

European Taxonomy: A “Green” Future for Nuclear, Gas and Bioenergy?

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Since the entry into force (in 2020) of Regulation (EU) 2020/852 (the “**Taxonomy**”), the European Commission has been at work on the screening criteria that will determine whether a given economic activity (and any related investments, or financial products) may be treated and marketed as “environmentally sustainable”. The screening criteria cover priority industry sectors that have a large emissions footprint or are otherwise seen as key for the sustainability transition (e.g., energy, manufacturing, transport).

The classification of an activity as “sustainable” (or not sustainable) will affect the costs of financing for such activity and its ability to attract investments. In the future, Taxonomy rules may be used in state aid, public procurement, tax and other EU regulatory frameworks.

Laying down certain screening criteria proved of course more contentious than others.

Bioenergy was classified as “sustainable”, despite strong (and enduring) resistance.

Nuclear and natural gas power plants were so contentious that the Commission decided not to include them in June 2021’s first Delegated Regulation (EU) 2021/2139 (the “**Taxonomy Climate Delegated Act**”, applicable since this January), but rather to treat them under a separate set of rules. The rules applicable to nuclear and gas were published, in the form of a draft “Taxonomy Complementary Delegated Act”, on **February 2nd**. Litigation challenges may follow.

Below is a recap of what could prove to be the fiercest quarrel yet in EU’s road to “green”.

If you have any questions concerning this memorandum, please reach out to the authors or to your regular firm contact, including

Clara Cibrario Assereto
+39 06 6952 2225
ccibrarioassereto@cgsh.com

Andreas Wildner
+44 20 7614 2248
awildner@cgsh.com

Maurits Dolmans
+44 20 7614 2343
mdolmans@cgsh.com

Andrew Bernstein
+ 33 1 40 74 68 60
abernstein@cgsh.com

Barthélemy Faye
+33 1 40 74 69 49
bfave@cgsh.com

Helena K. Grannis
+1 212 225 2376
hgrannis@cgsh.com

Chris Macbeth
+ 971 2 412 1730
cmacbeth@cgsh.com

Francesca Odell
+1 212 225 2530
flodell@cgsh.com

Scott Senecal
+7 495 660 8520
ssenecal@cgsh.com

Sophie Smith
+44 7841 490 626
sosmith@cgsh.com

Denise Shiu
+86 10 5920 1080
dshiu@cgsh.com

Ferdisha Snagg
+44 20 7614 2251
fsnagg@cgsh.com



I. Background

The Taxonomy Climate Delegated Act¹ and the new draft “Taxonomy Complementary Delegated Act”² on nuclear and gas (“TCDA”) set out sustainability criteria in relation to the European Union’s (and the Taxonomy’s) first two environmental objectives: **climate change mitigation** and **climate change adaptation**.

Under the Taxonomy, an economic activity for which there is no technologically and economically feasible low-carbon alternative may still be considered to “contribute significantly” to climate change mitigation (and so qualify as “green”) as long as it (1) supports the transition to a climate-neutral economy and (2):

- (a) has greenhouse gas (“GHG”) emissions that correspond to the best performance in the sector or industry,
- (b) does not hamper the development and deployment of low-carbon alternatives, and
- (c) does not lead to a lock-in of carbon-intensive assets.

These kinds of (provisionally) green activities are called “**transitional activities**”.³

All sustainable activities (including transitional) are also subject to a “**do-no-significant-harm**” (**DNSH principle**), generally requiring the absence of significant damaging side effects.⁴

Through the TCDA, the Commission proposes to label nuclear and gas energy generation, gas-powered heating and cooling, and the construction and operation of nuclear plants as transitional activities.

II. Screening criteria for nuclear and gas

The TCDA sets out certain conditions (or “**screening criteria**”) that nuclear and gas operations will have to satisfy in order to qualify as sustainable.

This Section II provides a snapshot, limited to the

Commission’s amendments to the screening criteria compared to the leaked draft that was circulated for comments to EU Member States on December 31, 2021 (the “**Leaked Draft**”).⁵ Despite the inputs that various stakeholders put forward in response to the Leaked Draft, these adjustments appear relatively minimal.

A. *Nuclear*

The TCDA provides that the construction and safe operation of nuclear power plants may qualify under the Taxonomy provided it applies the “best-available technology”⁶ and (from 2025) accident tolerant fuel. Nuclear permits may be issued until 2045 (although construction and operation of the facility may continue after that date).

The Leaked Draft provided that the Member State concerned must also have a detailed plan to set up, by 2050, a disposal facility for high-level radioactive waste. The TCDA elaborates on this requirement, specifying that the plan must be “documented” and listing certain information that it must contain.

The Leaked Draft also provided that the Member State concerned must report to the Commission every five years on each project. The TCDA adds an obligation on the Commission to review, on the basis of the reports, the adequacy of the resources accumulated by the national radioactive waste management fund and the nuclear decommissioning fund (which each Member State in which a relevant activity is located must have in place), and the progress made in setting up the local waste disposal facility. The Commission may on such basis address an opinion to the Member State concerned.

Other sustainability requirements include operating nuclear facilities in compliance with Directive 2000/60/EC and Directive 2013/51/Euratom, on radioactive substances in water intended for human consumption. An environmental impact assessment

objectives (e.g. limiting pollution, or protecting biodiversity). This DNSH assessment must take into account the entire life cycle of products and services offered.

⁵ The Leaked Draft is accessible [here](#).

⁶ What falls under “best-available technology” must be reviewed by the Commission at least every 10 years but, currently, requires compliance with the requirements of Directive 2009/71/Euratom and with the most recent technical parameters of the IAEA standards and the WENRA Safety objectives and Reference Levels. We expect that “Generation IV” reactors (still in research and design stage) would satisfy these requirements.

¹ The Taxonomy Climate Delegated Act is accessible [here](#). For more background information on the Taxonomy, see our dedicated alert [here](#).

² The TCDA is accessible [here](#).

³ See Article 10, paragraph 2, of the Taxonomy.

⁴ See Articles 3(b) and 17 of the Taxonomy. The DNSH principle serves to avoid that – while contributing to one of the Taxonomy’s environmental objectives (e.g. mitigating climate change) – a green activity does not at the same time harm any of the other

must always be carried out prior to the construction of a nuclear power plant in accordance with Directive 2011/92/EU. Nuclear sites located in or near biodiversity sensitive areas, and likely to have a significant effect on biodiversity sensitive areas, will also call for a dedicated impact assessment and the adoption of the required mitigation measures.

B. Gas

For fossil gaseous fuels related activities, the Leaked Draft established the condition that the power generated may not yet efficiently be replaced by renewable energy sources (among other requirements applicable to facilities with a construction permit granted by December 31, 2030, or “**2030-Authorised Gas Facilities**”). The TCDA now specifies that this conclusion must be “*based on a comparative assessment with the most cost-effective and technically feasible renewable alternative for the same capacity*” and that “*the result of this comparative assessment [must be] published and [must be] subject to a stakeholder consultation*”.

One surprising change, given the criticism expressed in relation to gas, is the following: the Leaked Draft and the TCDA both provide that 2030-Authorised Gas Facilities must be designed to use renewable and/or low-carbon gaseous fuels, and switch to full use of renewable and/or low-carbon gaseous fuels by the end of 2035. The TCDA however deletes the intermediary targets set under the Leaked Draft (*i.e.*, a minimum 30% use of renewable or low-carbon gases by 2026, and 55% by 2030). This is likely to make it easier for gas to qualify as sustainable (until 2036).

C. Review of the screening criteria

Acknowledging that the nuclear and fossil gas energy sectors are characterised by rapid technological development, the TCDA establishes that the screening criteria shall be regularly reviewed by the Commission.

Also, the Commission must review for how long the relevant nuclear and fossil-gas related activities may qualify as “green”. However, whereas under the Leaked Draft the minimum share of renewable and low-carbon

gas use in the context of fossil-gas related activities also needed to be reviewed, this is not included in the TCDA.

III. **Third party verification requirements**

The TCDA introduces certain independent third-party verification requirements with respect to nuclear and gas activities’ compliance with the screening criteria.

These verification requirements concern among others, GHG emissions (that must remain under certain thresholds), as well as (for 2030-Authorised Gas Facilities) the absence of a cost-effective renewable energy alternative, the circumstance that the gas activity replaces a high emitting facility that uses solid or liquid fossil fuels and leads to a reduction in the related emissions of at least 55% GHG over the new facility’s lifetime, the commitment (approved by the management body) to switch to full use of renewable or low-carbon gaseous fuels by 2036, plus a parallel commitment by the Member State where the activity takes place to phase-out the use of energy generation from coal.

IV. **Disclosure rules**

Finally, the TCDA provides that investors and the public should enjoy a high degree of transparency on fossil gas and nuclear energy investments made by firms.⁷

It therefore introduces an obligation to disclose the proportion of any nuclear and fossil-gas related activities or investments made by a company (compared to the company’s overall activities and investments), as follows:

- (i) in the numerator: all “**taxonomy-aligned**” nuclear and gas activities (*i.e.*, those aligned with the TCDA’s screening criteria and so “**transitionally sustainable**”),
- (ii) in the denominator: all “**taxonomy-aligned**” nuclear and gas activities, *plus* “**taxonomy-eligible** but not taxonomy-aligned” nuclear and gas activities (*i.e.*, those covered but not compliant with the TCDA’s criteria), *plus* any “**taxonomy-non-eligible**” activities (related

non-financial EU disclosure requirements will be extended 20-fold, to more than 50,000 companies all across the EU. To see our analysis of the upcoming new non-financial disclosure regime (*i.e.* the “Corporate Sustainability Reporting Directive”) see our dedicated alert, accessible [here](#).

⁷ The related amendment introduced by the TCDA concerns Commission Delegated Regulation (EU) 2021/2178 (the so-called “**Taxonomy Disclosures Delegated Act**”), which will become gradually applicable (starting in 2023) to all firms that are subject to non-financial EU disclosure requirements. Starting in 2024,

to nuclear and gas but not covered by the TCDA).⁸

The TCDA contains standard templates for these disclosures.

V. Next Steps

The TCDA is now under the scrutiny of the European Parliament and Council, who have four months to object to the proposal. The European Parliament can block the TCDA by a majority of its members in plenary (*i.e.*, at least 353 MEPs), whereas the Council would need to reach a supermajority of at least 20 Member States representing 65% of the total EU population. Both institutions may request an additional two months.

Once the scrutiny period is over and if neither of the co-legislators objects, the TCDA will enter into force and apply as of **January 1, 2023**.

But the rules have already come under fire.

On January 24, 2022, the Commission's expert advisers (through the "Platform on Sustainable Finance") said they do not align with the DNSH principle of the Taxonomy and the EU's 2050 net zero emissions goal.⁹

Certain EU Member States, including Spain, Austria and Luxembourg, have indicated that they will reject the proposal. It is currently seen as unlikely, however, that these States will be able to win a vote in the Council. This could lead to different outcomes: the Spanish government has indicated that it might introduce a separate ("gold-plating") framework which excludes nuclear power and fossil gas; ministers from Austria and Luxembourg have instead stated their intention to bring a lawsuit against the Commission on the basis that the TCDA violates the basic principles of the Taxonomy.

On the other hand, countries like France (which rely on nuclear to satisfy ca. 70% of its power needs) say the CO₂-free energy source has a major role to play in addressing climate change, while several central and eastern European countries view gas as a necessary intermediate step to move away from coal.

VI. Other early challenges to the Taxonomy

On **February 4**, London-based NGO "ClientEarth" announced that it had just filed an internal review to the European Commission for having classified **bioenergy**,¹⁰ **bio-based plastics**¹¹ and **bio-based chemicals**¹² as "green", as part of the Taxonomy Climate Delegated Act.¹³ Bioenergy in particular has been attacked due to the concern that it would (*a*) lead to destruction of ecosystems (such as forests), and so harm biodiversity, and (*b*) lead to higher CO₂ emissions in the short term.

Unlike the TCDA's on nuclear and gas (which are still in draft form), the screening criteria challenged by ClientEarth have been applicable since **January 1, 2022**.

The European Commission now has 16 weeks to reply to the request. If unsatisfied by the reply, ClientEarth will consider challenging the decision before the European Court of Justice.

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⁸ Both the Leaked Draft and the TCDA contain these disclosure provisions.

⁹ The Platform issued its opinion on January 21, 2022 (on the basis of the Leaked Draft). The report is accessible [here](#).

¹⁰ *i.e.*, Energy derived from burning wood or other biomass (such as crop residues and animal waste). Approximately 10% of EU

energy is produced from bioenergy.

¹¹ *i.e.*, Plastics made out of biomass.

¹² *e.g.*, Ethylene and propylene, attacked on the grounds that they are derived from fossil-fuels and mostly used to make single-use plastics.

¹³ ClientEarth's press release on this motion is accessible [here](#).