

Deutsche Umwelthilfe e.V.  
Head Office Berlin  
Hackescher Markt 4  
10178 Berlin

**Unlawfulness under Union law of the delegated act of the  
European Commission of 2 February 2022, on the  
classification of natural gas and nuclear energy as  
“environmentally sustainable” within the meaning of the  
Taxonomy Regulation**

**Outline**

<i>Summary</i>	<i>p. 2</i>
<i>I. Taxonomy Regulation and authorisation to adopt delegated acts</i>	<i>p. 3</i>
<i>II. Framework for action when adopting delegated acts</i>	<i>p. 5</i>
<i>III. Unlawfulness of the “complementary delegated act” of 2 February 2022 in terms of Union law</i>	<i>p. 6</i>
<i>1. Classification of the use of natural gas as “environmentally sustainable” contrary to EU law</i>	<i>p. 6</i>
<i>a) Criteria for environmentally sustainable economic activities (Art. 3 Taxonomy Regulation)</i>	<i>p. 7</i>
<i>b) No “substantial contribution to climate change mitigation” (Art. 10 Taxonomy Regulation)</i>	<i>p. 8</i>
<i>aa) No “consistency with a pathway to limit the temperature increase to 1.5°C”</i>	<i>p. 9</i>
<i>bb) Obstructing the “development and deployment of low-carbon alternatives”</i>	<i>p. 10</i>
<i>cc) Risk of lock-in effects</i>	<i>p. 15</i>
<i>c) Not an “enabling activity” (Art. 16 Taxonomy Regulation)</i>	<i>p. 15</i>

d) Significant impairment of environmental objectives (Art. 17 Taxonomy Regulation)	p. 18
e) Precautionary principle (Art. 191(2) TFEU)	p. 19
2. Classification of the use of nuclear energy as “environmentally sustainable” in violation of EU law	p. 20
3. Validity of delegation of power doubtful; need for an impact assessment	p. 22
IV. Consequences for the taxonomy of changes to EU energy policy in light of the Russian war of aggression	p. 23

## **Summary**

*The “complementary delegated act” published by the European Commission in its final version on 2 February 2022, by which the Commission intends to classify the operation of natural gas power plants and the use of nuclear energy as environmentally sustainable activities, is contrary to Union law. It is not compatible with the overarching Taxonomy Regulation and EU primary law.*

*In principle, natural gas power plants can be considered as a transitional technology. However, the specific criteria that the European Commission wants to set for the operation of power plants even after 2030 are highly likely to hamper the development and deployment of low-carbon alternatives and, in particular, the expansion and development of renewable energies, as well as to lead to lock-in effects, also with a view to the expansion and development of renewable energies. A substantial contribution to climate change mitigation in the sense of the Taxonomy Regulation is not made; the opposite is the case. This rules out the classification as “environmentally sustainable”.*

*The classification of the use of nuclear energy as “environmentally sustainable” cannot be considered valid from the outset with any possible justification.*

*In addition, the EU's energy policy assumptions and goals on the path to climate neutrality have changed significantly since 2 February 2022. As a result of the Russian war of aggression against Ukraine, which is contrary to international law, on 8 March 2022 the European Commission decided to immediately launch new and further actions, in particular to accelerate the production of green energy once again and to significantly reduce energy demand, also well before 2030.*

*The delegated act on the Taxonomy Regulation does not stand in isolation, as it were, but is an integral part of EU energy policy, which is currently undergoing a considerable shift. Continued adherence to the delegated act published on 2 February 2022 is therefore out of the question. Otherwise, the delegated act would be based on outdated and incorrect assumptions and would therefore also be contrary to Union law.*

## **I. Taxonomy Regulation and authorisation to adopt delegated acts**

On 18 June 2020, the European Parliament and the Council, as the European legislator, adopted the “*Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088*”,<sup>1</sup> hereafter called the Taxonomy Regulation.

The Taxonomy Regulation is intended to contribute to the European Green Deal by encouraging private investment in green and sustainable projects. The Regulation creates the world's first “green list” of sustainable economic activities – a common classification system with consistent terminology that investors can use if they want to invest in projects and economic activities with significant positive climate and environmental impacts. The taxonomy is intended to enable investors to direct their investments towards more sustainable technologies and companies, thus making a decisive contribution to the EU becoming climate neutral.<sup>2</sup>

In the Taxonomy Regulation, the legislator authorises the European Commission as the executive branch to issue implementing regulations, i.e., to issue so-called delegated acts. This authorisation is given in particular in Art. 8(4), Art. 10(3) and Art. 11(3) of the Taxonomy Regulation.

The European Commission has exercised this delegation of power by its Delegated Act (EU) 2021/2139 of 4 June 2021,<sup>3</sup> based on Articles 10(3)

---

<sup>1</sup> OJ 2020 L 198, 13.

<sup>2</sup> Cf. *European Commission*, Press release, 18 June 2020, IP 20/1112.

<sup>3</sup> Commission Delegated Regulation of 4 June 2021 “supplementing Regulation

and 11(3) of the Taxonomy Regulation, and by its Delegated Act (EU) 2021/2178 of 6 July 2021,<sup>4</sup> based on Article 8(4) of the Taxonomy Regulation.

In addition to this, however, the European Commission submitted a draft for a “complementary delegated act” on 31 December 2021. It published the final version of these further delegated acts (EU) 2021/2139 and (EU) 2021/2178 as “complementary delegated acts” on 2 February 2022.<sup>5</sup> The operation of natural gas and nuclear power plants in compliance with the criteria provided for in the Act shall be considered “environmentally sustainable” within the meaning of the Taxonomy Regulation. The “complementary delegated act” is to apply from 1 January 2023 (cf. Art. 3 of the Act).

## **II. Framework for action when adopting delegated acts**

The European Commission has not been given *carte blanche* by the delegation of power provided for in the Taxonomy Regulation. Rather, the European Commission is bound both formally and substantively, i.e., in terms of content, by the other requirements of the Taxonomy Regulation as well as by higher-level law in the form of primary law, in particular also by the requirements of the Treaty on the Functioning of the European Union

---

(EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives”, OJ 2021 L 422, 1.

<sup>4</sup> Commission Delegated Regulation of 6 July 2021 “supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation”, OJ 2021 L 443, 16.

<sup>5</sup> *European Commission*, Commission Delegated Regulation (EU) amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, published on 2 February 2022 as C(2022) 631/3 and on 9 March 2022 as C(2022) 631 final.

(TFEU).

Art. 290 TFEU clearly formulates this obligation of the European Commission, stating in paragraph 1:

*“A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.*

***The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.”*** (emphasis added by the author)

If the European Commission, with a delegated act that it intends to adopt, goes beyond the framework defined by the legislation of the European Parliament and the Council and by primary law in a binding manner with regard to the objectives, content, scope, and duration of the delegation of power in formal or substantive terms, the delegated act is unlawful. It may not be adopted by the European Commission and may not enter into force or be applied.

In order to ensure this and thus the binding of the European Commission to the superordinate legislative act, in this case the Taxonomy Regulation, and to primary law, the European Parliament and the Member States must now act accordingly vis-à-vis the European Commission.

For this purpose, Art. 290(2) TFEU provides that the delegated act cannot enter into force if the European Parliament or the Council objects within the period laid down in the legislative act. Art. 23(6) of the Taxonomy Regulation provides for a time limit of four months after transmission of the legal act to the European Parliament and the Council for raising objections.

In addition, Art. 263 TFEU provides the European Parliament and the individual Member States with the possibility of enforcing the provisions of the Taxonomy Regulation and of primary law against the European

Commission before the European Court of Justice by way of an action for annulment pursuant to Art. 263 TFEU.

### **III. Unlawfulness of the “complementary delegated act” of 2 February 2022 in terms of Union law**

#### **1. Classification of the use of natural gas as “environmentally sustainable” contrary to EU law**

The requirements for the classification as “environmentally sustainable” and thus at the same time for the assessment of the legality of the delegated act submitted by the European Commission are mainly derived from Art. 3, Art. 10, Art. 16, and Art. 17 of the Taxonomy Regulation.

The European Commission cannot extend these provisions independently; it is, see above, bound by the objectives and contents laid down by the legislator pursuant to Art. 290(2) TFEU.

With the draft published on 31 December 2021 and the way it planned to classify natural gas as sustainable in the sense of the taxonomy, the European Commission had already exceeded the binding legal framework it had been given. This applies even more to the version published by the European Commission on 2 February 2022, which further weakens the criteria for natural gas power plants from the perspective of climate change mitigation. In detail:

#### **a) Criteria for environmentally sustainable economic activities (Art. 3 Taxonomy Regulation)**

Art. 3 of the Taxonomy Regulation sets out the “Criteria for environmentally sustainable economic activities”. It states: <sup>[1]</sup><sub>SEP</sub>

*“For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity:*

*a) contributes substantially to one or more of the environmental objectives*

*set out in Article 9 in accordance with Articles 10 to 16;*

*b) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17;*

*c) is carried out in compliance with the minimum safeguards laid down in Article 18; and*

*d) complies with technical screening criteria that have been established by the Commission in accordance with Article 10(3), 11(3), 12(2), 13(2), 14(2) or 15(2)."*

All the requirements of Art. 3 of the Taxonomy Regulation must be met cumulatively, it is not sufficient that only one of them is met.

According to Art. 9(a) of the Taxonomy Regulation, the environmental objective within the meaning of Art. 3(a) of the Taxonomy Regulation is, in particular, climate change mitigation.

**b) No “substantial contribution to climate change mitigation”  
(Art. 10 Taxonomy Regulation)**

Art. 10(1) and (2) of the Taxonomy Regulation then specifies the environmental objective “climate change mitigation” and defines which economic activity is suitable to make a “substantial contribution to climate change mitigation” within the meaning of the Taxonomy Regulation.

Article 10(1) of the Regulation covers economic activities which

*“are consistent with the long-term temperature goal of the Paris Agreement through the avoidance or reduction of greenhouse gas emissions or the increase of greenhouse gas removals.”*

These requirements are not met from the outset with regard to the combustion of natural gas.

Art. 10(2) of the Taxonomy Regulation further identifies three categories of activities for which a substantial contribution to climate change mitigation

can be assumed because they are “transitional technologies”. Article 10(2) of the Taxonomy Regulation reads:

*“For the purposes of paragraph 1, an economic activity for which there is no technologically and economically feasible low-carbon alternative shall qualify as contributing substantially to climate change mitigation where it supports the transition to a climate-neutral economy **consistent with a pathway to limit the temperature increase to 1.5°C above pre-industrial levels**, including by phasing out greenhouse gas emissions, in particular emissions from solid fossil fuels, and where that activity:*

*a) has greenhouse gas emission levels 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, considering the economic lifetime of those assets.” (emphasis added by the author)*

These requirements must also all be met cumulatively. This is not the case for the operation of natural gas power plants under the criteria of the “complementary delegated act” of the European Commission:

#### **aa) No “consistency with a pathway to limit the temperature increase to 1.5°C”**

It is already doubtful whether allowing the use of fossil fuels beyond 2030 can be at all consistent with a pathway to limit the temperature increase to 1.5°C – see not least the considerations of the German Federal Constitutional Court on the need to *initiate at an early stage and thus now a safe path for the time after 2030*.<sup>6</sup>

However, it is precisely such use beyond 2030 that is to be classified as “sustainable” in the European Commission's current delegated act:

---

<sup>6</sup> Cf. Federal Constitutional Court, decision of 24 March 2021 – BvR 2656/18, i.a. fourth paragraph.



For power plants licensed before 31 December 2030, not only is there to be no time limit on operation, but in addition a conversion to “low-carbon gases” is not required until 31 December 2035. However, as their name suggests, these fuels are not greenhouse gas-free or climate-neutral, but merely greenhouse gas-reduced.

This means that this Regulation will permit the unlimited use of “low-carbon gases” in gas-fired power plants beyond 2035 and, as a result, uncontrolled additional emissions of greenhouse gases that are likely to consume the remaining emissions budget available under the 1.5-degree target in an equally uncontrolled manner.

The delegated act of the European Commission explicitly does not stipulate that investment in gas-fired power plants can only be sustainable if new and existing permits for these power plants stipulate from the outset or subsequently in the form of conditions that they may only use greenhouse gas-free or climate-neutral fuels without exception from 31 December 2035 at the latest.

Thus, the basic requirement of Art. 10(2) of the Taxonomy Regulation is already not fulfilled, the requirement to be “consistent with a pathway to limit the temperature increase to 1.5°C above pre-industrial levels” is not ensured.

Compared to the Commission's draft of 31 December 2021, the criteria for natural gas power plants have been weakened further in the version of 2 February 2022. In particular, the criterion requiring new natural gas power plants to emit 55 per cent less CO<sub>2</sub> than the power plant they replace has now been applied to the entire life of the new power plant. This in turn means that significantly higher emissions are possible in the initial phase, as a switch to green hydrogen is only to be made at the end of the operating period.

**bb) Obstructing the “development and deployment of low-carbon alternatives”**

Furthermore, the condition laid down in Art. 10(2)(b) of the Taxonomy Regulation, according to which “the development and deployment of low-carbon alternatives” must not be hampered, is not met.

The energy industry's need for new gas-fired power plants arises from the secure output or balancing capacity required to balance volatile renewables and ensure security of supply. There is a twofold risk of hampering the deployment of low-carbon alternatives, affecting the renewables themselves on the one hand and other flexibility options for ensuring security of supply on the other.

(1) An impediment to renewables as a low-carbon-alternative to new gas-fired power plants arises when gas-fired power plants are not used solely as a back-up to compensate for a weather-related low feed-in of renewables. In order to rule this out, it would be necessary to limit the annual operating hours of the gas-fired power plants. Only then would it be ensured that gas-fired power plants are actually used as “gap fillers” for renewables and do not – conversely – hamper their development.

However, the European Commission does not actually set an operating hours limit. Instead, the following “technical screening criteria” should be applied:

*“i. direct GHG emissions of the activity are lower than 270 g CO<sub>2</sub>e/kWh of the output energy, or annual GHG emissions of the activity do not exceed an average of 550 kg CO<sub>2</sub>e/kW of the output energy of the facility’s capacity over 20 years”*

This means that new power plants must either meet the limit of 270 g CO<sub>2</sub>e/kWh in relation to the kilowatt hour generated (“output energy”) or an annual budget of 550 kg CO<sub>2</sub>e/kW on average over 20 years.

(2) The first condition – the limit of 270 g CO<sub>2</sub>e/kWh – is completely unsuitable for limiting the annual operating hours from the outset.

(3) The second condition that may be chosen as an alternative – the annual budget of 550 kg CO<sub>2</sub>e/kW as an average over 20 years – also does not imply an effective limitation. This is clear from the following:

If this value were actually regarded as an annual limit, this would in fact be equivalent to a limitation of the operating hours. A modern gas-fired power plant with estimated emissions of 330 CO<sub>2</sub>e/kWh would thus be able to achieve 1,667 operating hours per year before the annual budget would be used up (0.33 kg CO<sub>2</sub>e/kWh/550 kg CO<sub>2</sub>e/kW = 1,667 h). First of all, this would be in line with the requirement of Art. 10(2)(b) of the Taxonomy Regulation to limit the operating hours and thus not hamper low-carbon alternatives such as renewables.

However, this is immediately counteracted by the addition of an average over 20 years. This is because it makes it possible to distribute the entire budget from the 20 years as desired over the life of the power plants: The total budget is therefore 20 years \* 550 kg CO<sub>2</sub>/kW = 11,000 kg CO<sub>2</sub>/kW. According to the ideas of the European Commission this can, for example, be used up completely or to a large extent in the first years of operation of the plant, with the consequence that gas-fired power plants then enter into massive competition with renewable energies on the electricity market and thus hamper their expansion and further development.

(4) This finding is reinforced by the fact that a conversion to “*renewable or low-carbon gases*” is not due to apply until 2036.

In addition, only the emissions of the “energy output” are to be considered in the annual carbon budget, so that no accounting of the total life-cycle emissions takes place. This, in turn, is crucial for low-carbon gases, as the main emissions from “blue hydrogen” (generated from natural gas by steam reformation in combination with carbon capture and storage) occur in the upstream chain. This is due to extremely climate-impacting methane emissions from the production, transport, and processing of natural gas, from the energy-intensive processes of carbon capture and storage, and technically induced losses from capture and storage itself. The hydrogen

produced, on the other hand, would nevertheless be considered carbon-free.

This is obviously not in the spirit of truly effective climate change mitigation. For the latter, it is irrelevant at which point in the supply, process or production chain climate-damaging emissions occur. The decisive factor for truly effective climate change mitigation is whether the climate-damaging emissions occur or not.

In this way of accounting per “energy output” intended by the European Commission, a carbon-free fuel thus defined does not consume the carbon budget. In other words, blending of these fuels would not limit the operating hours of gas-fired power plants. As a result, according to the European Commission's ideas, gas-fired power plants could be operated with high, if not unlimited, operating hours with fossil gas in the initial years and continue to operate at will during the later conversion to “low-carbon gases” without further depletion of the budget.

But this means nothing other than that these gas-fired power plants will also displace, or at least significantly limit, technologies that are significantly more advantageous in terms of climate policy, such as electricity generation from renewable energies, over their entire service life. This, in turn, is in conflict with Article 10(2)(b) of the Taxonomy Regulation.

(5) The above applies accordingly with regard to other flexibility options on the electricity market, such as making the electricity consumption of large consumers more flexible – which would also help to ensure security of supply. The potentially unlimited hours of operation for gas-fired power plants would also hamper these low-carbon alternatives.

(6) In addition to “direct” competition in the energy markets, new gas-fired power plants also hamper low-carbon alternatives for the following reasons:

When it comes to investments in energy infrastructure, on the one hand there is competition for limited funds from private (and public) sources. If gas-fired power plants also competed for green financial products, this

would tie up funds that could otherwise be invested in renewables, efficiency measures, or large-scale heat pumps, for example.

On the other hand, mandating the conversion of gas-fired power plants to hydrogen without further requirements would mean a substantial future consumption of hydrogen by the electricity and heating sectors, thus hindering decarbonisation in the industry and transport sectors. However, it is currently at least unclear whether enough hydrogen will be available at all in the future. According to calculations, 673 terawatt hours (TWh) of green hydrogen will be needed in 2030 for the decarbonisation of industry, shipping, and aviation alone.<sup>7</sup> The target from the European Commission's recent "REPowerEU" Communication<sup>8</sup> is to have 20 million tons of hydrogen available in 2030, which is equivalent to about 660 TWh. In other words, all the hydrogen that could be produced and imported for the foreseeable future would actually be needed to decarbonise the industrial and transportation sectors. In addition, the conversion of green hydrogen back into electricity is very inefficient, with an overall efficiency level of less than 40 per cent.

### **cc) Risk of lock-in effects**

The above under aa) and bb) is accompanied by the risk of considerable lock-in effects and thus a violation of Art. 10(2)(c) of the Taxonomy Regulation.

Allowing high, if not unlimited, operating hours increases the economic attractiveness of gas-fired power plants and their operation with fossil gas, see above.

---

<sup>7</sup> *Climate Action Network (CAN) Europe/European Environmental Bureau (EEB), Building a Paris Agreement Compatible (PAC) energy scenario, Technical summary of key elements, June 2020.*

<sup>8</sup> *European Commission, "REPowerEU: Joint European Action for more affordable, secure and sustainable energy", Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 March 2022, COM(2022) 108 final.*

This applies in particular to the possibility of operating power plants permanently with “low-carbon gases”, i.e., fuels that are not greenhouse gas-free or climate-neutral. Operators retain a strong economic incentive to continue operating the plants in the usual manner on a permanent basis. The hurdles for renewables and other flexibility options would thus remain just as permanent. But this is nothing less than a classic lock-in effect.

### c) Not an “enabling activity” (Art. 16 Taxonomy Regulation)

The operation of gas-fired power plants is also not an “enabling activity” within the meaning of Article 16 of the Taxonomy Regulation, i.e., it is not an activity that directly enables other activities to make a substantial contribution to environmental objectives.

This is because Art. 16 of the Taxonomy Regulation explicitly prohibits the lock-in effects just described for “enabling activities” as well, and the provision also requires consideration of the whole life-cycle.

Literally, Art. 16 of the Taxonomy Regulation reads:

*“An economic activity shall qualify as contributing substantially to one or more of the environmental objectives set out in Article 9 by directly enabling other activities to make a substantial contribution to one or more of those objectives, provided that such economic activity:*

*a) **does not lead to a lock-in** of assets that undermine long-term environmental goals, considering the economic lifetime of those assets;*

***and***

*b) **has a substantial positive environmental impact, on the basis of life-cycle considerations.** (emphasis added by the author)*

Like lock-in effects, “life-cycle considerations” stand in the way of classifying the operation of gas-fired power plants as sustainable, in two respects:

aa) On the one hand, with regard to “low-carbon gases”, for which, see above, the main environmental impact, for example in the use of blue

hydrogen, occurs precisely not in the combustion of the fuel, but in the supply chain.

bb) On the other hand, it can be assumed that considerable amounts of methane emissions are also released during the extraction, feed-in and transportation of natural gas. Without the extraction, feed-in and transportation of natural gas, however, the operation of natural gas power plants is simply not possible. In other words, life-cycle considerations must necessarily take into account extraction, feed-in and transportation as conditions that cannot be ignored for the operation of natural gas power plants. Even when “low-carbon gases” are used, it cannot be ruled out that they are based on natural gas, see the explanations above on blue hydrogen.

To date, there is no reliable and evaluated knowledge about the actual greenhouse gas balance of natural gas. There is no determination of methane emissions related to the extraction, feed-in and transportation of natural gas on the basis of independently collected and verifiable data. Rather, the available data are based on reports from the gas industry itself, as well as on statistical values and projections. According to current scientific findings, however, a leakage rate of about 2.3 per cent has been determined for the USA, for example.<sup>9</sup> This means that the actual leakage rate is 60 per cent higher than self-reported by the industry or projected by the Environmental Protection Agency (EPA) based on industry data.<sup>10</sup> And according to the International Energy Agency (IEA), actual methane emissions from the energy sector are 70 per cent higher than official figures to date.<sup>11</sup>

It is true that natural gas from different countries and sources differs, for example, in its specific composition. There are also differences between

---

<sup>9</sup> *Alvarez et al.*, Assessment of methane emissions from the U.S. oil and gas supply chain”, *Science* 361, 186 et seqq. (2018).

<sup>10</sup> *Alvarez et al.*, Assessment of methane emissions from the U.S. oil and gas supply chain”, *Science* 361, 186 et seqq. (2018).

<sup>11</sup> *IEA*, <https://www.iea.org/news/methane-emissions-from-the-energy-sector-are-70-higher-than-official-figures>, last accessed 11 April 2022.

specific extraction and transport methods, and so on. However, this does not change the fact that the new scientific findings obtained for the USA at least provide strong indications of considerable methane emissions also in the extraction, feed-in and transportation of natural gas in Europe and Russia, for example.

Methane is a greenhouse gas that contributes massively to climate change. Its impact on the climate is many times more than that of carbon dioxide: by a factor of 31 over a period of 100 years, and by a factor of 83 over a period of 20 years.<sup>12</sup> Methane emissions act as boosters for global warming. Even small(er) releases of methane are therefore of significant importance.

The United Nations Environment Programme (UNEP) describes the effect of methane emissions on average global warming in its recent report on global methane emissions, “*Global Methane Assessment – Benefits and costs of mitigating methane emissions*”<sup>13</sup> . According to this study, (recorded) methane emissions from the natural gas industry alone have so far contributed 0.1°C to global warming.

cc) Both the use of natural gas and “low-carbon gases” do not have a “substantial positive environmental impact, on the basis of life-cycle considerations”; in fact, the opposite is true.

#### **d) Significant impairment of environmental objectives (Art. 17 Taxonomy Regulation)**

Finally, according to Art. 17(1) and (2) of the Taxonomy Regulation:

---

<sup>12</sup> See *Intergovernmental Panel on Climate Change (IPCC)*, Sixth Assessment Report, Part 1, Climate Change 2021. The Physical Science Basis, 9 August 2021.

<sup>13</sup> *United Nations Environment Programme (UNEP)*, Global Methane Assessment – Benefits and costs of mitigating methane emissions, 6 May 2021, online at <https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emissions>, last accessed 11 April 2022.



“(1) ... **taking into account the life cycle of the products and services provided by an economic activity**, including evidence from existing life-cycle assessments, that economic activity shall be considered to significantly harm:

- a) climate change mitigation, where that activity leads to significant greenhouse gas emissions.

...

*(2) When assessing an economic activity against the criteria set out in paragraph 1, both the environmental impact of the activity itself and the environmental impact of the products and services provided by that activity **throughout their life cycle shall be taken into account, in particular by considering the production, use and end of life of those products and services.** (emphasis added by the author)*

Due to the very likely significant and extremely damaging impact of methane emissions associated with the extraction, feed-in and transportation of natural gas (see above), the criterion “significant harm to environmental objectives” is just as likely to be met.

#### **e) Precautionary principle (Art. 191(2) TFEU)**

Article 191(2) sentence 1 TFEU imposes an obligation to achieve a high level of environmental protection. Art. 191(2) sentence 2 TFEU stipulates that environmental policy is based on “the precautionary principle and on the principles that preventive action should be taken”. Article 191(2) sentence 2 TFEU constitutes a binding mandate to act for the Union institutions, i.e., also for the European Commission.

The precautionary principle in Article 191(2) sentence 2 TFEU not only legitimises action in the case of a mere concern about possible environmental damage below the danger threshold, but it also commits to risk avoidance.<sup>14</sup>

---

<sup>14</sup> See, for example, *Calliess*, in: *Calliess/Ruffert* (eds.), *TEU/TFEU*, 6th ed. 2022, Art. 191 TFEU, (28) et seqq.; *idem*, *Rechtsstaat und Umweltstaat* [Constitutional

In other words, action to protect the environment should not be taken only when there is a threat of damage caused by specific environmental hazards but should aim to minimise risks before they occur. As a result, there is an obligation to plan environmental precautions with the greatest possible foresight, with the aim of preventing environmental damage from occurring in the first place.

The precautionary principle is thus a key instrument for combating climate change. In particular, it would also be counteracted if the extremely high methane emissions that are very likely to be associated with the operation of natural gas power plants continued to be completely ignored by the European Commission in its classification of natural gas under the taxonomy.

## **2. Classification of the use of nuclear energy as “environmentally sustainable” in violation of EU law**

The European Commission's classification of the use of nuclear energy as “sustainable” is also incompatible with Art. 10, Art. 16 and Art. 17 of the overarching Taxonomy Regulation and the precautionary and polluter pays principles of Art. 191(2) TFEU.

The risks associated with the use of nuclear energy are at best only partially insurable, and operator liability is therefore regularly limited by law. This obviously contradicts the precautionary and polluter pays principles of primary law.

Furthermore, the following applies: An energy source that can only be

---

State and Environmental State], pp. 153 et seqq.; *Schröder*, Umweltschutz als Gemeinschaftsziel und Grundsätze des Umweltschutzes [Environmental Protection as a Community Goal and Principles of Environmental Protection], in: Rengeling (ed.), Handbuch zum europäischen und deutschen Umweltrecht [Handbook of European and German Environmental Law], 2003, § 9 Marginal note 35; *Lübbe-Wolff*, Präventiver Umweltschutz – Auftrag und Grenzen des Vorsorgeprinzips im deutschen und europäischen Recht [Preventive Environmental Protection – Mission and Limits of the Precautionary Principle in German and European Law], in: Bizer/Koch (eds.), Sicherheit, Vielfalt, Solidarität [Security, Diversity, Solidarity], 1998, pp. 51 et seqq.; *Wahl/Appel*, Prävention und Vorsorge [Prevention and Precaution], 1995, pp. 58 et seqq.

established if the state assumes liability already indicates in market terms that it cannot be a sustainably responsible energy source.<sup>15</sup> It leads to competitive distortion against those who focus on climate-friendly, sustainable energy sources.<sup>16</sup>

In addition, in particular

- with the legal opinion “Nuclear Power and the Taxonomy Regulation” of July 2021 prepared by *Rechtsanwälte Redeker pp.* on behalf of the Austrian Ministry for Climate Action,<sup>17</sup>
- the *Scientists for Future (S4F)* statement “Kernenergie und Klima” [Nuclear Energy and Climate] of October 2021<sup>18</sup> as well as
- the technical opinion (“Fachstellungnahme”) issued by the *Federal Office for the Safety of Nuclear Waste Management (BASE)* in September 2021 on the Report of the Joint Research Centre of the European Commission “*Technical assessment of nuclear energy with respect to the ‘do no significant harm’ criteria of Regulation (EU) 2020/852 (‘Taxonomy Regulation’)*”<sup>19</sup>

in order to avoid repetition, reference is made to these assessments in their entirety at this point.

Nuclear power generation does not fall into any of the categories for which a substantial contribution to climate change mitigation can be assumed because none of the conditions formulated in the overarching Taxonomy Regulation apply. Therefore, it is also irrelevant that the generation of

---

<sup>15</sup> This was clearly expressed by Germany’s *Federal Minister of Finance, Christian Lindner* at a meeting of the FDP on 6 January 2022.

<sup>16</sup> *Federal Minister of Finance Christian Lindner*, *ibid.*

<sup>17</sup> Online at [https://www.bmk.gv.at/dam/jcr:22c30412-4acd-4b9f-b150-b25998e16d6c/Redeker-Sellner-Dahs\\_Nuclear-Power-Taxonomy-Regulation.pdf](https://www.bmk.gv.at/dam/jcr:22c30412-4acd-4b9f-b150-b25998e16d6c/Redeker-Sellner-Dahs_Nuclear-Power-Taxonomy-Regulation.pdf), last accessed 11 April 2022.

<sup>18</sup> Online at <https://doi.org/10.5281/zenodo.5573719>, last accessed 11 April 2022.

<sup>19</sup> Online at [https://www.base.bund.de/SharedDocs/Downloads/BASE/DE/berichte/2021-06-30\\_base-opinion-jrc-report.pdf.pdf?\\_\\_blob=publicationFile&v=6](https://www.base.bund.de/SharedDocs/Downloads/BASE/DE/berichte/2021-06-30_base-opinion-jrc-report.pdf.pdf?__blob=publicationFile&v=6), last accessed 11 April 2022.

nuclear power is partly regarded as a low-carbon activity. As such, this is not sufficient to meet the requirements of the Taxonomy Regulation.

Nuclear power generation is not legally covered by the Taxonomy Regulation; it is not an environmentally sustainable investment. Nuclear energy does not make a significant contribution to an environmental objective as defined by the Taxonomy Regulation. Even the assumption that it is a (supposedly) low-carbon form of electricity generation is not sufficient according to the systematics of the regulation. Moreover, based on the studies obtained by the European Commission, it already cannot be ruled out that nuclear power generation affects other environmental objectives. The “do no significant harm” criterion of the Taxonomy Regulation is not met by nuclear power. Classifying the use of nuclear energy as sustainable is out of the question.

The delegated act published by the European Commission on 2 February 2022 thus violates Art. 10(1) and (2), Art. 16, and Art. 17(1) and (2) of the Taxonomy Regulation. For the reasoning in detail, reference is made in particular to the aforementioned legal opinion.<sup>20</sup>

### **3. Validity of delegation of power doubtful; need for an impact assessment**

a) Without this being of decisive importance according to the above, it must also be doubted whether the European Commission still has a valid delegation of power at all.

Firstly, there are clear and binding stipulations in terms of time, namely the deadline of 1 June 2021 for delegated acts based on Article 8(4) of the Taxonomy Regulation (cf. Article 8(4) sentence 2 of the Regulation) and the deadline of 31 December 2020 for delegated acts based on Article

---

<sup>20</sup> See footnote 17.

10(3), Article 11(3) of the Taxonomy Regulation (cf. Article 10(6), Article 11(6) of the Regulation). These deadlines have obviously expired.<sup>21</sup>

Secondly and most importantly, both Art. 8(4) and Art. 10(5), Art. 11(5) of the Taxonomy Regulation provide that only *one* delegated act shall be adopted at a time.

The legislator of the Taxonomy Regulation obviously wanted to ensure that the individual technologies are set in relation to each other with regard to their sustainability and effects, and that the result of such an overall view is then reflected in *a single delegated act*. The Taxonomy Regulation does not provide for a singular addition of certain technologies, as the European Commission has now presented.

b) Art. 23(4) of the Taxonomy Regulation further requires the European Commission to act in accordance with the principles and procedures contained in the “Interinstitutional Agreement of 13 April 2016 on better law-making” before adopting a delegated act. However, this means that the Commission should have conducted an impact assessment with consultation – especially considering the scope of the complementary delegated act and the broad public debate. By failing to do so, it has also acted contrary to Union law in this respect.

#### **IV. Consequences for the taxonomy of changes to EU energy policy in light of the Russian war of aggression**

In light of the Russian war of aggression against Ukraine, the following is critical with regard to the taxonomy and the delegated act published on the part of the European Commission:

---

<sup>21</sup> The general and open-ended provision of Art. 23(2) of the Taxonomy Regulation cannot override the detailed and specific provisions of Art. 8(4), Art. 10(6), Art. 11(6) of the Regulation. In this respect, the legal conflict of laws rule *lex specialis derogat legi generali* applies, the more specific regulation supersedes the general one. Accordingly, the more specific legal norm takes precedence over the more general one.

1. The EU imports 90% of its gas consumption, with Russia providing more than 40% of the EU's total gas consumption.

Whether, in what quantity and at what point in time this dependence on Russia could be replaced by imports from other states is, at least at present, an open question – irrespective of whether energy dependence on states such as Qatar, for example, can be desirable or even justifiable.

Qatar has sold 90 to 95 per cent of its LNG production on a long-term basis. This means that a maximum of ten per cent of the volumes end up on the spot market, where they can be purchased at short notice. With Qatar's annual production of a good 100 billion cubic meters, only over ten cubic metres would therefore be available at all.<sup>22</sup>

Nevertheless, on the one hand the European Commission apparently wants to adhere to its delegated act of 2 February 2022 and the criteria there for classifying the operation of natural gas power plants as “sustainable” within the meaning of the taxonomy.

On the other hand, the European Commission, in its Communication of 8 March 2022,

*“REPowerEU: Joint European Action for more affordable, secure and sustainable energy”<sup>23</sup>*

clearly points out the consequences of the EU's dependence on energy imports. The Communication states:

*“Following the invasion of Ukraine by Russia, the case for a rapid clean energy transition has never been stronger and clearer. The EU imports 90% of its gas consumption, with Russia providing more than 40% of the EU's total gas consumption. ...*

---

<sup>22</sup> See *Goldthau/Sitter*, Power, authority and security: the EU's Russian gas dilemma, *Journal of European Integration*, 2020, 42:1, 111 et seqq.

<sup>23</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 of 8 March 2022, COM(2022) 108 final.

*The EU needs to be ready for any scenario. It can reach independence from Russian gas well before the end of the decade. The sooner and more decisively we diversify our supply, accelerate the roll out of green energy technologies and reduce our demand of energy, the earlier we can substitute Russian gas.*

***Accelerating the green transition will reduce emissions, reduce dependency on imported fossil fuels, and protect against price hikes.***

***This communication sets out new actions to ramp up the production of green energy, diversify supplies and reduce demand, focusing primarily on gas, which significantly influences the electricity market and where the global market is less liquid.”***  
*(emphasis added by the author)*

In other words, the European Commission's energy policy actions have been based on significantly changed assumptions and targets since 8 March 2022. In its Communication, the European Commission proposes *new actions to ramp up the production of green energy and reduce demand.*

This in turn means that the assumptions and targets on which the Commission based its delegated act of 2 February 2022 with regard to the duration and scope of the operation of natural gas power plants were themselves revised only a short time later; the Commission's original assumptions and targets – even if one were to hypothetically assume them to have been correct at the time – are now outdated.

The Executive Vice-President for the European Green Deal, Frans Timmermans, said on the occasion of the launch of the “REPowerEU” Communication:

*“It is time we tackle our vulnerabilities and rapidly become more independent in our energy choices. Let's dash into renewable energy at lightning speed. Renewables are a cheap, clean, and potentially endless source of energy and instead of funding the*

*fossil fuel industry elsewhere, they create jobs here. Putin's war in Ukraine demonstrates the urgency of accelerating our clean energy transition.*<sup>24</sup>

The intention now is specifically to increase production and imports of biomethane and hydrogen from renewable sources, and to accelerate reductions in fossil fuel use in residential, commercial, industrial, and energy systems by increasing energy efficiency, expanding renewables and electrification, and eliminating infrastructure bottlenecks.<sup>25</sup>

Full implementation of the Commission's proposals under the "Fit for 55" package would already reduce annual fossil gas consumption by 30 per cent, or 100 billion cubic metres, by 2030. The measures under the "REPowerEU" plan could *gradually save at least 155 billion cubic metres of fossil gas*. This corresponds to the amount imported from Russia in 2021.<sup>26</sup>

*This means that there is still a saving of 55 billion cubic metres of gas to come by 2030, additional to the savings resulting from the implementation of "Fit for 55".*

However, if this is the case, the European Commission – and the Member States – cannot at the same time adhere to their delegated taxonomy act of 2 February 2022 without any changes. On the contrary, it is now even more important that no obstruction and lock-in effects are created to the detriment of renewable energies through investment subsidies in natural gas power plants and that independence from imports of fossil fuels can be achieved as quickly as possible.

The delegated act, like any other act, must be based on an accurate and current factual basis. If the factual basis changes fundamentally, a delegated act must be revised. This means that the question of whether and under what conditions the operation of natural gas power plants can

---

<sup>24</sup> See *European Commission*, Press release, 8 March 2022, IP 22/1511.

<sup>25</sup> See *European Commission*, COM(2022) 108 final and IP 22/1511.

<sup>26</sup> See *European Commission*, COM(2022) 108 final and IP 22/1511.



be considered sustainable must take into account the fact that a further 55 bcm reduction in gas demand (155 bcm instead of “only” 100 bcm) by the EU alone must be achieved by 2030.

2. Incidentally, the seventh recital of the Taxonomy Regulation, which overrides the delegated act, explicitly calls for the establishment of a systems-based and forward-looking approach to environmental sustainability that can be used, among other things, to *address the appearance of new threats*. The ninth recital requires *the prevention of new obstacles emerging*.

The use of the supply of energy or fossil fuels as a means of political pressure may well be understood as a new threat, and the continuation or creation of import dependencies as a new barrier in this sense.

Although the legislator of the Taxonomy Regulation may have initially had threats to the environment and market barriers in mind when looking at the seventh and ninth recitals, both recitals are worded in such an open manner that they are capable of encompassing the current changed geopolitical situation.

This is another reason why the European Commission must re-evaluate the present delegated act and withdraw it.

Since the delegated act is not to be applied until January 2023, no legally relevant reliance has been placed on it to date that could give rise to claims by developers or investors.

The withdrawal or retraction of a (delegated) act is also not an unusual occurrence. In 2015, for example, the Commission withdrew an entire legislative package on the circular economy,<sup>27</sup> and in 2016, a delegated act on transparency registers.<sup>28</sup>

3. Finally, with regard to the classification of the use of nuclear energy, it is worth quoting from *Novaya Gazeta* of 3 February 2022 which, after the

---

<sup>27</sup> See *European Commission*, Press release IP/15/4567.

<sup>28</sup> See *European Commission* [https://ec.europa.eu/transparency/documents-register/detail?ref=c\(2016\)7793&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=c(2016)7793&lang=en), last accessed 11 April 2022.

publication of the text version of the delegated act by the European Commission on 2 February 2022, described the extent to which Russia could benefit from this delegated act:

*“Sure, the idea is not to encourage investment in Russian companies and their projects. But Gazprom, Novatek and Rosneft can now - regardless of the active phase of the energy transition - make investment plans aimed at maintaining long-term demand from Europe. ... The same applies to nuclear energy: for political reasons Rosatom will find it difficult to obtain new orders for the construction [of nuclear power plants]. ... But in countries like Hungary or Bulgaria it has good chances. Moreover, Rosatom can offer much sought-after services involving the reprocessing of spent fuel rods from European power plants as well as supplying fresh fuel.”<sup>29</sup>*

As long as fuel rod imports from Russia are not covered by EU sanctions and the delegated act classifying the use of nuclear energy as “sustainable” in the sense of the taxonomy will be maintained, *Novaya Gazeta* 's assessment will remain valid in principle.<sup>30</sup>

In addition, it is not only the case that the supply of existing nuclear power plants in the EU has so far been exempt from the sanctions. Rosatom also still plans to build new reactors at Hanhikivi in Finland and Paks in Hungary. It is already surprising that the cooperation of the Siemens group with Rosatom is apparently seen by the German Federal Ministry of Economics solely as “a result of a business decision” and that a political dimension of the cooperation of Siemens and Rosatom is denied.<sup>31</sup> Adherence to the complementary delegated act of 2 February 2022 would actually explicitly

---

<sup>29</sup> See <https://www.eurotopics.net/en/275690/eu-natural-gas-and-nuclear-power-now-green>.

<sup>30</sup> See also <https://www.spiegel.de/wissenschaft/technik/brennstaebe-technik-betrieb-auch-bei-der-atomkraft-ist-europa-abhaengig-von-russland-a-80fd72fe-1448-41f0-9cda-7bccfe98b2d7>, last accessed 11 April 2022.

<sup>31</sup> See, for example, taz of 14/15 April 2022, “Siemens bleibt treu” [Siemens remains faithful].

encourage this reliance on Russian energy imports and cooperation under the taxonomy.

Berlin, 19 April 2022

Dr. Cornelia Ziehm  
Attorney at Law

*The English translation of this legal assessment was supported by the Heinrich-Böll-Stiftung European Union.*