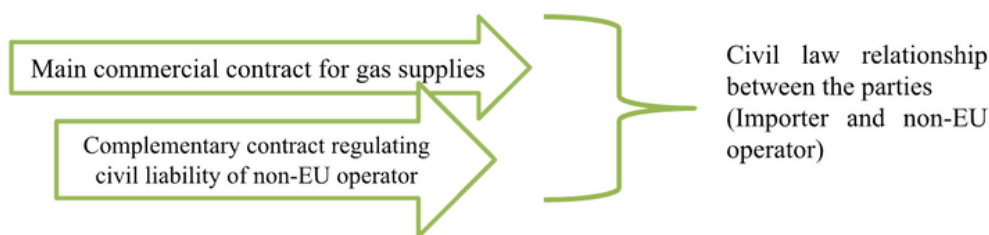
Matters to be covered by the contract are specified under Article 5(3) and (4) of the WSR.

Obligations of:		
1. Notifier	2. Consignee	3. Operator of recovery facility
To take the waste back if the shipment or the recovery or disposal has not been completed as intended or if it has been classified as an illegal shipment.	To recover or dispose of the waste if it has been effected as an illegal shipment.	To provide a certificate that the waste has been recovered or disposed of.

85. Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190 12.7.2006, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1013-20210111>.

The contract has to be concluded and be effective at the time of notification and for the duration of the shipment until a certificate of recovery is issued by the operator of the recovery facility (consignee).

The Methane Regulation proposal could introduce provisions requiring the signing of a contract which will regulate in more detail the obligations related to information on methane emissions established under the Methane Regulation proposal, namely its Article 12 and the implementation of the obligations of the operators required under Articles 13 to 17. Given the specific nature of purchase gas contracts and, above all, their long-term duration, consideration should be given to how to shape the requirements in this area to meet the needs of the market. It seems that the complementary contracts should be binding between the parties for shorter periods than the entire duration of the main contract, in order to enable updating the specific obligations such as emissions standards. Failure to conclude such contract would result in the inability to supply gas to the EU (due to the relevant regulatory restrictions that would have to be imposed). Verification of whether a contract has been concluded would be the responsibility of the competent authority of the country in which the gas importer into the EU operates.



It is worth noting that under the WSR, apart from the conclusion of a relevant contract, a financial guarantee or equivalent insurance link to the risks of its implementation has to be signed covering:

- costs of transport of waste;
- costs of recovery or disposal of waste, including any necessary interim operation; and
- costs of storage of waste for 90 days.

The competent authority of the country of waste dispatch has to approve the financial guarantee or equivalent insurance, including the form, wording and amount of the cover. The competent authority which has approved the financial guarantee or equivalent insurance has access thereto and shall make use of the funding, including for the purpose of payments to other authorities concerned.

This point might be considered if there is a high risk of methane emissions in transport or other activities, to cover the penalties derived from the leakage.

Lack of compliance with the obligations is subject to severe legal consequences. Entities which do not comply with the said requirements and which were fined under national law may be declined from any future transboundary shipments of waste (based on Article 11(1) letter (c) of the WSR).

Under a complementary contract, the non-EU operator could be deemed responsible to cover any costs arising from the failure to comply with the requirements under the Methane Regulation, including any administrative penalties (if such will be introduced under the proposal).

For example, the legislation could sanction EU-based operators for importing to EU gas originating from sources that do not comply with the Methane proposal, but those EU-based importers would be able, under contracts with non-EU operators, to seek reimbursement of such costs by civil action from contractors who are actually in breach of the legislation. This would shift the burden of claiming penalties or costs from public to private entities which profit directly from importing gas into the EU.

A complementary contract regulating civil liability of non-EU operators should also include requirements for the provision of financial security (along the lines of the solution in the WSR), which would simplify the procedure for the assertion of potential claims between the parties.

## To conclude:

The contractual agreement will be a natural complement to the legislation. While the proposal for Methane Regulation could include provisions establishing the content of the contracts and distribution of responsibilities, this is not an absolute requirement. In the case that the EU is negotiating on behalf of EU Member States, that International Agreement will set the basis for bilateral contracts between operators, which might refer to the obligations and methane emissions targets established under the Methane Regulation in force.

The penalties will need to be adjusted to the specific nature of the gas contracts. Fines and payments will be more appropriate than seizure of the goods (gas), as the latter would lead to situations affecting energy security.

In order to complement and ease the imposition of fines, it would also be useful for the provisions on financial securities to be introduced in the proposal for Methane Regulation. However, these rules are difficult to adopt as they face opposition from some economic sectors.

The proposal of Methane Regulation could include a provision requiring:

The entering of oil and gas in the EU market to be based on contractual agreements where the methane emissions limit and the MRV, LDAR and BFRE requirements are included and further described in the contract between the operator outside the EU and the EU operators.

In relation to financial securities, the following provision could be introduced,:

*Financial provision by way of financial security or any other equivalent should be made by the operator in order to cover the risk of lack of compliance with the obligations established by this Regulation and leading to emissions subject to fines under Article 30 of the proposal for Regulation.*

# 6. ENFORCEMENT PROVISIONS FOR NON-COMPLIANCE

## 6.1. Penalties

The proposal for Methane Regulation includes certain provisions establishing a system to ensure the enforcement of the obligations imposed on operators. The proposal requires Member States to lay down in their legal framework rules on penalties applicable to infringements of the provisions of the Regulation by operators and to take all necessary measures to ensure their implementation.

**Article 30 requires Member States to define at least the following fines and periodic penalty payments:**

*The penalties provided for must be effective, proportionate and dissuasive and may include:*

*(a) fines proportionate to the environmental damage, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their infringements and gradually increasing the level of such fines for repeated serious infringements;*

*(b) periodic penalty payments to compel operators to put an end to an infringement, comply with a decision ordering remedial actions or corrective measures, supply information or submit to an inspection, as applicable*

*Member States shall notify the rules on penalties to the Commission [...].*

In addition, Article 30 **defines certain infringements** that should be subject to penalties, without preventing Member States sanctioning other infringements:

*3. At least the following infringements shall be subject to penalties:*

*(a) failure of operators or mine operators to provide the competent authorities or the verifiers with the assistance necessary to enable or facilitate the performance of their tasks in accordance with this Regulation;*

*(b) failure of operators or mine operators to carry out the actions set out in the inspections report referred to in Article 6;*

*(c) failure of operators or mine operators to submit the methane emissions reports as required by this Regulation, including the verification statement issued by independent verifiers in accordance with Articles 8 and 9;*

*(d) failure of operators to carry out a leak detection and repair survey in accordance with Article 14;*

*(e) failure of operators to repair or replace components, to continuous survey components and to record leaks in accordance with Article 14;*

*(f) failure of operators to submit a report in accordance with Article 14;*

*(g) venting or flaring by operators or mine operators beyond the situations provided for in Articles 15, 22 and 26, as applicable;*

*(h) routine flaring by operators;*

- (i) failure of operators or mine operators to demonstrate the necessity to opt for venting instead of flaring and to demonstrate the necessity to opt for flaring instead of either re-injection, utilisation on-site or dispatch of the methane to a market, in the case of operators, or utilisation or mitigation, in the case of mine operators, in accordance with Articles 15, 22 and 26;
- (j) failure of operators or mine operators to notify or report on venting and flaring events in accordance with Articles 16, 23 and 26, as applicable;
- (k) use of flare stacks or combustion devices in breach of the requirements laid down in Article 17;
- (l) failure of importers to provide the information required in accordance with Article 27 and Annex VIII.

**Article 30 sets out the following criteria according to which the degree of penalty should be defined:**

- Member States shall take into account at least the following indicative criteria for the imposition of penalties, as appropriate:
- (a) the duration or temporal effects, the nature and the gravity of the infringement;
  - (b) any action taken by the undertaking, operator or mine operator to timely mitigate or remedy the damage;
  - (c) the intentional or negligent character of the infringement;
  - (d) any previous infringements by the undertaking, operator or mine operator;
  - (e) the financial benefits gained or losses avoided directly or indirectly by the undertaking, operator or mine operator due to the infringement, if the relevant data are available;
  - (f) the size of the undertaking, operator or mine operator;
  - (g) the degree of cooperation with the authority;
  - (h) the manner in which the infringement became known to the authority, in particular whether, and if so to what extent, the operator timely notified the infringement;
  - (i) any other aggravating or mitigating factor applicable to the circumstances of the case.

The reasoning behind imposing these penalties ultimately is the environmental damage caused by the non-compliance. Therefore, the option chosen by the proposal for Methane Regulation is to determine the fines proportionately to the environmental damage caused by the non-compliant actor.

This solution draws inspiration from the **EU Timber Regulation**, which requires Member States to lay down the rules on penalties applicable to the infringements of the EUTR's provisions. Specifically, its Article 19(2) establishes the obligation for the penalties to be effective, dissuasive and proportionate, and suggests measures such as **fines, seizure of the timber and timber products or immediate suspension of the authorisation to trade**.

In relation to the **fines**, the EUTR establishes the possibility of quantifying them in proportion to the environmental damage caused, the value of the timber concerned, the tax losses and economic detriment resulting from the infringement. This option is similar to the sanctioning system established under the proposal for Methane Regulation.

However, quantification of the fine could pose a challenge and undermine its enforcement. Neither the proposal for Methane Regulation nor the EUTR establish how the environmental damage should be calculated. How big the damage would be in relation to climate change might depend on the urgency of the situation. Defining the environmental damage brought on by methane emissions might be easier if it is linked to the tonnes of CH<sub>4</sub> emitted. This system would require a solid MRV system including the verification of the emissions outside the EU, which is not clearly in place in the current proposal.

This option would require capping the amount of emissions allowed so that the excess could be multiplied by the cost of each emitted tonne in EUR in order to determine the fine. This model is used, for example, **in the CO<sub>2</sub> emission performance standards for cars and vans Regulation**.<sup>86</sup> Accordingly, Article 8(2) establishes the following formula to quantify the fine: Excess emissions × EUR 95 and multiplied by the number of newly registered vehicles, since the system is applied to the fleet. By capping the amount of methane emissions in the proposal for Methane Regulation, it would be possible to apply a similar logic to its penalty scheme.

Based on a system where the emissions are capped, the enforcement system of the **F-Gas Regulation** establishes a penalty applied as a reduction in the allowed emissions in the following period.<sup>87</sup> Article 25(2) of the Regulation establishes a 200 % reduction on the allocated quota for the period subsequent to the registered overflow. While this solution would be easily applicable to methane, it would require a cap for methane emissions to be defined.

Under the ETS, Article 16 requires Member States to adopt rules on penalties applicable to infringements of the national provisions adopted pursuant to the ETS Directive and to take all measures necessary to ensure that such rules are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Based on a system of a CO<sub>2</sub> emissions cap, a penalty is imposed on operators or aircraft operators who do not each year surrender sufficient allowances to cover their excess emissions during the preceding year. The penalty is calculated applying EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. It should be noted that the ETS stresses that the payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year. The European index of consumer prices will be applied to the excess emissions penalty.

The price of carbon allowances may be close to EUR 100 (as last August)<sup>88</sup> which is the cost of the fine per tonne of CO<sub>2</sub> emitted without surrendering the corresponding allowance. That fact leads some stakeholders to question the effectiveness of the enforcement system. However, an operator would have to pay the allowances due and not yet surrendered as well as the fine. A fine per tonne higher than the price of the allowance has a stronger dissuasive and preventive effect on the operators' behaviour.

## **6.2. Seizure of goods and suspension of authorisation to trade**

The EUTR also establishes under Article 19(2) paragraph (b) the 'seizure of the timber and timber products concerned'. In relation to oil and gas, seizure of the oil and gas might not be justified as a sanction for not reporting methane emissions. This option does not seem to be proportionate due to the economic value of the traded gas and could be considered disproportionate response and a disguised restriction on international trade against WTO rules.

The exception under Article XX of WTO rules in relation to measures limiting trade due to environmental considerations is subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The seizure of the oil and gas would probably be considered as not compliant with those requirements.

Similarly, the EUTR includes the possibility of imposing the 'immediate suspension of authorization to trade'. However, in relation to oil and gas, this option could affect energy security and would affect the relationship with the few traders of gas, in the current circumstances where Russia is already excluded.

86. Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO<sub>2</sub> 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 (recast).

87. Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006.

88. <https://ember-climate.org/data/data-tools/carbon-price-viewer/> or <https://sandbag.be/index.php/carbon-price-viewer/>

#### Conclusion:

In light of the above, we can conclude that the penalty regime proposed by the proposal for Methane Regulation needs a more detailed definition of environmental damage, linking it to the emissions based on a methane emissions standard capping the emissions of oil and gas imported to the EU market. That would require the establishment of a strong measuring and verification system.

This system would be effective, proportionate and dissuasive, as proven by implementation in other referred EU legislation.

### 6.3. Enforcement system under the Environmental Crime Directive

Criminal sanctions for non-compliance could possibly be an effective tool to consider when discussing the Methane Regulation proposal's enforcement. Opposed to administrative penalties and compensation mechanisms under civil law, criminal sanctions demonstrate a social disapproval and have therefore a qualitatively different nature from other enforcement tools.<sup>89</sup> It is precisely this specificity that makes them a dissuasive and effective enforcement tool.

According to the **Environmental Crime Directive 2008/99/EC**, '(...) the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause (...) **substantial damage to the quality of air**, (...)' constitutes a criminal offence, when committed unlawfully or intentionally or with at least serious negligence.<sup>90</sup>

The scope of this provision is quite broad, encompassing both damage caused by a certain action and the risk of causing such damage (likelihood of a certain action causing damage). It seems, therefore, that methane emissions occurring due to lack of compliance with the Methane Regulation provisions would fit this description and potentially qualify as criminal offences. However, the Directive applies to infringements of environmental legislation listed in its Annex. The current version of the **Directive** recently reviewed by the European Commission in December 2021<sup>91</sup> includes, inter alia, illegally harvested timber, illegal ship recycling, source discharge of polluting substances from ships, serious breaches related to dealing with fluorinated greenhouse gases; etc. The introduction of a reference to the Methane Regulation in the Directive would also be plausible but it would require amending the (proposal for) Environmental crimes Directive.

As for the applicable sanctions, while the Directive's original version was quite vague, only referring to the Member States' discretion to impose 'effective, proportionate and dissuasive criminal penalties',<sup>92</sup> the new proposal has intensified this provision by implementing imprisonment as a sanction **for natural persons**. Specifically, Article 5(a) states 'by a maximum term of imprisonment of at least six years.' Furthermore, the same Article provides for additional sanctions, such as:

- **obligation to reinstate the environment within a given time period**

*This sanction would also be challenging to enforce, as the damage caused to the environment by methane is difficult to repair even if it could be precisely measured, which might not always be possible. Climate change is not easily reversible.*

- **(criminal and administrative) fines**

*Fines for non-compliance would be a viable and effective option.*

- **temporary or permanent exclusions from access to public funding, including tender procedures, grants and concessions**

89. Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, recital 3.

90. Ibid., Article 3(a)

91. Available at: [https://ec.europa.eu/info/sites/default/files/1\\_1\\_179760\\_prop\\_dir\\_env\\_en.pdf](https://ec.europa.eu/info/sites/default/files/1_1_179760_prop_dir_env_en.pdf)

92. Article 5.

EU or national funding does not apply to methane operators outside the EU unless it is to pay for the oil and gas traded. This sanction would only be applicable if the trading agreement is based on a licence or concession, which would be cancelled due to the lack of compliance. However, this might lead to energy security issues and therefore might not be transposable to the methane proposal

- **disqualification from directing establishments of the type used for committing the offence**

This sanction could potentially apply to the methane proposal, if it were proved that the non-compliance had been attributable to the operator due to wilful misconduct or negligence.

- **withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence**

In the case of trading oil or gas, this sanction could imply withdrawing the agreement to trade oil and gas with the EU. This could potentially be disproportionate and lead to energy security issues. It could be applied while ensuring compliance with WTO rules and based on the legal requirement that infringement of the Regulation would lead to serious environmental damage (exception under Article XX of WTO rules) and was committed intentionally or with at least serious negligence.

- **national or Union-wide publication of the judicial decision relating to the conviction or any sanctions or measures applied**

Publishing the conviction or any applied sanctions or measures is one of the measures proposed by the Methane Regulation which requires Member States to publish annually information on the type and the size of the penalties imposed under this Regulation, the infringements and the operators upon which penalties have been imposed.

Differently, for legal persons, besides the above-mentioned sanctions, the proposal for revision of the Environmental Crimes Directive also includes:

- **placing under judicial supervision**

Monitoring an operator after non-compliance would be a reasonable way of ensuring that it would comply with the proposal in the future. Therefore, this sanction could possibly be applied.

- **judicial winding-up**

This sanction, though possible to enforce, seems disproportionate for the methane proposal. Considering there is only a small number of operators in the market, ordering the judicial winding-up of one would affect the market beyond reasonable extent and therefore this sanction should not be applied to the proposal.

- **obligation of companies<sup>94</sup> to install due diligence schemes for enhancing compliance with environmental standards**

The due diligence model under the EU Timber Regulation has been described above, concluding that it is a feasible option for enforcing the methane proposal, even if there are some problems regarding its efficient implementation.

Finally, **imprisonment** of natural persons would be difficult to impose within the proposal for Methane Regulation, as it seems that non-compliance would mostly be attributable to legal persons, rather than natural persons (i.e. operators). Therefore, although possible, it would be disproportionate to apply this sanction to, for example, the manager of an establishment.

93. Article 5(5)(a) to (g)

94. Article 7(2)(g) to (j)

# 7. OTHER OPTIONS, INCLUDING MARKET-BASED MECHANISMS

## 7.1. Including methane emissions in the EU ETS scheme

In its Annex II, the EU ETS Directive includes methane as a pollutant with a view to implementing Articles 3 and 30.

Article 3 defines 'tonne of carbon dioxide equivalent' as one metric tonne of carbon dioxide (CO<sub>2</sub>), or an amount of any other greenhouse gas listed in Annex II that has an equivalent global-warming potential. Article 30 requires this Directive to be kept under review in the light of international developments and efforts undertaken to achieve the long-term objectives of the Paris Agreement. In particular, the Commission needs to report to the European Parliament and to the Council in the context of each global stock take agreed under the Paris Agreement, most notably with regard to the need for additional Union policies and measures in view of necessary greenhouse gas reductions by the Union and its Member States, including in relation to the linear factor referred to in Article 9.

However, the scope of the EU ETS obligations does not include methane. According to the Explanatory memorandum of the Methane Regulation proposal, Regulation (EU) 2018/842 (the Effort Sharing Regulation, ESR<sup>95</sup>) contains binding annual greenhouse gas emission targets at country level for Member States from 2021 to 2030 for sectors including transport (without aviation), buildings, agriculture, waste, industry and the parts of the energy sector not covered by the existing EU Emissions Trading System (ETS). It includes methane in its scope and this is maintained in the proposal for revision adopted on 14 July 2021.<sup>96</sup>

The inclusion of methane (CH<sub>4</sub>) as an emitter for which ETS allowances should be surrendered would entail the implementation of a system to monitor, report and verify emissions that is similar to the one established under the proposal for Methane Regulation but without the trading of allowances. Implementing the EU ETS so that operators outside the EU exporting oil and gas to be consumed in the EU are subject to the MRV obligations as well as to the payment of allowances is legally possible (as discussed in section 4.1).

It does not seem necessary to establish two parallel systems that are so similar, and the Commission has decided to go for the adoption of the Methane Regulation.

The proposal for Methane Regulation is considered complementary to the ESR as it introduces specific measures for the reduction of methane emissions. The ESR does not prescribe such measures and leaves some margin of discretion for Member States to define how best to achieve the required greenhouse gas emission reductions. However, the ESR establishes a limit to its greenhouse gas emissions per Member State (in Annex I in relation to its greenhouse gas emissions in 2005), determined annually by the Commission according to emission allocations for the years from 2021 to 2030 in terms of tonnes of CO<sub>2</sub> equivalent.

The Methane Regulation aims to contribute to Member States fulfilling their targets under the ESR in a more cost-effective way due to the trading potential in the ESR between Member States (explanatory memorandum). However, it is not applicable to operators outside the EU. The methane emission standard proposed by NGOs would establish a methane emissions limit that would be applicable to operators outside the EU.

95. 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 amending Regulation (EU) No 525/2013.

96. Explanatory memorandum of the proposal for Methane Regulation, p. 3.

## 8. FINAL CONCLUSIONS

The proposal for Methane Regulation limits the scope of the emissions abatement measures to operators based in the EU. In the Impact Assessment for the Methane Regulation Proposal<sup>97</sup> it was stated that: 'Given that coal, oil and fossil gas together make up 70% of the EU's energy consumption and given that the EU is dependent on imports for 90% of its fossil gas consumption, such a set of measures could put EU energy security at risk'.

The main question presented is whether the MRV, LDAR and BRVF obligations for EU operators could be extended to operators outside the EU.

From the point of view of the legal feasibility, the response is based on the CJEU jurisprudence related to EU climate legislation designed to be applied to aircraft operators established outside the EU for flights departing from and arriving at EU airports. This jurisprudence stated that such legislation does not breach the sovereignty principle since those aircrafts are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU.<sup>98</sup> This criterion was expressed by Advocate General Kokott as having a sufficient link with the State or International organisation concerned. The principle of territorial link means that Directive 2008/101/EC does not contain any extraterritorial provisions, as it is concerned solely with aircraft arrivals at and departures from aerodromes in the European Union.<sup>99</sup>

This conclusion is applicable to either a measure proposing the extension of the current provisions of the proposal for Methane Regulation or to a new provision establishing a methane emissions standard. In both cases the sufficient territorial link criterion is fulfilled because the gas is sold and consumed in EU territory.

Similarly, the WTO rules are not an obstacle for the application of the measures proposed in the Methane Regulation Proposal to operators outside the EU. Under the WTO rules, the establishment of trade restrictions or conditions imposed on operators outside the EU introducing products in the EU market should not be discriminatory or a disguised restriction of international trade. The proposal for Methane Regulation, which is equally applicable to operators inside the EU and operators outside the EU introducing a product into the EU, respects these principles.

The current Methane Regulation Proposal only includes an information obligation for importers of fossil fuels in relation to methane emissions from operators outside the EU. This obligation is based on the development of a transparency list of Union countries and companies exporting fossil energy to the Union. It should include information on their international reporting obligations on methane emissions feeding into a global monitoring tool to divulge the magnitude, recurrence and location of methane emitters globally. An information obligation does not necessarily lead to methane emissions reduction from sources outside the EU.

The MRV, LDAR and BRVF obligations for EU operators regarding methane emissions reduction could be extended to operators outside the EU by introducing an amendment into Article 1(3) of the Methane Regulation Proposal expanding its scope. However, the control and enforcement of these measures would require the adoption of complementary provisions.

An option with a similar effect would be to introduce a provision in the Methane Regulation Proposal to cap emissions to 0.20 % along the entire supply chain for both domestic and imported gas sold and consumed in the EU by 2025.<sup>100</sup> This proposal would require MRV, LDAR and BRVF obligations to monitor, report, verify and implement the emissions cap. This measure would also require the introduction of a provision in the European Climate Law establishing a target, for example, a 75 % methane emissions reduction by 2030. Similarly, this option would require the adoption of complementary provisions for the enforcement of the MRV, LDAR and BRVF measures.

97. According to the Commission's summary after stakeholder consultations, 65% of responses backed the idea of imposing obligations on MRV, LDAR and venting and flaring equally on all actors of the oil and gas value chain for oil and gas consumed in the EU, including actors from outside of the EU, information available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021SC0459>, accessed on: 11 July 2022.

98. Case [C-366/10](#) Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, paragraph 125.

99. Opinion of Advocate General Kokott in the case [C-366/10](#), paragraphs 154 & 156.

100. NGO Coalition position paper EU Methane Regulation, March 2022.

Should the MRV, LDAR and BRVF obligations for EU operators regarding methane emissions reduction be applicable to operators outside the EU, it would require the establishment of a monitoring and verification system of the emissions reported, similar to the one applied to EU operators. The choice of the enforcement measures would be critical.

Regulation Proposal refers to the UNEP led International Methane Emissions Observatory (IMEO) as the body responsible for the verification of methane emissions data. One option would be to extend the IMEO competence of verifying emissions within the framework of the Methane Regulation Proposal in non-EU countries. If Article 1(3) of the proposal for Methane Regulation is amended to expand its scope to operators outside the EU, the extension of the IMEO to cover them, would need to be referred to under Article 10.

The existing international reporting scheme under the Oil & Gas Methane Partnership (OGMP) is linked to the IMEO as the independent verifier of methane emissions reported. While there is an advantage in the fact that the Commission is nominating the IMEO as the verification body in the proposal for Methane Regulation, the fact that oil and gas production companies and countries are linked to the OGMP 2.0 Partnership and the IMEO, raises questions about the independence of the IMEO.

Therefore, another option could follow the model set under Regulation (EU) 2017/625 - Official Controls Regulation<sup>101</sup> where the Commission is granted the competence to act as an independent verifier. Unlike the IMEO, the Commission verifies compliance of national measures implemented in a given non-EU country, but does not directly monitor private entities. Non-EU countries set national systems of pre-export inspections carried out by them prior to exporting goods to the Union with a view to ensuring compliance with the requirements of the Regulation. The Commission would verify those non-EU country systems at a later stage on the basis of annual control programmes adopted through implementing acts.

This system is similar to the Voluntary Partnership Agreements under FLEGT and could be complementary to a due diligence mechanism such as in the EUTR. The establishment and implementation of those systems require introducing provisions in the proposal for Methane Regulation, defining roles and responsibilities of the operators outside the EU as well as the third country competent authorities, including the provisions and obligations with which they need to ensure compliance.

101. Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulation (EC) No 999/2001 (Official Controls Regulation), (OJ L 095 7.4.2017, p. 1), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R0625-20220128>.

# 9. ANNEX: LEGAL BASIS FOR THE TERRITORIALITY PRINCIPLE AND WTO RULES

## 9.1. Territoriality principle and State Sovereignty

The possibility of establishing these measures with operators outside the EU but introducing a product in the EU market would inevitably entail extraterritorial implementation of EU legislation. Such a scenario may conflict with the public international law principle of state sovereignty.<sup>102</sup>

Sovereignty of a state can be understood as the exclusive right of a given state to exercise supreme political authority over a defined territory and the people within that territory. This means that no other State can have formal political authority over a sovereign state.<sup>103</sup>

The principle of sovereignty has been nuanced through numerous international disputes. In the case of the *S.S. Lotus*, the Permanent Court of International Justice stated that *'first and foremost restriction imposed by international law upon a State is that it may not exercise its power in any form in the territory of another State'*.<sup>104</sup> At the same time, the court acknowledged that public international law recognises the possibility of exercising state powers outside the territory of a state. The Court also found in the case *Nicaragua v. United States of America*,<sup>105</sup> that *'[a] State's domestic policy falls within its exclusive jurisdiction (...). Every State possesses a fundamental right to choose and implement its own political, economic and social systems'*. As confirmed by the CJEU in case *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, *'the European Community must respect international law in the exercise of its powers'*.<sup>106</sup> Therefore, it can be concluded that the principle of sovereignty must be respected. However, there are situations in which Union law regulates actions that take place outside the territory of the Union, as long as the effects of those regulated activities arise within the territory of the Union.<sup>107</sup>

This criterion has been applied by the CJEU in relation to the applicability of the EU ETS<sup>108</sup> rules to aircraft operators for flights departing from and arriving at EU airports under Directive 2008/101/EC.<sup>109</sup> The Court established in the case C-366/10<sup>110</sup> that EU legislation does not breach the sovereignty principle since those aircrafts are physically in the territory of one of the Member States of the EU and are thus subject to the unlimited jurisdiction of the EU. The Court concluded that *'the EU had competence, in the light of the principles of customary international law, to adopt Directive 2008/101/EC, in so far as the latter extends to all flights which arrive at or depart from an aerodrome situated in the territory of a Member State. In the court's view, this was a juncture justifying the application of EU law.'*

102. Sovereignty, Samantha Besson, available at: <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1472#>, accessed on 20 July 2022.

103. Beckman R., Butte D., (2019), Introduction to International Law, available at: <https://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/intlawintro.pdf>, accessed on 20 July 2022.

104. Case *France v. Turkey*, Permanent Court of International Justice, available at: [https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie\\_A/A\\_10/30\\_Lotus\\_Arret.pdf](https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf), accessed on 20 July 2022.

105. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

106. Case C-286/90, *Anklagemyndigheden v. Poulsen i Diva Navigation*, point 9, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61990CJ0286>, accessed on 21 July 2022.

107. Case C-181/73, *Haegeman v. Belgium* paragraph 5, ECLI:EU:C:1974:41.

108. Regulated by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0087-20210101> accessed on 21 July 2022.

109. Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

110. Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-366/10>, accessed on 20 July 2022.

111. Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, paragraph 125.

Prior to issuance of a judgment, Advocate General Kokott issued an opinion stating that a State or International organisation may take into account circumstances occurring outside its territorial jurisdiction when particular facts display a sufficient link with the State or International organisation concerned. It stated that Directive 2008/101 does not contain any extraterritorial provisions as it is concerned solely with aircraft arrivals at and departures from aerodromes in the European Union, and it is only with regard to such arrivals and departures that any exercise of sovereignty over the airlines occurs. Furthermore, the principle of territorial link or the *'territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the European Union. Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. [...] Directive 2008/101/EC does not preclude third countries from bringing into effect or applying their own emissions trading schemes for aviation activities'*.<sup>112</sup>

Thus, in the case of the Methane Regulation Proposal, the fact that the methane gas is meant to enter the EU market (regardless of infrastructure ownership) would be a **'sufficient link'** justifying the application of EU law outside the territory of the Union (following the opinion of Advocate General Kokott). In addition, the traded gas is destined for consumption by final users from the European Union. The identification of these two aspects should be considered satisfactory to justify the extraterritorial application of the provisions of the Methane Regulation Proposal.

In relation to the application of Competition law in case *Intel Corp. v European Commission*<sup>113</sup> the CJEU clarified the fact that an agreement would be applicable to an entity established in a third country if **such an agreement has effects within the territory of the internal market**.<sup>114</sup> As in the case of the EU ETS, the court acknowledged that the existence of a **reasonable link** between an effect occurring within the EU and conduct occurring outside the EU justifies the application of the legislation.

In the case C-507/13 relating to the components of remuneration for certain employees in the banking sector and the extent to which Article 94(1)(g) should be applied to employees of institutions outside of the EEA, or whether it would infringe the principle<sup>115</sup> against extraterritoriality under customary public international law, the Advocate General Jääskinen clearly argued that state right to legislate is **not restricted to territorial jurisdiction under international law** and added that **sufficient nexus demonstrating the need for extraterritorial application of the provisions was provided**.

There was no judgment issued due to the **withdrawal of the application**. The enforcement of extraterritoriality has been interpreted in a more restrained way in relation to digital rights and the GDPR, at least in the recent cases *Glawischnig-Piesczek v Facebook Ireland Limited*<sup>116</sup> and case *Google LLC v Commission nationale de l'informatique et des libertés*,<sup>117</sup> which can be attributed to the characteristics of digital rights, which have a global effect.

## 9.2. Trade considerations

As the issue at stake concerns methane gas as a product that is traded into the EU from countries beyond EU borders, the World Trade Organization's (hereafter 'WTO') rules and procedures must be considered. WTO rules are applicable to its 164 members since July 2016 and apply to 98 % of world trade, constituting the main instrument of trade international law.

112. Opinion of Advocate General Kokott in the case C-366/10, paragraphs 154 & 156, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-366/10>, accessed on 20 July 2022.

113. Case C-413/14 *Intel Corp. v European Commission*, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-413/14>, accessed on 21 July 2022.

114. Kaleda S.L., (2020), Zakres obowiązywania i stosowania prawa Unii, Źródła prawa Unii Europejskiej, available through Legalis on-line database at: <https://sip.legalis.pl/>, accessed on 20 July 2022.

115. Case C507/13 *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*.

116. Opinion of Advocate General, N. Jääskinen, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=161321&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1935338>, accessed on 25 July 2022.

117. Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*.

The CJEU ruled that organisations that have no physical establishment in the EU can be obligated to comply with the GDPR and that 'GDPR does not preclude a court of a Member State from ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law', although (as emphasised by Advocate General Szpunar '(...) in the interest of international comity, (...) that court should, as far as possible, limit the extraterritorial effects of its junctions concerning harm to private life and personality rights.'

118. Case *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)*, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-507/17>, accessed on 25 July 2022, in which the court explained that EU law does not currently require that the de-referencing granted in the judgment concern all (worldwide) versions of the search engine (only the one in the European Union) but it also does not prohibit such a practice. In line with the court's reasoning, the Regulation's provisions on the 'right to be forgotten' were not given a scope that would extend beyond the territory of the Member States.

119. [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

The system that the WTO has created is based on a set of agreements, negotiated and ratified by the WTO Member States, that provide the ground rules on international trade. Those rules allow trade to flow as easily as possible, without unnecessary restrictions and undesirable side effects. The flagship and oldest agreement of the WTO on the trade of goods is the General Agreement on Tariffs and Trade (GATT) adopted in 1948<sup>120</sup> and amended multiple times since then to address the new needs of the global market.

In the previously mentioned case C-366/10<sup>121</sup> related to the EU ETS, the AG Kokott highlighted that the Court of Justice has consistently held that the WTO cannot be used as a benchmark against which the validity of acts of EU law can be reviewed, because of the nature and broad logic of the WTO rules and decisions. The Court's reasoning is essentially based on the great 'flexibility' of the GATT (and now of WTO law), which is designed for negotiated solutions and based on the principle of reciprocity. It was also argued that international law forms an integral part of the legal order of the European Union and under Article 3(5) TEU, the EU ensures the strict observance of International law.

Therefore, in this section we are not considering the validity of the legislation but the consistency of the implementation of the EU MRV, LDAR and BRVF standards to the trade of gas emitting methane entering the EU with the provisions of the WTO according to the jurisprudential interpretation by the **Dispute Settlement Body of the WTO**. If the dispute on imposed restrictions on trade is not resolved by the contracting states, a 'Panel' of experts is set to consider a case and make recommendations to resolve it or provides rulings to the same end. The Panel also has the power to authorise retaliation when a country does not comply with a ruling and in this sense resembles an international court.

The main principles under which the WTO operates include the following:

- **The Most-Favoured-Nation (MFN) Treatment:** according to Article I:1 of the GATT '*(...)any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*'.

The MFN treatment effectively requires that countries who are- members of the WTO cannot discriminate against their trade partners and that they should offer the same conditions to all contracting parties aiming to access their internal market. This is the case under the methane emissions reduction measures at stake as they are imposed on operators in the EU.

- **The National Treatment Principle:** Article III of the GATT provides that imported and locally produced products (once on the market) should be treated equally and should not be subject to '*direct or indirect taxes, charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products*'.

This principle ensures that, once goods have entered the market of a contracting state or a trade union, they are not susceptible to different treatment than local products. This is the case under the methane emissions reduction measures at stake as they are imposed on operators in the EU.

- **Article XX specifically provides general exceptions**, in which restrictions in trade are possible, while complying with the WTO rules: '*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (...)*
  - (b) necessary to **protect human, animal or plant life or health**; (...)
  - (g) relating to the **conservation of exhaustible natural resources** if such measures are made effective **in conjunction with restrictions on domestic production or consumption**...'

The measures at stake imposing trade restrictions for the reduction of methane emissions are related to the protection of the environment and would be compliant with the exception of Article XX sub-paragraph (b) or (g), according to relevant jurisprudential interpretations.

120. General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

121. Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-366/10>, accessed on 20 July 2022.

In the case **Brazil – Retreaded Tyres**, the Appellate Body of the Dispute Settlement Body made the remark that ‘[T]he results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time’<sup>122</sup>.

In the case of **US – Gambling**, the Appellate Body stated that: ‘[A] responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.’<sup>123</sup>

Furthermore, trade restriction rules for the reduction of methane emissions might also be in line with the conditions of Article XX(g). Imposing requirements such as MRV, LDAR and BRVF to importers of gas is a measure ‘in relation to’ the conservation of the respective resources, in the sense that there is ‘a close and genuine relationship between ends and means’. It is also ‘made effective in conjunction with similar domestic measures’, in the sense that it ‘work[s] together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource’, especially considering that similar provisions would also apply within the EU.

In the case **US – Gasoline** the Panel and the Appellate Body considered that ‘clean air’ was an **exhaustible natural resource**<sup>124</sup>. The Panel found that the measure was ‘related to’ (i.e. ‘primarily aimed at’) the ‘conservation of exhaustible natural resources’ and thus fell within the scope of Article XX(g). However, the measure was still not justified by Article XX because the discriminatory aspect of the measure constituted ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade’ under the chapeau of Article XX.

It is also important to highlight that similar restrictions have been considered in academic literature in line with WTO law. In the case of the extension of the EU ETS System to aviation, Professor Lorand Bartels<sup>125</sup> concluded that extending the scope of the EU ETS to aviation might breach one or more provisions of the General Agreement on Tariffs and Trade (GATT),<sup>126</sup> but this breach would fall under the environmental exceptions provided in Article XX GATT.<sup>127</sup>

Compliance of trade restrictions with WTO in relation to Article XX entails that the measures adopted are not ‘applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination between countries** where the same **conditions prevail**, or a disguised restriction on international trade.’

The assessment of the WTO Article XX requires analysis of the following three criteria:<sup>128</sup>

- Whether the restrictions constitute a discrimination;
- Whether the discrimination is arbitrary;
- Whether the discrimination is justifiable.

122. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm)

123. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm)

124. The “Gasoline Rule” under the US Clean Air Act that set out the rules for establishing baseline figures for gasoline sold on the US market (different methods for domestic and imported gasoline), with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution. The Panel found that the measure treated imported gasoline ‘less favourably’ than domestic gasoline in violation of Article III:4, as imported gasoline effectively experienced less favourable sales conditions than those afforded to domestic gasoline. In particular, under the regulation, importers had to adapt to an average standard, i.e. ‘statutory baseline’, that had no connection to the particular gasoline imported, while refiners of domestic gasoline had only to meet a standard linked to their own product in 1990, i.e. individual refinery baseline

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds2\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm)

125. Bartels, L., The WTO legality of the application of the EU’s emission trading system to aviation, *European Journal of international law* 23.2 (2012): 429-467.

126. The Methane Regulation proposal might, for instance, constitute a Quantitative Restriction pursuant to Article XI:1 GATT which provides that: ‘no prohibitions or restrictions other than duties, taxes or other charges, (...) shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party’.

127. See WTO rules and environmental policies: GATT exceptions, available at: [https://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

128. US – Shrimp, see [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm)

Climate change **is not directly mentioned** in the WTO's agreements. However, environmental pressures influence trade, raising its costs and disrupting supply chains, which makes the goals of sustainable development and environmental protection central for the WTO's targets. **In fact, national and regional measures tackling climate change often relate to trade, e.g. incentives, taxes, tariffs, and market-based mechanisms – and these may be subject to the WTO's rules and procedures.** Put differently, the implementation of such programs will necessarily factor in the impact on the trade of WTO members, as well as their rights and obligations.<sup>129</sup> On the other hand, trade has a significant impact on climate change. Evidence collected by the WTO in 2021 has pointed out that 20-30 % of global greenhouse gas emissions are generated by the production and transport of imported goods and services.<sup>130</sup>

On these grounds, the WTO has in place **a forum for its members to discuss policies on trade and climate change**, as climate action potentially enables economic growth and diversification.<sup>131</sup> Given the rising relevance of trade in environmental matters, the European Union has in 2021 committed to increasing the role of trade in the fight against climate change, by signing **three new initiatives to join forces with the WTO**. One of these initiatives is on fossil fuel subsidy reform, which implies that 45 WTO Members will define options to **further the transparency of fossil fuel subsidies**, as well as **facilitating reform for the said subsidies**. Moreover, this initiative aims to encourage the remaining WTO members to join the initiative and to accommodate the specific needs of developing countries, and would also be applicable to third countries.

Considering the above, although the WTO's rules do not directly address climate change and environmental matters, a rising concern seems to exist for these topics in recent years. Therefore, measures have been taken by the WTO to increase sustainability of trade and ensure its continuity. Given the threat methane emissions pose to the environment, these are not disregarded by the WTO and potential restrictions on trade might be considered in line with its General Principles.

The **extraterritorial** aspects of an EU measure do not present any problem under WTO Law: In the case **US - Shrimp**: the Appellate Body held that turtles, as a species, were an essentially migratory species, and therefore sufficiently within US territory to provide a **'jurisdictional nexus'** for the regulation.

129. [https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_measures\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_measures_e.htm)

130. [https://www.wto.org/english/news\\_e/news21\\_e/clim\\_03nov21-4\\_e.pdf](https://www.wto.org/english/news_e/news21_e/clim_03nov21-4_e.pdf)

131. [https://www.wto.org/english/tratop\\_e/envir\\_e/climate\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm)

132. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_6882](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6882)

133. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm)

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