

Board of Directors

European Investment Bank
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Dear Sir or Madam,

EIB Energy Lending Policy

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We refer to the European Investment Bank Energy Lending Policy. The Board of Directors is due to discuss the policy on 14 November 2019.

The EIB published its first draft Energy Lending Policy on 26 July 2019 (the “Original Draft Policy”).¹ The Original Draft Policy would have phased out support to energy projects reliant on fossil fuels, including gas. The Original Draft Policy stated that “*As a result, all the Bank’s activities in the energy sector will be fully aligned with the Paris Agreement.*”²

The EIB, in the Original Draft Policy, sought to properly discharge its legal obligations to support the EU’s commitments under the Paris Agreement, including the rapid decarbonisation and clean energy investment required to limit global temperature rise.

On 26 September 2019, the EIB published a revised draft policy (the “Revised Draft Policy”) ahead of the October 2019 Board of Directors meeting.³ The Revised Draft Policy significantly weakens the proposed restrictions on the EIB’s support for energy projects reliant on gas, and would permit ongoing support for gas-fired power plants.

We are extremely concerned at certain Member States’ reported opposition to, and efforts to undermine, the EIB’s Original Draft Policy.⁴ Further EIB support for investment in gas projects would be inconsistent with the emission reductions and clean energy investment required by the Paris Agreement. It would put Member States and the EIB in clear breach of EU legal obligations as set out in this letter and its annex. We write to put Member States and the EIB on notice of these obligations and urge the Board of Directors to adopt the Original Draft Policy or impose equivalent restrictions on support for gas-reliant projects.

¹ Draft EIB Energy Lending Policy, 24 July 2019, <https://www.eib.org/attachments/draft-energy-lending-policy-26-07-19-en.pdf>.

² Draft EIB Energy Lending Policy, para 10.

³ Revised draft EIB Energy Lending Policy, <https://www.eib.org/attachments/consultations/revised-draft-energy-lending-policy-20190926-en.pdf>.

⁴ Financial Times, European Investment Bank postpones decision on natural gas lending, 15 October 2019, <https://www.ft.com/content/6e90906a-ee9f-11e9-ad1e-4367d8281195>.

I. Legal obligations of Member States and the EIB

The relevant legal obligations of Member States and the EIB create a clear imperative to adopt the proposals in the Original Draft Policy to phase out support for gas and other fossil fuel-reliant projects:

1. The Paris Agreement provides for greenhouse gas emission reductions and financial flows consistent with limiting global temperature rise. The EU is a party to the Paris Agreement and has repeatedly committed to making the emission reductions and facilitating the clean energy investment required by that Agreement.
2. Member States are legally obliged to act consistently with, and in support of, the commitments given by the EU on their behalf in the Paris Agreement. This obligation derives from the principle of sincere cooperation set out in Article 4(3) TEU. It includes taking such measures as are necessary to ensure the fulfilment of other obligations arising under the Treaties, including in relation to the EIB.
3. Under Article 309 TFEU and Court of Justice case law, the EIB is required to contribute towards the attainment of the EU's objectives.⁵ Under Article 18 of the EIB Statute, the EIB is required to employ its funds rationally in the interests of the EU. The EU's objectives and interests include the EU's commitments under the Paris Agreement and its environmental protection obligations in Articles 11 and 191 TFEU.

II. Incompatibility of ongoing EIB support for natural gas projects with Member States' and the EIB's legal obligations

The effect of the legal obligations summarised above is to require the EIB, and Member States in relation to the EIB, to curtail support for further gas-reliant energy projects and associated greenhouse gas emissions.

The EIB and Commission have accepted that reaching the goals of the Paris Agreement will require the elimination of nearly all greenhouse gas emissions by 2050, with a steep reduction in the role of gas and increased clean energy investment. So far, 24 Member States have supported the Commission's proposal to commit to net-zero emissions by 2050. On the Commission's long-term modelling, the share of gas in the energy mix falls to below 20% by 2030 and to around 3% in 2050 in 1.5°C scenarios.⁶

Under the Revised Draft Policy, finite EIB public funding would continue to be channelled into polluting gas-reliant energy projects operating for decades to come. The Paris Agreement goals require that all new generation capacity be renewable. Even "abated" gas-fired power plants – unproven at industrial scale – are directly linked to significant upstream emissions of methane, a powerful greenhouse gas, during extraction and transmission. This would not be captured by the proposed emission standard. Oil Change International's recent report concluded, based on IPCC, IEA and Bloomberg data, that natural gas cannot be

⁵ Case 85/86 *Commission v European Investment Bank*, para 29; Case C-15/00 *Commission v European Investment Bank*, paras 102 and 122.

⁶ European Commission, Communication 28 November 2018, Figure 2.

regarded as a bridging fuel.⁷ Ongoing investment in natural gas projects also entails stranded asset risk, given the emission reductions required by the Paris Agreement. Given EU infrastructure overcapacity, new gas infrastructure projects are not required for security of supply.⁸

The scale of the energy transformation necessary for the EU to comply with its legal obligations is considerable. The EIB, as the world's largest multilateral lender, has a particular responsibility to facilitate this transformation, as do the Member States represented on its Board. The continued funding of gas-reliant projects would divert resources from projects that will maximise the necessary emission reductions and would prolong dangerously high emission levels. Such continued funding also cannot be justified under the Bank's own test for lending in its Statute.

We would regard action by Member States to weaken the Original Draft Policy as incompatible with the commitments of the EU and in breach of Member States' undertakings in Article 4(3) TEU. The Board of Directors would also place the EIB in breach of its obligation to ensure that its funds are employed as rationally as possible in the interests of the EU.

III. Incompatibility of PCI loophole with Member States' and the EIB's legal obligations

We are also extremely concerned that the Revised Draft Policy provides that Projects of Common Interest ("PCIs") are eligible for EIB support without requiring the cumulative application of emission criteria otherwise included in the policy. By creating such a wide exception to its own eligibility criteria, the Revised Draft Policy is, in practice, defeating its purpose of incentivising and catalysing private investment in clean energy projects. We recall that the EIB does not have any legal obligation to channel funding to PCIs. In order for the policy to be fully Paris compliant, it should explicitly provide that its lending criteria apply to any type of project, including if a project has been awarded the PCI classification.

IV. Conclusion

We urge the Board of Directors, representing the EU Member States, to adopt the Original Draft Policy or to impose equivalent restrictions on support for natural gas and other fossil fuel-reliant projects. Further public investment in gas-reliant energy projects cannot be justified.

If gas-fired power plants are to remain eligible for support, the emission standard should be aligned with the 100 gCO₂ per kWh emission standard under the proposed EU Taxonomy and support should be expressly conditional upon actually meeting that standard (not simply a "credible plan" to do so) with an indemnity if such a condition is not met.

⁷ Oil Change International, "Burning the gas 'bridge fuel' myth: Why gas is not clean, cheap, or necessary", May 2019, http://priceofoil.org/content/uploads/2019/05/gasBridgeMyth_web-FINAL.pdf.

⁸ European Political Strategy Centre, Nord Stream 2 - Divide et Impera Again?, https://ec.europa.eu/epsc/sites/epsc/files/epsc_-_nord_stream_-_divide_et_impera_again.pdf, page 5.

The gas-fired power plants and PCIs eligible for EIB support under the weakened Revised Draft Policy would risk locking in high carbon infrastructure for decades. In addition to the breach of Member States' and the EIB's legal obligations described above, this would expose the EIB to ongoing litigation risk (indeed it is already facing ongoing litigation in relation to its controversial financing of a biomass plant in Spain in *ClientEarth v EIB*).⁹ We urge Member States to take this opportunity to approve a final policy that phases out support for fossil fuel-reliant projects consistent with the interests and objectives of the EU and the EIB.

Yours faithfully,



James Thornton
Chief Executive Officer, ClientEarth

⁹ Case T-9/19 *ClientEarth v EIB*.

Annex: Detailed Legal Analysis¹

The aim of this annex is to provide constructive comments on the revised draft Energy Lending Policy published by the EIB on 26 September 2019 (the “Revised Draft Policy”)² by reference to the original draft Energy Lending Policy published on 26 July 2019 (the “Original Draft Policy”)³ (Section 1) and the EU and international legal obligations of the EIB and EU Member States (Section 2). These legal obligations are incompatible with the EIB’s providing continued support for natural gas-reliant projects (Section 3).

1 The Draft Policies

1. The EIB sought, in its Original Draft Policy of July 2019, to adopt an approach consistent with the Paris Agreement and the broader framework of legal obligations of the EIB and its constituent EU Member States. We note the following key passages and provisions.

- a. The Executive Summary states (para 10):

“As a result, the Bank will phase out support to energy projects reliant on fossil fuels: oil and gas production, infrastructure primarily dedicated to natural gas, power generation or heat based on fossil fuels. These types of projects will not be presented for approval to the EIB Board beyond the end of 2020.”

- b. Chapter 3, “Approach of the energy policy” states (paras 18-20) (emphasis added):

“A consequence of the focus on these priorities is that the Bank will phase out the financing of investment in energy infrastructure directly associated with fossil fuels.

Once in effect, this means that the Bank will have a clear position not to support upstream oil or gas production, coal mining, infrastructure dedicated to coal, oil and natural gas (networks, liquefied natural gas terminals, storage), and power generation or heat production from fossil fuel sources (coal, gas, oil, peat).

*The Bank’s decision to phase out lending to fossil fuels is a significant change in its policy. To manage this change smoothly, **the Bank will no longer originate projects after the adoption of this policy and will stop lending to fossil-fuel energy projects by the end of 2020.**”*

¹ This legal analysis was prepared with substantial input from Hugo Leith, Brick Court Chambers.

² Revised draft EIB Energy Lending Policy, <https://www.eib.org/attachments/consultations/revised-draft-energy-lending-policy-20190926-en.pdf>.

³ Draft EIB Energy Lending Policy, 24 July 2019, <https://www.eib.org/attachments/draft-energy-lending-policy-26-07-19-en.pdf>.

- c. A footnote to this passage indicated the following qualification:

“The only exception to this principle is for high-efficiency gas-fired co/tri-generation meeting the Bank’s criteria, including resulting in greenhouse gas emissions of less than 250 gCO₂ per kWh and efficient gas boilers included within building renovation programmes.”

- d. Annex II, “Energy supply” sets out more detailed provisions for the assessment of proposed lending. The technical and economic assessment criteria provide, in respect of power generation, as follows (emphasis added):

“Sector: Power generation

Sub-sector: Low carbon energy sources

Criteria: **Only power generation based on low-carbon energy sources is eligible for Bank support.** *Depending on local conditions, some renewable technologies can be associated with GHG emissions, e.g. geothermal, large-scale hydro or biomass. The Bank will not support a renewable power project which results in emissions of more than 250 gCO₂ equivalent per kWh_e.”*

2. The approach taken in the Original Draft Policy is appropriate and was consistent with the realistic and timely warning given by the EIB President that, *“We believe that gas emissions are too high and cannot be maintained. We must move out of these fossil fuels. We are aware that it takes help for the regions that are dependent on coal and gas. But one should not hide behind these arguments in order to perpetuate the use of these types of materials.”*⁴
3. The Revised Draft Policy would dilute several of the key statements and criteria set out in the Original Draft Policy. The proposed changes are regressive and conflict with the duties of the EIB and Member States as set out below (and recognised by senior EIB officials).
4. We urge the EIB Board of Directors to reject these proposed changes and draw particular attention to the following detailed points:

Eligibility criteria applicable to gas projects

- a. Paragraph 10 of the Executive Summary would refer to the supposed role of gas in decarbonising energy systems, and refers to “low-carbon” gases such as biogas, synthetic gas and hydrogen (as do paragraphs 7 and 24 of Chapter 2). As set out below, any suggestion that natural gas is compatible with reducing greenhouse gas emissions is misguided given the significant associated methane emissions. There is, moreover, significant uncertainty as to the viability of so-called low-carbon gases as a broad scale substitute for natural gas. Given the precautionary principle, the approach suggested in this paragraph should not be adopted.

⁴ *The Guardian*, Concerns as EU bank balks at plan to halt fossil fuel investments, 15 October 2019, <https://www.theguardian.com/environment/2019/oct/15/concerns-eu-bank-balks-plans-halt-fossil-fuel-investments-climate-action-eib>.

- b. Paragraph 12 of the Executive Summary would permit consideration of gas infrastructure projects already included in the 4th list of Projects of Common Interest (as does paragraph 22 of Chapter 3). The fact that a proposed project may have been included in this list is self-evidently not a basis for regarding its funding as being compliant with the framework of legal duties set out below. The changes proposed in Annex IV under “Gas infrastructure”, to permit funding of PCIs on this list, are objectionable for the same reasons.
- c. Paragraphs 20-21 of Chapter 3 open the door to continuing to fund power generation projects involving natural gas, subject to the project not exceeding a threshold of 250 gCO₂ per kWh of electricity generated. This proposed change is plainly incompatible with the need for the EIB to direct its finite pool of funding to promoting renewable sources. The standard as set disregards the very substantial emissions from methane, as described below, and in any event is materially higher than the level set for ‘sustainable investment’, as the Revised Draft Policy acknowledges (footnote 9). We also call the attention of the EIB to the fact that best practices for emission accounting mandate full lifecycle calculation and not merely plant level emissions.⁵ To this effect, the calculations should explicitly take into account upstream emissions and refer to gCO₂e per kWh instead of gCO₂ per kWh. If gas-fired power plants are to remain eligible for support, the emission standard should be aligned with the 100 gCO₂ per kWh emission standard under the proposed EU Taxonomy.
- d. Amendments are also proposed to Annex II. The assessment criteria for “Power generation” would (consistent with the changes to Chapter 3) permit lending for power generation projects involving natural gas. The wording proposed is particularly broad as it would provide for the EIB to be permitted to “*support gas-fired power plants which provide a credible plan to blend increasing shares of low-carbon gas over the economic lifetime of the project, such that the emission standard above is met on average.*” Permitting funding of gas-powered power generation is objectionable in principle; moreover, in the case of this specific proposal it is highly doubtful that any “average” could be reliably monitored or enforced, given the particularly long lifetime of projects such as this. If gas-fired power plants are to remain eligible for support, support should be expressly conditional upon actually meeting that standard (not simply a “credible plan” to do so) with an indemnity if such a condition is not met.
- e. A further amendment is proposed in Annex II to “Heating and cooling; co/tri generation” under “Technology”. Additional wording would provide that, “*In addition, efficient gas-fired small boilers applicable for buildings or SMEs will be eligible where in line with the EU Eco-Design Directive, or appropriate standards outside the EU.*” There is no reasonable justification for this change. Reference to the EU Eco-Design Directive does not create any additional restriction (since the standards under that directive are mandatory in any event). There is no apparent basis for the EIB or public funding to be used to support gas-fired boilers when alternatives are available on the market.

⁵ See for instance IEA calculations IEA – Energy Technology System Analysis Programme – Gas fired power (2012): https://iea-etsap.org/E-TechDS/PDF/E02-gas_fired_power-GS-AD-gct.pdf or UK CCC report on carbon budget available here report (2015) <https://www.theccc.org.uk/wp-content/uploads/2015/10/Power-sector-scenarios-for-the-fifth-carbon-budget.pdf>

Projects of Common Interest

- f. ClientEarth is concerned that the Revised Draft Policy provides that Projects of Common Interest (“PCIs”) are eligible for funding without requiring the cumulative application of emissions criteria otherwise included in the Policy. By creating such a wide exception to its own eligibility criteria, the Revised Draft Policy is in practice defeating its purpose of incentivising and catalysing private investment in clean energy projects.
- g. Paragraph 12 of the Executive Summary of the Revised Draft Policy mentions that: *“In addition, during this period, the Bank will support gas infrastructure projects included under the 4th list of Projects of Common Interest co-financed with EU budget.”* Moreover, footnote 12 states that: *“The European Commission has noted the importance of continued Bank support towards gas projects of common interest. The EC publishes its list of PCIs every two years and the fourth list is expected by end 2019.”*
- h. Last but not least, in Annex IV, “Technical and economic assessment criteria”, the Revised Draft Policy differentiates for gas infrastructure between “*low carbon gases integration*”, for which the Energy Lending Policy criteria would be used, and PCIs. In order to benefit from EIB funding as a PCI, it is stated in Annex IV that it is sufficient to be included in “*4th list of projects of PCIs, cofounded by the EC under the Connecting Europe Facility (CEF), and approved by the EIB Board before end 2020.*” Aside from a reference to “best industry practices” and the obligation to provide the EIB with a cost benefit analysis, there are no specific criteria that the EIB would apply (p. 42). The possibility for PCIs to benefit from EIB funding was not included in the Original Draft Policy.
- i. More concerning to ClientEarth, we have been made aware that the EIB distributed a “Background Document” as Annex 3 to the Revised Draft Policy. Under “3. Future lists of Gas Projects of Common Interest (PCIs)” (p. 2 of the Background Document), it is stated that (emphasis added):
- “At the request of the Commission, the Bank’s draft ELP was amended after the September Board discussion in order to enable the co-financing of gas PCIs that will benefit from CEF funding under the fourth list of PCI. As with any project of overriding public interest, should new gas infrastructure projects may [sic] be submitted under the fifth and sixth lists, such projects could be submitted to the Board as an exception to the ELP.”*
- The Commission is about to publish its fourth lists of [PCI] by the end of 2019. This list is updated every two years. According to the EC website, such projects must contribute to the EU’s Climate and Energy Goals and have the right to apply for funding from the Connecting Europe Facility (CEF).”*
- j. In Annex 2 to the Revised Draft Policy, “Introductory Speech by VP McDowell & Proposed Foreword to the Energy Lending Policy”, the speech dated 10 September 2019 rightly notes that the lending criteria of the EIB are not aligned with other EU programmes, and can in certain cases be more restrictive. The speech offers the example of the 550gCO₂ / kWh emission standard, which was used as an EIB lending criterion while no such rule existed under EU law, and which is now incorporated in the Clean Energy Package for capacity remuneration mechanisms.

- k. However, the Background Document states that even gas PCIs which may be selected in future lists could benefit – on an exceptional basis – from EIB funding. In practice, such a wide exception externalises the decision to fund fossil fuel-reliant projects to the co-drafters of the PCI lists. We question whether such a loophole represents a rational use of EIB funds. We note that the EIB does not have any legal obligation to channel funding to PCIs.
- l. In order for the final Energy Lending Policy to be consistent with the legal framework below, the EIB it should explicitly provide that the Energy Lending Policy criteria should apply to any type of project, including if a project has been awarded the PCI classification.

2 Framework of legal obligations

5. We set out below the relevant legal obligations of Member States and the EIB. In summary:
 - a. The EU has committed to reduce its greenhouse gas emissions in order to meet its obligations to limit global temperature rise under the Paris Agreement.
 - b. The EIB is required to facilitate the EU’s performance of those commitments. Member States, when participating in the EIB’s Board, are also required to act compatibly with the EU’s performance of its commitments.
 - c. The Treaties establish further specific objectives and requirements for the protection of the environment. The EIB, and Member States when participating in the EIB’s Board, are required to act in furtherance of these objectives and consistently with these requirements.
 - d. The EIB must also ensure that it employs its funds on a rational basis, in the interests of the EU, and where the lending increases economic productivity and promotes the internal market.

2.1 The Paris Agreement

6. The 2015 Paris Agreement provides for the parties to it to take steps to limit global temperature rise. Article 2(1) relevantly provides:

“1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

...

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”

7. The EU has repeatedly committed to making the emission reductions required by the Paris Agreement.⁶ In a Communication published by the European Commission and addressed to, among other institutions, the EIB (the “Communication”)⁷, the EU’s policy in fulfilling the Paris Agreement was described in clear terms (p.4):

“The EU has been at the forefront of addressing the root causes of climate change and strengthening a concerted global response in the framework of the Paris Agreement. The Paris Agreement, ratified by 181 parties, requires strong and swift global action to reduce greenhouse gas emissions, with the objective to hold global temperature increase to well below 2°C and to pursue efforts to limit it to 1.5°C.”

8. The EU (through the Council and the Commission) has also submitted Nationally Determined Contributions pursuant to the UNFCCC on behalf of the Union and each of its Member States.⁸

2.2 EU Treaty provisions on the environment and human health

9. Various provisions of the Treaties also establish the need for the EU to ensure high levels of environmental protection:

- a. Article 11 TFEU states:

“Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

- b. Article 191(1) TFEU refers to the protection and preservation of the environment and human health, the prudent and rational use of natural resources, and in particular to combating climate change:

“1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,*
- protecting human health,*

⁶ For example, Regulation (EU) 2018/842 of the European Parliament and of the Council expressly describes the emission reductions measures it enacts as “contributing to climate action to meet commitments under the Paris Agreement.”

⁷ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, “A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy”, COM(2018) 773 final (28 November 2018).

⁸ See eg the Submission by Latvia (in its capacity holding the Presidency of the Council) and the European Commission dated 6 March 2015.

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”

- c. Article 191(2) TFEU then also establishes that Union policy on the environment must be based on the precautionary principle:

“2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

According to the EU Court of Justice “the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.”⁹

2.3 Obligations on the EIB to contribute to EU objectives and policies

10. The provisions of the Treaties establishing the EIB and the case law of the Court of Justice make clear that the EIB is to contribute to the attainment of the EU’s objectives, and to engage in financing activities consistently with the interests of the EU.

11. Article 309 TFEU defines the tasks of the EIB, including as follows:

“The task of the European Investment Bank shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union.”

12. In Case 85/86 *Commission v EIB*, referring to the predecessor to Article 309, construed it as meaning that “the Bank is intended to contribute towards the attainment of the Community’s objectives and thus by virtue of the Treaty forms part of the framework of the Community” (para 29). The Court of Justice affirmed this position in Case C-15/00 *Commission v EIB* (at para 102) and explained that (para 122):

“the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community’s objectives and places it within the Community legal order, so that the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.”

⁹ Case T-74/00 *Artegoda v Commission* para 184.

13. The Statute of the EIB similarly provides that in its financing activities, the EIB is to act in accordance with the interests of the Union. Article 18(1) of the Statute provides (emphasis added):

“In its financing operations, the Bank shall observe the following principles:

1. It shall ensure that its funds are employed as rationally as possible in the interests of the Union.”

14. It follows from these provisions (and the interpretations placed on them by the case law) that the EIB is to contribute to the objectives of the EU, and to act in accordance with its interests. For present purposes, those objectives and interests include the facilitation of the EU’s commitments under the Paris Agreement and adherence to the principles in Articles 11 and 191 TFEU.

2.4 Obligations of Member States

15. The EU’s commitments under the Paris Agreement are of particular salience for Member States. Each Member State bears important obligations in this regard pursuant to the principle of “sincere cooperation” as set out in Article 4(3) TEU:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

16. The Court of Justice has explained of this duty (formerly in Article 5 of the Treaty of Rome) in terms of “*the solidarity which is at the basis of... the whole of the Community system in accordance with the undertaking provided for in [ex] Article 5 of the Treaty [now Article 4(3) TFEU].*”: see Cases 6 & 11/69 *Commission v France*, para 16.
17. On its face, Article 4(3) TEU requires the Member States to act so as to ensure that the obligations entered into by the EU internationally are fulfilled.
18. The case law of the Court of Justice in any event makes clear that the principle of sincere cooperation is engaged where the EU acts in international relations. Where (as under the Paris Agreement) the EU has engaged in conduct in the sphere of external affairs, and has developed a common concerted strategy, individual Member States will have duties of “action and abstention”: see Case C-246/07 *Commission v Sweden*. A Member State which takes action (or fails to act) in a manner incompatible with the common position of the Union will breach these duties. As the Grand Chamber of the Court of Justice observed in that case (at para 104):

“Such a situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned.”

19. Accordingly, Member States are obliged to ensure that they act consistently with and in support of the commitments made by the EU at an international level.
20. The scope of the principle of sincere cooperation extends beyond ensuring fulfilment of the EU’s international commitments. The principle also requires Member States to take such measures as are necessary to ensure the fulfilment of any other obligations arising under the Treaties.

2.5 Duties of the EIB as to its financing activities

21. Article 18(1) of the Statute of the EIB establishes specific requirements as to the nature of the financing activities that the EIB undertakes (emphasis added):

“In its financing operations, the Bank shall observe the following principles:

1. It shall ensure that its funds are employed as rationally as possible in the interests of the Union. It may grant loans or guarantees only:

(a) where, in the case of investments by undertakings in the production sector, interest and amortisation payments are covered out of operating profits or, in the case of other investments, either by a commitment entered into by the State in which the investment is made or by some other means; and

(b) where the execution of the investment contributes to an increase in economic productivity in general and promotes the attainment of the internal market.

22. This provision of the Statute accordingly requires any lending to be conducted:
 - a. as rationally as possible;
 - b. in the interests of the Union; and
 - c. only where the activity will increase economic productivity in general and promote the attainment of the internal market.

3 Incompatibility of funding natural gas-related activities under the legal framework

23. The legal framework creates clear requirements on the EIB, and on Member States when acting through the Board, to curtail lending by the EIB that would facilitate the

development of natural gas extraction, distribution or usage. These requirements have two complementary aspects:

- a. First, there are direct requirements to reduce emissions, in particular from fossil fuels (and to dedicate funding to clean energy sources) stemming from the Paris Agreement and Treaty provisions on the protection of the environment and human health;
- b. Second, it is also clear that further financing of natural gas-related projects would lead to the creation of stranded assets, in breach of the standards that must be met for any lending project considered by the EIB.

3.1 Duties to reduce emissions and fossil fuel usage and to drive investment in clean energy usage

24. In order for the EU to meet its commitments under the Paris Agreement, the share of energy generated by natural gas must fall very significantly from its present levels. The EIB and the Commission have accepted that natural gas usage must fall to a fraction of its current level by 2050; significant increases in investment to meet energy needs without greenhouse emissions are also required.

25. **Reduction of natural gas usage.** The EIB's own consultation conducted in advance of the preparation of the Draft Policies rightly observed that nearly all greenhouse gas emissions must be eliminated by 2050 for these commitments to be met, with implications for natural gas usage (p.6, para 17):

“Reaching the goals of the Paris Agreement requires the EU to eliminate nearly all greenhouse gas emissions by 2050. It follows that by the middle of the century, if not earlier, fossil fuels such as coal, crude oil and even natural gas will no longer be used to any significant extent, at least in the absence of carbon capture and storage, to generate electricity, supply heat or fuel transport. This implies a radical transformation of energy systems.”

26. The Commission's November 2018 Communication reached the same conclusion and set out the reasoning in detail. The Communication notes that significantly more ambitious action is required beyond the policies already in place to meet the Paris Agreement temperature goals, to which the EU has committed (Section 2, p.5):

“The policies put in place today will have a continued impact after 2030 and will therefore already go a long way, with projected emissions reductions of around 60% by 2050. This is, however, not sufficient for the EU to contribute to the Paris Agreement's temperature goals.”

27. As to the energy sector, the Communication envisages net-zero emissions (Section 3, p.6):

“The transition towards a net-zero greenhouse gas economy gives energy a central role as it is today responsible for more than 75% of the EU's greenhouse gas emissions. In all options analysed, the energy system moves towards net-zero greenhouse gas emissions. It relies on a secure and

sustainable energy supply underpinned by a market-based and pan-European approach.”

28. So far, 24 Member States have supported the Commission’s proposal to commit to net zero emissions by 2050.

29. As regards natural gas and energy, the key points arising from the analysis of these future scenarios are set out in Figure 2 of the Communication.

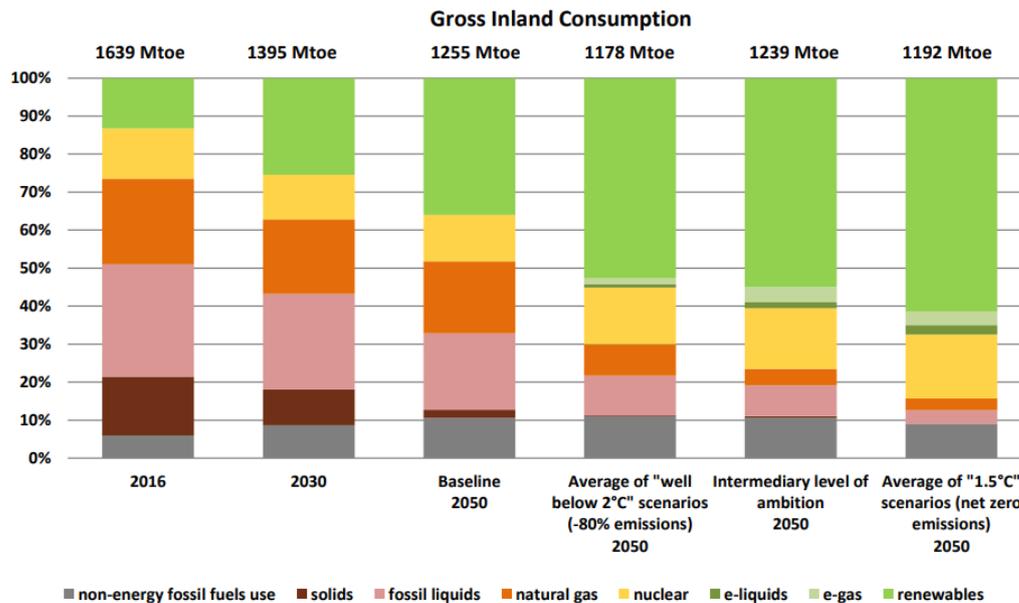


Figure 2. Fuel mix in Gross Inland Consumption

30. This graph shows the different mixes of fuel supporting inland energy consumption at present, and in a range of different scenarios analysed as means of complying with the Paris Agreement (see p.9):

- a. As at 2016, energy from natural gas accounts for in excess of 20% of gross energy consumption;
- b. This is projected to fall by 2030 to below 20%;¹⁰
- c. As of 2050, natural gas consumption is projected under different scenarios:
 - i. Under the ‘baseline’ scenario (ie, without the further climate action required by the Paris Agreement), natural gas consumption would continue to have a similar share as projected in 2030;
 - ii. Under the scenario of action to meet the “well below 2C” scenario, involving overall emissions reductions in the order of 80%, the share of natural gas falls well below 10% of the total;

¹⁰ And even then, of a lower total volume of energy consumption: 1395 Mtoe, as opposed to 1639 Mtoe in 2016.

- iii. At an “intermediary level ambition”, the share of natural gas is projected to be lower still, to around 4% of the total;
- iv. Across an average of scenarios to meet the target for a 1.5C scenario, the share of natural gas is projected at around 3% of the total.

31. These figures are further explained in the in-depth analysis accompanying the Communication (page 69 – emphasis added):

“The share of natural gas (excluding non-energy uses) decreases slowly from 21% in 2015 to 20% in 2030, and then by 2050 more sharply in the decarbonisation to between 7%-9% in the 80% GHG reduction scenarios, and 3%-4% in the stronger reduction cases. Importantly, natural gas is, in several scenarios (P2X, COMBO, 1.5TECH and 1.5LIFE), partially substituted by e-gas, which then represents 4%-6% of the gross inland consumption in 2050.”

32. The Commission’s In-Depth Analysis then adds (page 69):

“Overall, the decreasing roles of fossil oil and natural gas in the energy mix will contribute to improving the security of energy supply of the EU.”

33. **Financing for energy and efficiency in a net-zero emissions economy.** Having set out in clear terms the need for a steep reduction in the role of natural gas, the Communication also addresses the need for increased investment in the energy system in order to meet a net-zero target by 2050 (see p.16):

“Modernising and decarbonising the EU’s economy will stimulate significant additional investment. Today around 2% of GDP is invested in our energy system and related infrastructure. This would have to increase to 2.8% (or around € 520-575 billion annually) in order to achieve a net-zero greenhouse gas economy. This means considerable additional investments compared to the baseline, in the range of € 175 to 290 billion a year. This is also in-line with the IPCC special report that estimated that between 2016 and 2035 investments are needed in the energy system representing about 2.5% of world GDP.”

34. The Commission acknowledges that the EU and Member States have a leading role in guiding financing. This is consistent with Article 2(1)(c) of the Paris Agreement which, as noted above, requires the contracting parties to, “*Mak[e] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*” The Communication is explicit as to the role to be played by the EU and Member States on investment and its relationship to private investment (p.17):

“Private business and households will be responsible for the vast majority of these investments. To foster such investment, it is crucial for the European Union and Member States to offer clear, long-term signals to guide investors, to avoid stranded assets, to raise sustainable finance and to direct it to clean innovation efforts most productively. Providing a vision will entrench the direction of where financial and capital flows need to go. In this perspective, transparent stakeholder engagement in planning for a low-carbon future is indispensable.”

35. The EIB also rightly acknowledges that even to meet the EU's current 2030 targets, a doubling of renewable energy capacity is required.¹¹ Under the EU's Clean Energy Package, a target of 32% renewables has been agreed. In a 2016 Communication to the EIB and other EU bodies, the Commission has stated that to meet this target (p.4):¹²

"In order to reach the EU's 2030 climate and energy targets, about €379 billion investments are needed annually over the 2020-2030 period: mostly in energy efficiency, renewable energy sources and infrastructure."

36. The EIB would self-evidently play a key role in contributing to this required funding. Lending to natural gas projects would divert funds that are needed for that purpose.

37. In summary, fulfilment of the commitments given in the Paris Agreement and realisation of the broader policy objectives of the EU:

- a. will clearly necessitate very significant reductions in the use of natural gas – even under the minimum standard set by the Paris Agreement of limiting any temperature increase to “well below” 2°C; and
- b. will necessitate significant increases in investment in alternative energy sources and related measures, in which the EU and Member States must play a leading role to guide private investors, and direct finance to clean energy activities most productively.

38. These duties under the Paris Agreement are reinforced by Articles 11 and 191 TFEU. The principles established by those provisions must be interpreted and applied in light of the commitments made under the Paris Agreement and the detailed analysis undertaken by the Commission and other bodies indicating that very significant reductions in fossil fuel usage, including natural gas, are required to meet the temperature goals set by that Agreement and to have a realistic chance of avoiding greater and dangerous temperature increases.

39. **Practical effect of the legal framework.** Given the enormous challenge of reducing natural gas usage and developing a clean energy system, on any realistic view of the EIB's functions these legal duties require the EIB and its Member States to curtail the funding of natural gas-related activities and to do so forthwith.

40. The EIB's duty under Article 18 is to carry out any lending activities as rationally as possible. While a very substantial undertaking, the EIB ultimately has finite resources to apply towards energy projects. Any funding allocated to projects that increase the use of fossil fuels is funding that cannot be used to develop renewable energy or other methods of reducing energy consumption. For the EIB to continue to finance natural gas-related activities producing emissions, while also funding measures to reduce emissions, does not meet the standard of lending on as rational a basis as possible.

41. Continued funding of natural gas-related projects, even in the short term, would also be incompatible with the EIB's and Member States' duties. While the Commission has made clear that CO₂ emissions must fall to net zero by 2050, it is clear that more urgent action

¹¹ Revised Draft Policy, Executive Summary, para 6.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: Clean Energy for All Europeans, COM(2016) 860 final (30 November 2016).

is required well before that time and that the maintenance or expansion of natural gas-related activities is inconsistent with this requirement:

- a. The IPCC has reported that under most of the modelling it has conducted, for temperatures not to exceed 1.5°C, CO₂ emissions must by 2030 fall by at least 45% as compared with 2010 levels, and net zero by 2050.¹³ The EU's current emission reduction legislation for the period 2021-2030 does not require reductions of that level.¹⁴
 - b. Moreover, the EU is in reality obliged to reach net-zero emissions earlier than 2050. The Paris Agreement requires contracting parties to implement it (Article 2(2)), *“to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”* Given the EU's relatively high share of the historical emissions budget, and its high degree of economic and technical capability today, the EU bears a duty to reach zero emissions ahead of other parties.
 - c. Indeed, the two versions of the Draft Policies both rightly acknowledge what the Commission has also made clear in its Communication: *“The world is not on track to meet the targets of the Paris Agreement.”*
42. Moreover, to the extent that it may be suggested that natural gas can be substituted for other fossil fuels and thereby achieve a lower level of CO₂ emissions, this would be misplaced. A range of compelling evidence indicates that in addition to CO₂ emissions between the extraction and the combustion of natural gas, there are substantial leakages of methane (CH₄). These methane emissions through leaks are typically disregarded or under-estimated but they lead to material increases in overall greenhouse gas emissions, even compared with the coal-sourced energy systems they may replace. For example:
- a. A detailed study for the European Commission in 2015 found (p.112):¹⁵

“Another source of gas ‘consumption’ during transport is leakage. Methane, the principal ingredient of natural gas, is a powerful greenhouse gas; therefore leaks may have a significant environmental effect.

“For international gas pipelines, the major environmental impact comes from the gas combustion to run the compressor stations. The impact is larger with increased distance. Some of the critical points in the transmission process for gas consumption are turbine compressors that burn natural gas at compressor stations along the way, electric motors and gas engines, power generation, and

¹³ See IPCC Summary for Policymakers (2018), Global Warming of 1.5C: An IPCC Special Report on the impacts of global warming of 1.5C above pre-industrial levels and related global greenhouse gas emission pathways in context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, para C.1 (p.12).

¹⁴ The ETS Directive, the Effort Sharing Regulation, and the Land Use, Land Use Change, and Forestry Regulation collectively would reduce the EU's emissions (in the sectors they cover) by 40% compared with 1990 levels, which is a higher baseline level of emissions than 2010.

¹⁵ Study for DG Energy, on Actual GHG Data for Diesel, Petrol, Kerosene and Natural Gas (July 2015). Work order: ENER/C2/2013-643.

leaks of methane gas – fugitive emissions – during transmission. Fugitive emissions are a major component of GHG emissions from natural gas systems, however they are often difficult to accurately identify.”

- b. The study for the Commission noted most supply chains would involve leaks of up to 1.5% of the total volume. Given that methane has a global warming potential (GWP) of 25, the report described the effect of these leaks as “quite significant”.¹⁶
- c. Further research complementing the Commission’s findings has confirmed that the methane emissions in the supply of natural gas are significant and that the replacement of coal units with natural gas units most likely results overall in an aggregate increase in greenhouse gas emissions. These effects are underestimated by the International Energy Agency, among others.¹⁷ As a report prepared by Traber and Fell concludes as regards electricity generation, on the basis of a review and synthesis of this research (pp.11-12):

“Electricity Sector: Replacing Coal Power Plants with Natural Gas Power Plants

“Figure 3 below shows the substantial negative climate effect when replacing electricity generation in existing coal-fired power plants with electricity generation in new natural gas power plants. The estimated increase of GHG emissions of this switch is +41%. While this is partly a result of the fact that new natural gas applications are sourced from rather expensive and emission-intensive resources, it also becomes clear that with the hypothetical use of global average gas, no savings can be reached either.”

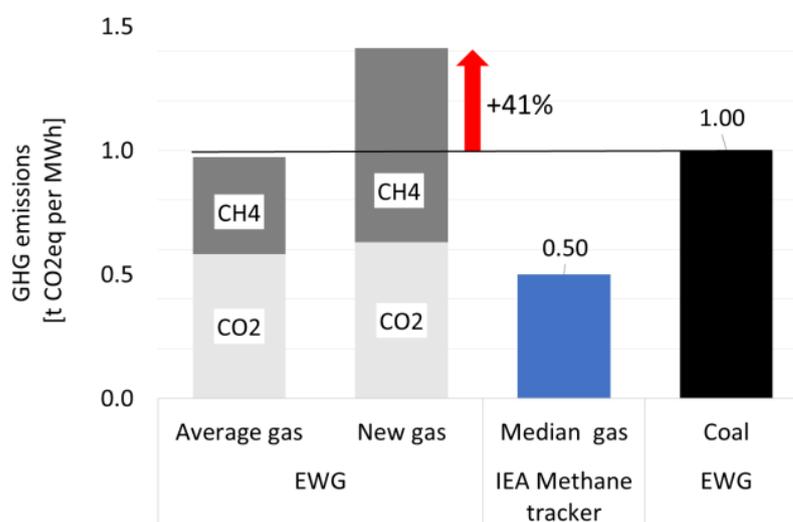


Figure 3: Greenhouse gas emissions from fossil sources and additional emissions from the switch from coal to new natural gas for electricity generation: Additional methane emissions more than offset any CO₂ savings. Source: Own calculation, IEA Methane tracker.

43. It would therefore be misguided to proceed on the basis that natural gas can provide a short-term ‘bridge’ to reducing greenhouse emissions over the longer term. Any funding

¹⁶ See section 4.3.4 of the Study.

¹⁷ See Traber and Fell, “Natural Gas Makes No Contribution to Climate Protection”, Energy Watch Group (September 2019).

directed to natural gas is funding that is unavailable for energy efficiency projects and renewable energy projects producing no or much lower emissions, and the assumption that natural gas actually does in aggregate produce lower emissions is highly contested. Given the need to proceed in accordance with precautionary principle as expressed in Article 191(2) TFEU, further public investment in natural gas-related activities cannot be justified.

3.2 Funding of natural gas-related activities would be incompatible with EIB lending requirements

44. As set out above, Article 18 of the EIB's Statute requires lending to be conducted:

- a. as rationally as possible;
- b. in the interests of the Union; and
- c. only where the activity will increase economic productivity in general and promote the attainment of the internal market.

45. It is difficult to see how lending for natural gas-reliant projects could meet these requirements. Even apart from the duties on the EU and the EIB to reduce emissions (addressed above), lending for natural gas-reliant projects is unlikely to meet the tests for economic performance set by Article 18.

46. Investment in natural gas is exposed to two intersecting challenges.

47. First, natural gas infrastructure already provides capacity at a level that exceeds current demand and will continue to do so:

- a. A 2017 paper prepared for the European Commission on existing gas infrastructure noted that investment in further pipeline or LNG terminal infrastructure was unnecessary and wasteful (p.5): *"According to European Commission assessments, the EU currently has the capacity to import around 700 billion cubic meters per year (490 from pipelines, 197 from liquefied natural gas terminals). In 2015, EU gas imports amounted to 300 billion cubic meters. There is thus an infrastructure overcapacity in the EU as it currently imports less than half the gas that it could when using all existing available infrastructure."*
- b. As such, the construction of new infrastructure would create stranded assets (p.6): *"the building of Nord Stream 2 will lead to stranded assets in the future, either in the form of the new pipeline itself or of other pipeline investments which would get stranded due to the change in entry points and linked downstream gas flows."*
- c. To similar effect, the Commission's 2017 Energy Union report stated that the gas transmission network was largely complete: *"The gas grid has become more resilient and nearly all Member States... already have access to two sources of gas."* It forecast that under existing projects, all Member States (other than Malta and Cyprus) would have access to three sources of gas by 2022 (Section 2.3, p.7).

48. It is therefore highly doubtful (at best) that investment to increase the capacity of gas infrastructure in the EU would find anything like a corresponding level of demand under current conditions.
49. Second and in any event, demand is also likely to fall significantly. As the Commission has noted in its Communication, natural gas usage will fall to around 3-4% of total energy needs by 2050 under the trajectories aligning with the Paris Agreement. The Revised Draft Policy also rightly notes (as does the Communication) that energy demand will also fall over the period to 2030; it follows that the overall level of infrastructure required on the supply side will also decline over that period (including in the supply of natural gas): see Revised Draft Policy, Section 2, para 22.
50. Given the declining trajectory for demand and the current over-supply of capacity in gas infrastructure, the economic case for further investment in gas is highly questionable. As such, such further financing of natural gas-related activities would be wasteful and would lead to stranded assets. It could not increase economic productivity in general or contribute to the development of the internal market.
51. It bears emphasis, moreover, that even if the role of non-fossil gases grows in the energy sector, it is highly doubtful that an increase in the use of these forms of gas could take up the excess capacity left by a decline in natural gas:
- a. The Commission's 2018 Communication itself contemplates only a relatively small proportion of the energy fuel mix being derived from "e-gas" in 2050; in the order of 5%.
 - b. Other economic analysis is to a similar effect. Eurostat figures for 2018 indicate that gross EU consumption of natural gas in 2018 amounted to 18,168.77 PJ.¹⁸ Research conducted on behalf of major gas suppliers indicated that under optimal conditions, the supply of renewable methane in 2050 would reach 1170 TWh,¹⁹ which is the equivalent of around 4,212 PJ. The International Council on Clean Transportation, by contrast, estimated the potential renewable methane supply at 36 billion m³ p.a., the equivalent of 1,432.8 PJ.²⁰ Even on the higher of these estimates, the supply of 'clean' gas (and hence the usage of the existing level of gas infrastructure) would be significantly lower than at present.
52. In summary, it is difficult to see how the standard for assessing lending set by Article 18 can be met for new activities involving natural gas, given these factors. This conclusion is fortified by the Commission's finding in the Communication that (as set out above) a decline in the role of natural gas "*will contribute to improving the security of energy supply of the EU*".

4 Conclusion

53. We would regard action by Member States to weaken the Original Draft Policy as incompatible with the commitments of the EU and in breach of Member States'

¹⁸ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Provisional_natural_gas_balance_sheet_by_country_2018_-_table_1.png

¹⁹ Navigant, Gas For Climate, March 2019, section 6.3 (p.77).

²⁰ International Council on Clean Transportation, Working Paper 2017-26 (October 2018), p.8.

undertakings in Article 4(3) TEU. The Board of Directors would also place the EIB in breach of its obligation to ensure that its funds are employed as rationally as possible in the interests of the EU, given the emission reductions required by the Paris Agreement and the associated stranded asset risk of ongoing gas investment.

54. We are extremely concerned that the Revised Draft Policy provides that Projects of Common Interest (“PCIs”) are eligible for EIB support without requiring the cumulative application of emission criteria otherwise included in the policy. By creating such a wide exception to its own eligibility criteria, the Revised Draft Policy is, in practice, defeating its purpose of incentivising and catalysing private investment in clean energy projects. We recall that the EIB does not have any legal obligation to channel funding to PCIs. In order for the policy to be fully Paris compliant, it should explicitly provide that its lending criteria apply to any type of project, including if a project has been awarded the PCI classification.
55. We urge the Board of Directors, representing the EU Member States, to adopt the Original Draft Policy or to impose equivalent restrictions on support for natural gas and other fossil fuel-reliant projects. Further public investment in gas-reliant energy projects cannot be justified.
56. If gas-fired power plants are to remain eligible for support, the emission standard should be aligned with the 100 gCO₂ per kWh emission standard under the proposed EU Taxonomy and support should be expressly conditional upon actually meeting that standard (not simply a “credible plan” to do so) with an indemnity if such a condition is not met.