

# REPowerEU: Updating EU Legislation to Make the EU Independent from Russian Fossil Fuels

ClientEarth comments on the proposed amendments to Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility

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## Executive Summary

On 18 May 2022, the Commission released its REPowerEU Plan, which seeks to eliminate the EU's dependence on Russian fossil fuels and accelerate the clean energy transition.<sup>1</sup> To help finance the package, the Commission issued a proposal for a Regulation ("Proposed Regulation")<sup>2</sup> to amend the Regulation establishing the Recovery and Resilience Facility ("RRF Regulation").<sup>3</sup> The Proposed Regulation would require Member States to seek financing for reforms and investments that promote REPowerEU by adding a new chapter to their Recovery and Resilience Plans ("RRPs").<sup>4</sup>

We have significant concerns regarding **the preferential treatment that the Proposed Regulation gives to the financing of fossil gas and oil infrastructure**, which Member States are invited to include in their

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<sup>1</sup> 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, 18.05.2022 ("REPowerEU Communication").

<sup>2</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060, Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814, COM (2022) 231 final, 18.5.2022. As the name of the proposal suggests, the Commission is also proposing to amend various legislation and decisions governing the Common Provisions Regulation, Common Agricultural Policy Strategic Plans, and the EU Emissions Trading System. Our comments in this briefing are limited to the proposed amendments to the RRF Regulation.

<sup>3</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021).

<sup>4</sup> Proposed Regulation, Rec. 4-6, Art. 1(6) (proposing new Art. 21c).

RRPs “to meet immediate security of supply needs for oil and gas, notably to enable diversification of supply in the interest of the Union as a whole.”<sup>5</sup> **Although we recognise the very real need to shore up energy security in the short term, the proposal is misguided. It ignores obligations of transparency and objectivity that are central to critical energy infrastructure planning, circumvents core climate and environmental protections under the RRF, and creates inconsistencies with the State aid rules.**

Specifically, we are concerned with the following elements of the Proposed Regulation:

1. The **closed-door process** followed when the fossil fuel industry, acting at the Commission’s request, developed a wish list of new fossil gas and oil infrastructure that is effectively guaranteed to receive financing via the RRF, and the **lack of any meaningful transparency, stakeholder participation, and independent scrutiny** that will be allowed before these projects are funded;
2. The **preferential exemption from the Do No Significant Harm principle** under the RRF for these very same oil and fossil gas projects, which will also weaken application of the Guidelines on State aid for climate, environmental protection and energy 2022 (“CEEAG”)<sup>6</sup>; and
3. The **failure to conduct any impact or climate assessment for the Proposed Regulation**, despite the fact that by definition this proposal will have a significant environmental impact.

As explained below, **the proposed preferential treatment that will be given to select fossil gas and oil infrastructure is not only misguided, it is potentially illegal.** A few key changes must be made:

1. The Proposed Regulation must provide for meaningful stakeholder consultation and independent scrutiny of any fossil gas or oil project that is included in a Member State’s REPowerEU chapter;
2. The exemption from the Do No Significant Harm principle must be withdrawn, as it is potentially unlawful, unnecessary (fossil fuel projects already receive RRF funding), and dangerous; and
3. The Commission must conduct impact and climate assessments for the Proposed Regulation.

**The Commission need not sacrifice core principles of environmental protection, transparency, and independence for security of supply.** Instead, our proposed changes will help swiftly mitigate security of supply risks while promoting the EU’s environmental acquis.

## 1. Endorsing Industry’s Fossil Fuel Project Wish List

### A. The Commission Unlawfully Circumvented Principles of Transparency, Independent Decision-making, and Stakeholder Participation When Endorsing its Fossil Fuel Projects

The explanatory memorandum to the Proposed Regulation cites as its legal basis five provisions of the Treaty on the Functioning of the European Union (“TFEU”), on economics, social and territorial cohesion, environment, energy, and budget implementation.<sup>7</sup> Strikingly, an expected reference to Articles 170 to 172 TFEU, on trans-European networks, is not included. This is despite the fact that the Proposed Regulation clearly covers the development of EU cross-border energy infrastructure and the removal of bottlenecks.<sup>8</sup> Articles 170 to 172 TFEU provide the legal basis for legislation on planning and financing critical energy infrastructure of EU-wide importance. Article 171 directs EU institutions to establish a series of guidelines

<sup>5</sup> Ibid, Art. 1(6) (proposing new Art. 21c(1)(a)).

<sup>6</sup> Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy 2022, (2022/C 80/01, 18.2.2022).

<sup>7</sup> Proposed Regulation, Explanatory Memorandum, p.4 (citing Articles 175, 177, 192, 194, & 322 TFEU).

<sup>8</sup> Ibid, Art. 1(6) (proposing new Art. 21c(1)(a) & (c)), Annex I(a) (proposing new point 2.12 to Annex V(2)).

to this effect and to “support projects of common interest ... identified in the framework of” these guidelines.<sup>9</sup> The TEN-E Regulation<sup>10</sup> provides these guidelines, imposing stakeholder consultation, transparency, and analysis requirements for several processes entrusted to the European Network of Transmission System Operators for Gas (“ENTSOG”).<sup>11</sup> For each, ENTSOG must conduct an “extensive consultation process involving all relevant stakeholders” which is “open and transparent”.<sup>12</sup> Robust stakeholder consultation requirements are also imposed on other decision-makers.<sup>13</sup> The intent of the TEN-E Regulation is therefore clear: **when evaluating energy infrastructure for EU financing, decision-makers must conduct extensive and transparent stakeholder consultations, and they must allow independent scrutiny of their proposals and decisions.**

Unfortunately, **the Commission not only omitted the legal basis for trans-European networks from its proposal, but it also altogether ignored these requirements when it identified and endorsed those fossil fuel projects which the REPowerEU Communication states are necessary to mitigate immediate security of supply risks.** The infrastructure proposed by the Commission in the REPowerEU Communication includes an additional 10 billion euros worth of fossil gas projects and an additional 1.5 to 2 billion euros worth of oil projects.<sup>14</sup> Despite the substantial cost involved, there is scarce detailed data available as to how this emergency list came to be. The Commission does not explain the analysis it conducted to identify the oil infrastructure.<sup>15</sup> As for the fossil gas infrastructure, the Commission relies exclusively on analysis from ENTSOG.<sup>16</sup> Although **ENTSOG’s analysis is not publicly available**, the Commission explains that the organisation examined at least two different demand scenarios and three different levels of infrastructure development.<sup>17</sup> The Communication mentions that this analysis was “subsequently discussed with Member States in a regional context”,<sup>18</sup> but there is no indication that ENTSOG’s preferred list of projects was meaningfully scrutinised by the Member States.<sup>19</sup>

Moving forward, **the Proposed Regulation also circumvents requirements of independent decision-making and stakeholder participation by effectively guaranteeing that ENTSOG’s preferred list of fossil fuel projects will receive EU financing, without any meaningful opportunity for independent scrutiny.** The Proposed Regulation invites Member States to seek RRF funding for measures aimed at “improving energy infrastructure and facilities to meet immediate security of supply needs for oil and gas, notably to enable diversification of supply in the interest of the Union as a whole.”<sup>20</sup> Although any range of feasible measures could be proposed for this, including demand-side interventions, **the Commission specifically instructs Member States to refer to the list of fossil fuel projects in the REPowerEU Communication.** Member States are told that any “investments and reforms ... to diversify supply away from Russia should build on the needs currently identified through the assessment conducted and agreed by the European Network of Transmission System Operators for Gas (ENTSOG).”<sup>21</sup> And once included in their RRP, there will be no meaningful opportunity for the public to scrutinise whether the projects should

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<sup>9</sup> Art. 171(1) TFEU.

<sup>10</sup> Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 (OJ L 152, 3.6.2022).

<sup>11</sup> TEN-E Regulation, Rec. 25.

<sup>12</sup> *Ibid*, Rec. 25, Arts. 12(1), 13(1).

<sup>13</sup> *Ibid*, Arts. 9(4), 11(7), 12(1), Annex III(1), Annex VI.

<sup>14</sup> REPowerEU Communication, pp. 13-14.

<sup>15</sup> *Ibid*, p. 14.

<sup>16</sup> *Ibid*, Annex 3, p. 7.

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*

<sup>20</sup> Proposed Regulation, Art. 1(6) (inserting a new Article 21c(1)(a)).

<sup>21</sup> *Ibid*, Rec. 6 (emphasis added). The guidance which the Commission issued with the Proposed Regulation on how RRPs should be updated in light of REPowerEU is even more direct. It states that “Member States are particularly encouraged to consider the possibility of RRF financing for additional gas projects identified by the infrastructure needs assessment carried out for the purpose of the REPowerEU plan.” Commission Notice, Guidance on Recovery and Resilience Plans in the context of REPowerEU, 18.5.21 (“RRP Guidance”), pp. 23-24.

receive EU funds, as assessments and stakeholder consultations under the RRF Regulation are conducted on a plan-wide rather than measure-by-measure basis.<sup>22</sup>

**In sum, the Commission’s approach to identifying fossil fuel projects to receive financing under the RRF circumvents core obligations underlying critical energy infrastructure planning in the EU.** Further, by completely side-stepping the TEN-E Regulation in identifying and approving this infrastructure, **the Commission’s approach is arguably unlawful.** The legal grounds which the Commission cites for the Proposed Regulation do not explicitly empower EU institutions to plan or fund such projects.

**There were no public or stakeholder processes to scrutinise the fossil fuel infrastructure that was included in the REPowerEU Communication, and the Proposed Regulation does not ensure that meaningful scrutiny will be allowed at any time before the projects are approved for EU financing.** By selecting these fossil fuel projects behind closed doors and effectively guaranteeing RRF financing for them, the Commission has circumvented the carefully negotiated framework in the TEN-E Regulation and the principles it upholds.

## **B. ENTSOG Should Not Be Entrusted to Unilaterally Identify New Fossil Gas Infrastructure Which is Needed to Resolve Immediate Security of Supply Concerns**

It is also concerning that the Commission authorised ENTSOG exclusively to identify fossil gas projects to be funded through the RRF. The organisation’s members come entirely from the fossil gas industry,<sup>23</sup> and they are structurally incentivised to build fossil gas infrastructure to increase revenues. **Civil society<sup>24</sup>, regulators<sup>25</sup>, and independent consultants hired by the Commission<sup>26</sup> have all noted the conflicts-of-interest inherent to allowing ENTSOG to be responsible for network planning decisions.** The new TEN-E Regulation also explicitly calls for “*more scrutiny*” of ENTSOG’s decisions “*to enhance trust in the process*” and “*an increased role*” for the Agency for the Cooperation of European Energy Regulators (“ACER”) to provide “*independent validation*” of ENTSOG’s work.<sup>27</sup> Recent decisions from ACER have criticised the organisation in overinflating supply and demand assumptions and failing to adequately take into consideration current circumstances that would impact the same, including the Russian invasion of Ukraine and increasing energy prices.<sup>28</sup> Therefore, one should not immediately accept ENTSOG’s assumptions and modelling used for REPowerEU (which is not publicly available). This is particularly true since **other analyses from technical experts and civil society have shown that no or only limited**

<sup>22</sup> RRF Regulation, Arts. 18, 19, Annex V. There is one exception to this plan-wide approach; namely, Member States must assess compliance with the Do No Significant Harm Principle at a measure level. See Commission Notice, Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01), pp. 2-3 (“DNSH Technical Guidance”). However, as explained below, the Proposed Regulation exempts these fossil fuel projects from the DNSH assessment.

<sup>23</sup> Members, ENTSOG, <https://www.entsog.eu/members> (last visited 19 July 2022).

<sup>24</sup> Global Witness, Pipe Down – How gas companies influence EU policy and have pocketed €4 billion of taxpayer’s money, June 2020. <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/pipe-down/>; ClientEarth, Reforming Decision-Making in Trans-European Networks for Energy, Better governance to support the decarbonisation of energy infrastructure, June 2021. <https://www.clientearth.org/media/wfrbeshx/reforming-decision-making-in-ten-e.pdf>

<sup>25</sup> ACER & CEER, Position on Improving the Regulation on Guidelines for Trans-European Energy Networks, pp. 6, 7, 17 (TENE Regulation), March 2021. [https://www.acer.europa.eu/Official\\_documents/Position\\_Papers/Position%20papers/ACER\\_CEER\\_TEN\\_E\\_2021.pdf](https://www.acer.europa.eu/Official_documents/Position_Papers/Position%20papers/ACER_CEER_TEN_E_2021.pdf)

<sup>26</sup> F. Akkermans et al., Support to the evaluation of Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure, p. 14 January 2021. <https://op.europa.eu/en/publication-detail/-/publication/19bec11f-5f86-11eb-b487-01aa75ed71a1/language-en>.

<sup>27</sup> TEN-E Regulation, Rec. 24.

<sup>28</sup> ACER Opinion No 05/2022 of 14 July 2022 on ENTSOG’s Summer Supply Outlook 2022; ACER Opinion No 06/2022 of 15 July 2022 on key elements of ENTSO-E and ENTSOG draft TYNDP 2022 Scenario Report, p. 5.

**additional fossil gas infrastructure is needed** to mitigate energy security risks from a cut-off of Russian gas, especially when combined with efficiency and other initiatives to reduce reliance on fossil fuels.<sup>29</sup>

It is also worth noting that ENTSOG is not an EU agency or other public body, but a private entity that has been attributed only certain tasks by EU law under Regulation 715/2009.<sup>30</sup> It is true that the tasks attributed to ENTSOG allow it to intervene in relevant decisions of EU gas policy, including the elaboration of network codes, or the preparation of the Union-wide TYNDPs.<sup>31</sup> However, these tasks do not include preparation of a list of emergency fossil gas infrastructure proposed in the REPowerEU Communication. **It is therefore questionable whether the Commission is allowed to solely rely on the biased input of a private entity without a specific legal mandate when setting emergency gas infrastructure priorities.**

**The conflicts of interest which are inherent to ENTSOG-led planning processes, and recent examples of ENTSOG using inflated assumptions, make it crucial that any ENTSOG analysis regarding the need for new fossil gas infrastructure is independently scrutinised.** Civil society must be allowed to provide their insights in this regard, which will result in a more balanced analysis.

### **C. Obligations of Transparency, Independence, and Stakeholder Participation Must Be Upheld Before Fossil Fuel Projects Receive Financing through the RRF**

It is essential that requirements of transparency, independence, and stakeholder participation are upheld before dedicating EU funding to energy infrastructure that is of Union-wide importance. Stakeholders must be given an opportunity to at least scrutinise any analysis from ENTSOG on the necessity of such infrastructure. **The process for approving Projects of Common Interest under the TEN-E Regulation offers a suitable proxy in this regard.** Given the current situation and the urgent need to add an unbiased analysis to the Commission's assessment, we consider that the Commission must, as a minimum:

1. Publish the full analysis conducted by ENTSOG and any other analyses conducted to identify the fossil fuel projects listed in REPowerEU, along with all relevant information that was considered;
2. Open a consultation for at least two months where experts, civil society, and the wider public can submit their own analyses and scrutinise the information published by the Commission. ACER should also be tasked with providing its own opinion on these analyses;
3. Publish a new emergency list that considers all input received. The new emergency list should be accompanied by an explanation of how the input received in the consultation was considered. If any security of supply risks can be alleviated through alternative, more efficient interventions which do not require new infrastructure investments, those must be approved;
4. Make it explicit in the Proposed Regulation that the new emergency list is a recommendation and that Member States are not bound by an obligation to support the projects therein; and
5. When submitting a fossil fuel project for EU financing via their RRP, Member States may choose from projects in the Commission's revised list. The inclusion of such projects, and the RRP, must still abide by all requirements in the RRF Regulation, as amended by the Proposed Regulation.

<sup>29</sup> Artelys, Does phasing-out Russian gas require new gas infrastructure?, <https://www.artelys.com/wp-content/uploads/2022/05/Artelys-Russian-gas-phase-out-Briefing-note.pdf>; Bellona Europa, Ember, Regulatory Assistance Project, E3G, EU Can Stop Russian Gas Imports by 2025, March 2022, <https://www.raponline.org/wp-content/uploads/2022/03/rap-e3g-ember-bellona-stop-russian-gas-2025-final.pdf>.

<sup>30</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, (OJ L 211, 14.8.2009).

<sup>31</sup> Ibid, Art. 8.

Any oil or fossil gas projects which are approved for financing via the RRF must still comply with the rules applicable to permit granting and other approvals in the TEN-E Regulation (e.g., Arts. 9 & 23 & Annex VI) and RRF Regulation (e.g., Art. 18(4)(q), Annex V), including their transparency and consultation rules.

The Commission should have followed the PCI process or a similar approach in selecting the fossil fuel infrastructure identified in REPowerEU as necessary to shore up security of supply. However, **the above process should better ensure that key principles of public participation, transparency, and independent decision-making in financing critical energy infrastructure are upheld, while still recognising the urgency of the situation.**

## 2. Exemption from the Do No Significant Harm Principle

### A. The Proposed Exemption from DNSH is Unlawful and Unnecessary

The Commission also proposes to exempt this list of fossil fuel infrastructure from the Do No Significant Harm principle, a key environmental protection at the heart of the RRF.<sup>32</sup> **This preferential exemption for only a select group of projects which, by their very nature, pose a high risk of environmental harm, is unlawful.** It is contrary to the Treaty obligations placed on all EU institutions and Member States to work toward a high level of protection and improvement of the quality of the environment.<sup>33</sup> Further, given the likely adverse climate impacts associated with this infrastructure, **this preferential treatment is also potentially in conflict with the obligations under the European Climate Law** to “prioritise swift and predictable emission reductions”<sup>34</sup>, to “take the necessary measures”<sup>35</sup> to enable the collective achievement of the Union’s climate targets, and to “endeavour to align” draft measures and legislative proposals “with the objectives” of the Climate Law and “provide the reasons” for any non-alignment.<sup>36</sup> And notably, the exemption **discriminates without legal justification** against measures which have a relatively low environmental impact (e.g., renewables or energy efficiency initiatives that must meet the DNSH standard) in favour of environmentally damaging projects (new fossil fuel infrastructure which does not need to be DNSH-compliant. This discrimination sets an absurd precedent and is obviously contrary to the core pillars to be served by the RRF, including “*smart, sustainable, and inclusive growth.*”<sup>37</sup>

**Further, the proposed exemption is not necessary.** Although the DNSH principle is meant (at least in theory<sup>38</sup>) to set a relatively high bar of environmental protection, the RRF Regulation and accompanying DNSH Technical Guidance<sup>39</sup> enable funding for fossil fuel infrastructure in limited circumstances. Although ClientEarth certainly disagrees as a matter of principle that fossil fuel projects can be DNSH-compliant for purposes of the RRF, **we are especially concerned that the Commission is proposing to get rid of this protection altogether for this infrastructure.** Instead, the DNSH requirements must continue to apply. The DNSH Technical Guidance expressly acknowledges the possibility of RRF funding for “*power*

<sup>32</sup> Proposed Regulation, Rec. 13.

<sup>33</sup> Art. 11 TFEU; Art. 4(3) TEU; Art. 3(3) TEU; Art. 37 EU Charter of Fundamental Rights.

<sup>34</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (OJ L 243, 9.7.2021), Art. 4(1) (“European Climate Law”).

<sup>35</sup> *Ibid.*, Art. 2(2).

<sup>36</sup> *Ibid.*, Art. 6(4).

<sup>37</sup> RRF Regulation, Art. 3.

<sup>38</sup> Civil society has expressed concerns with how the DNSH principle has been applied in practice under the RRF, demonstrating it is not achieving the level of environmental protection intended. [Statement of the Green 10 on the ‘do no significant harm’ principle](#), November 2021; WWF Analysis, [Keeping the Bar High on Green Recovery, The EU’s “Do No Significant Harm” Principle in Practice](#), March 2022; CEE Bankwatch, Euronatur, WWF, ReCommon, Joint Letter to Members of European Parliament’s Recovery and Resilience Working Group, [Action needed to avoid billions of EU public funds harming the environment](#), March 2022.

<sup>39</sup> Commission Notice, Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01).

and/or heat generation using fossil fuels, as well as related transmission and distribution infrastructure,” on a case-by-case basis.<sup>40</sup> Although the guidance contemplates that these projects will generally be DNSH-compliant where Member States “face significant challenges in the transition away from more carbon-intensive energy sources,”<sup>41</sup> that is not the only circumstance. Instead, this is simply a consequence of the alternatives analysis that is central to the DNSH test. The DNSH Technical Guidance explains that a lower threshold applies if there is no technologically and feasible alternative to meet a desired objective.<sup>42</sup> In that case, “Member States may demonstrate that a measure does no significant harm by adopting the best available levels of environmental performance in the sector.”<sup>43</sup> The infrastructure would also need to meet several additional conditions, including that it “avoid environmentally harmful lock-in effects” and “not hamper the development and deployment of low-impact alternatives.”<sup>44</sup> Any fossil gas transmission and distribution infrastructure must also “enable at the time of construction the transport (and/or storage) of renewable and low-carbon gases.”<sup>45</sup> Lastly, the project must meet the DNSH test for the remaining five environmental objectives.<sup>46</sup>

The Proposed Regulation creates a new objective to be served by the RRF; namely, to meet immediate security of supply needs for oil and fossil gas.<sup>47</sup> **Therefore, if an oil or fossil gas project included in a Member State’s RRP is truly needed to meet this new objective, and there are not any technologically and economically feasible alternatives with a lower environmental impact, then there is no reason to think that this project could never meet the DNSH standard under the RRF.** Of course, the additional stringent criteria discussed above apply, but these would only ensure that the infrastructure is truly necessary and meets the highest environmental performance standards available.

**Therefore, by proposing to exempt this infrastructure from the DNSH principle, the Commission is implicitly admitting that there could be technologically and economically feasible alternatives with a lower environmental impact; otherwise, such an exemption is not necessary. If there are indeed less environmentally harmful solutions, then the infrastructure simply should not be built. The only way to determine whether this is true is to ensure the DNSH principle applies equally to all measures included in an RRP.**

## B. The Proposed Exemption May Erode State Aid Rules

Exempting this infrastructure from the DNSH principle may also nullify the application of State aid rules, in particular the CEEAG. The Commission clearly states that **the State aid rules (including the CEEAG) continue to apply to fossil gas and oil infrastructure** which Member States include in their RRP to meet immediate security of supply concerns.<sup>48</sup> However, for fossil gas, the CEEAG also contain an assessment that closely tracks the DNSH assessment conducted under the RRF. **Therefore, by exempting these investments from DNSH for purposes of the RRF, the Commission calls into question the extent to which this similar assessment can practically still apply under the CEEAG.**

Investments in energy activities typically fall within the scope of the CEEAG or section 7 of the General Block Exemption Regulation<sup>49</sup> (“GBER”; currently under revision). Section 3 of the CEEAG requires the Commission to conduct a compatibility assessment which, among other things, includes a balancing exercise.<sup>50</sup> For this balancing exercise, the Commission must “**pay particular attention to Article 3 of**

<sup>40</sup> Ibid, p. 58/6.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, Annex III, p. 58/14.

<sup>46</sup> Ibid, p. 6.

<sup>47</sup> Proposed Regulation, Art. 1(6) (proposing new Art. 21c(1)(a))

<sup>48</sup> RRP Guidance, p. 32.

<sup>49</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014).

<sup>50</sup> CEEAG, para. 71.

*[the Taxonomy Regulation], including the ‘do no significant harm’ principle, or other comparable methodologies.*<sup>51</sup> If a DNSH assessment has been conducted under the RRF, then “*compliance with the ‘Do no significant harm’ principle*” is fulfilled.<sup>52</sup> Clearly, **the CEEAG track the DNSH test under the RRF.**

**The CEEAG include additional criteria for fossil gas investments to be considered compatible with the internal market. These criteria are similar to the additional conditions which apply to the same investments for purposes of assessing compliance with the DNSH principle under the RRF.** Under the CEEAG, Member States must demonstrate that fossil gas infrastructure “*is ready for the use of hydrogen and leads to an increase of the use of renewable gases.*”<sup>53</sup> If such a showing cannot be made, then Member States must explain why not and “*how the project does not create a lock-in effect for the use of natural gas.*”<sup>54</sup> And in either case, the Member State must demonstrate “*how the investment contributes to achieving the Union’s 2030 climate target and 2050 climate neutrality target.*”<sup>55</sup> This language is almost identical to the conditions in the DNSH Technical Guidance, which provide that the infrastructure must avoid “*environmentally harmful lock-in effects*”<sup>56</sup>, must “*not hamper the development and deployment of low-impact alternatives*”<sup>57</sup>, and must (at least for transmission and distribution infrastructure) “*enable at the time of construction the transport (and/or storage) of renewable and low-carbon gases.*”<sup>58</sup>

**Therefore, it is unclear whether and how the Commission can, as a practical matter, continue to conduct an assessment under the CEEAG for fossil fuel infrastructure which is exempt from the DNSH principle under the RRF.** If the Commission chooses not to conduct this analysis under the CEEAG, that would be contrary to the Commission’s stated intent. However, if the Commission conducts a full assessment under the CEEAG, this could render the DNSH exemption under the RRF ineffective.

To further demonstrate the untenable position created, consider any one of the following treatments that could be given to fossil fuel investments proposed in Member States’ RRP: (1) investment is in the REPowerEU chapter of a Member State’s RRP and subject to State aid control – exempt from DNSH but subject to the CEEAG; (2) investment is in the REPowerEU chapter but not subject to State aid control – exempt from DNSH and the CEEAG; (3) investment is in the RRP but not in its REPowerEU chapter and is subject to State aid control – both DNSH and CEEAG apply; (4) investment is in the RRP but not in its REPowerEU chapter and not subject to State aid control – DNSH applies but not the CEEAG. **This sort of complexity encourages gamesmanship among Member States to place their desired fossil fuel infrastructure in certain parts of their RRP to maximise the chances of receiving RRF funding.**

Such an unnecessarily complex framework creates an irreconcilable tension between the two sets of rules, even if these serve different goals. **Although the Commission claims that the CEEAG continue to apply, the proposed DNSH exemption will necessarily have a negative impact on the CEEAG and its ability to effectively ensure the avoidance of lock-in for fossil fuel projects. For this reason, the Commission must withdraw the proposed DNSH exemption.**

### 3. The Failure to Assess the Proposal’s Impacts

Lastly, the Commission did not conduct either an impact assessment or a climate assessment for the Proposed Regulation. It does not justify the lack of climate assessment, but it does cite “*the urgent nature of the proposal*” as the reason for not conducting an impact assessment.<sup>59</sup> **However, “urgency” does**

<sup>51</sup> Ibid, para. 72.

<sup>52</sup> Ibid, para. 72 n50.

<sup>53</sup> Ibid, para. 382(c).

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> DNSH Technical Guidance, p. 58/6.

<sup>57</sup> Ibid

<sup>58</sup> Ibid, Annex III, p. 58/14.

<sup>59</sup> Proposed Regulation, Explanatory Memorandum, p. 5.



not provide a sufficient justification to forego assessing the climate and other impacts of a legislative proposal. Instead, the Commission must carry out an impact assessment for any legislative proposal which is “*expected to have significant economic, environmental or social impacts.*”<sup>60</sup> There is no exception, although assessments generally “*must not lead to undue delays*” and “*should be proportionate as regards their scope and focus.*”<sup>61</sup> Similarly, Article 6(4) of the European Climate Law<sup>62</sup> **requires the Commission to “assess the consistency of any draft measure or legislative proposal” with the EU’s binding climate targets and objectives.** The Commission must also “*endeavour to align*” its draft measures and legislative proposals “*with the objectives*” of the law.<sup>63</sup>

The Proposed Regulation is a legislative proposal. **The exemption from the DNSH principle, and the lack of any real scrutiny for fossil fuel projects which are financed through the proposal, will almost by definition cause significant economic, environmental, or social impacts. Therefore, both an impact assessment and a climate assessment are required.** To suggest that the Commission can forego these obligations to serve an ill-defined notion of “urgency” would clearly set a dangerous precedent.

## Conclusion

ClientEarth appreciates the very real threats to energy security posed by the EU’s move away from Russian fossil fuels, and the impact that this has on energy prices. We are also aware that these threats are evolving and must be addressed swiftly. We support the Commission’s ambition in REPowerEU to accelerate the roll-out of energy efficiency, energy savings, and renewables solutions, as these present the real structural interventions needed to address the current crisis. **We are confident that energy security risks can be effectively and swiftly mitigated without sacrificing core obligations of environmental protection, transparency, stakeholder participation, and independent decision-making.** EU institutions must continue to abide by these obligations to ensure that the EU’s environmental acquis, including its climate protections, are promoted alongside energy security as mutually reinforcing.

Therefore, we strongly recommend that the Proposed Regulation be revised to (1) include opportunities for robust stakeholder participation and independent scrutiny of any fossil fuel projects which are proposed for EU financing in Member States’ RRP; and (2) withdraw the exemption from the ‘do no significant harm’ principle for these same projects. We also strongly recommend that the Commission conduct an impact assessment and a climate assessment for the Proposed Regulation.

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<sup>60</sup> Inter-Institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making Art. 13 (13 April 2016).

<sup>61</sup> *Ibid*, Art. 12

<sup>62</sup> European Climate Law, Art. 6(4).

<sup>63</sup> *Ibid*