

Europe in the Taxonomy Trap

Under European law, the Commission is not authorised to decide on the sustainability of nuclear power and natural gas

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On 02 February 2022, the European Commission adopted a delegated act on the EU climate taxonomy classifying nuclear energy and natural gas as “environmentally sustainable”. Germany has strong reservations; Austria and Luxembourg have already announced that they are ready to sue. This ceplnput looks into whether the European Parliament and the Council were ever in fact authorised by law to grant the Council power to adopt a delegated act on this fundamental issue.

- ▶ With the Taxonomy Regulation, the Commission has fallen into a trap in two respects: politically on the question of what constitutes “environmentally sustainable”; legally on the question of whether it can be authorised to decide on this in the first place.
- ▶ With its de facto taxonomy monopoly, the Commission has allowed itself to be given the right to classify economic activities as “environmentally sustainable”. Classification, however, as the current controversy shows, is highly contentious.
- ▶ If the Commission were to adopt the delegated act on the EU climate taxonomy, it would be virtually impossible to stop it under the ordinary procedure because there is no prospect of achieving the required majorities, either in Parliament or the Council. That only leaves proceedings in the European Court of Justice (ECJ).
- ▶ Under European law, Parliament and the Council cannot empower the Commission to classify the “environmental sustainability” of nuclear power and natural gas because this is a fundamental decision on a highly-contentious political issue and not simply a “non-essential” technical provision. The ECJ should therefore rule that the delegated act violated the concept of reserving essential elements for the EU legislator and was therefore invalid.

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1 Introduction

Late on New Year's Eve 2021, the European Commission published a draft "delegated act" as part of the "green taxonomy" indicating that it intends to classify nuclear energy and certain types of natural gas – subject to conditions – as "environmentally sustainable" economic activities. Although the publication of the draft act and its contents had already been expected in expert circles, it nevertheless triggered heated debate – Europe is deeply divided. On 2 February 2022, the Commission adopted the delegated act officially. France and numerous other EU Member States welcome the classification of nuclear power as sustainable. Austria and Luxembourg have, by contrast, announced that they are ready to take the matter to the ECJ. Although Germany firmly rejects the sustainability of nuclear power, it is generally in favour of classifying natural gas as a sustainable "bridging technology" for achieving climate neutrality.

This cepInput analyses the background to the current controversy. Section 2 sets out the basic principles of the green taxonomy. Section 3 explains the procedure for adopting "delegated acts" which is of particular significance in light of European law in this case. Section 4 assesses the current situation from the politico-economic and legal perspectives. Section 5 looks at how this situation may develop going forward.

2 Green taxonomy and delegated act

2.1 What is the purpose of the green taxonomy?

After lengthy preparatory work, the Commission submitted a draft Regulation to introduce the green taxonomy in May 2018.¹ It is based on the idea of using a classification system to establish criteria for determining whether an economic activity can be classified as "environmentally sustainable". The aim is to facilitate determination of the environmental sustainability of an investment and, in the medium term, channel more private funds into "environmentally sustainable" activities.² Following tough negotiations, the European Parliament and the Council finally agreed on the introduction of the green taxonomy at the end of 2019. The corresponding Regulation came into effect in July 2020.^{3,4}

The Taxonomy Regulation lays down a total of four conditions which all have to be met in order for an economic activity to be deemed "environmentally sustainable":⁵

1. It must contribute "substantially" to at least one of six environmental objectives; these are (1) climate change mitigation, (2) climate change adaptation, (3) the sustainable use and protection of water and marine resources, (4) the transition to a circular economy, (5) pollution prevention and control, and (6) the protection and restoration of biodiversity and ecosystems.
2. It must "do no significant harm" to any of these six environmental objectives.

¹ Proposal COM(2018) 353 of 24 May 2018 for a Regulation on the establishment of a framework to facilitate sustainable investment.

² Ibid., p. 1.

³ Council of the EU, Sustainable finance: EU reaches political agreement on a unified EU classification system, Press release of 18 December 2019.

⁴ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ["Taxonomy Regulation"].

⁵ Taxonomy Regulation [(EU) 2020/852], Art. 3 and 9.

3. It must comply with the “technical screening criteria” that are used to decide how the activity qualifies as contributing “substantially” to one of the six environmental objectives or does “significant” harm to them.
4. It must be in compliance with the minimum safeguards for employees.

The Regulation also distinguishes between three different classes of economic activity which may be deemed “environmentally sustainable”:⁶

1. Activities that are sustainable per se: These are activities that in themselves meet the four aforementioned conditions. They include, for example, the generation, transmission or use of renewable energy and serve e.g. the environmental objective of “climate change mitigation” because they contribute to the avoidance or reduction of greenhouse gas emissions.
2. “Enabling activities”: These are activities that do not contribute “substantially” to the environmental objectives themselves but enable other economic activities to make a “substantial” contribution. A common example of this is the manufacture of wind turbines.
3. “Transitional activities”: These are activities for which there is (as yet) “no technologically and economically feasible low-carbon alternative” but which contribute substantially to the objective of climate change mitigation and support the transition to climate neutrality.

2.2 What is a “delegated act”?

The Regulation states that the Commission has the power to specify the aforesaid “technical screening criteria” by way of so-called “delegated acts”. These are “non-legislative acts of general application to supplement or amend certain non-essential elements” of a legislative act (“basic legislative act”).⁷ The EU legislator – European Parliament and Council – has thereby conferred legislative powers on the Commission. These enable the Commission to determine, in detail, the criteria used to decide how an economic activity either contributes “substantially”, or does “significant” harm, to an environmental objective.⁸ In making this determination, the Commission must meet a total of eleven conditions: Thus, it must respect the principle of technological neutrality and consider both the short and long-term impact of an activity on an environmental objective. As far as possible, the criteria also have to be quantitative and contain thresholds, and must be based on “conclusive scientific evidence” and the precautionary principle. In general, it is the case that the criteria must always exclude power generation activities that use solid fossil fuels e.g. coal, and that the Commission thus cannot classify them as “environmentally sustainable”.⁹ The Commission can specify the screening criteria for each of the six aforementioned environmental objectives. At the same time, it is also authorised by the EU legislator to adopt the corresponding delegated acts for the environmental objectives of “climate change mitigation” and “adaptation to climate change”, by the end of 2020¹⁰ and, for the other environmental objectives, by the end of 2021¹¹.

⁶ Ibid., Art. 10– 16.

⁷ Treaty on the Functioning of the European Union (TFEU), Art. 290.

⁸ Taxonomy Regulation [(EU) 2020/852], Art. 23 in conjunction with Art. 10 (3), Art. 11 (3), Art. 12 (2), Art. 13 (2), Art. 14 (2), Art. 15 (2).

⁹ Ibid., Art. 19.

¹⁰ Ibid., Art. 10 (3), Art. 11 (3).

¹¹ Ibid., Art. 12 (2), Art. 13 (2), Art. 14 (2), Art. 15 (2).

As soon as the Commission officially adopts a delegated act it must simultaneously forward it to the Parliament and the Council.¹² Both EU legislative organs may then raise objections to the adopted act within four months. If they do not, the act will come into effect. Both Parliament and the Council may extend the four-month time limit by two months.¹³ Objections to a delegated act can be expressed by Parliament with a simple majority of its members – currently 353 MEPs.¹⁴ The Council requires a qualified majority for this¹⁵ which is achieved when at least 55% of the Member States agree, representing at least 65% of the population of the EU.¹⁶ Consequently, at least 20 Member States are needed to block a delegated act in the Council.

3 Adoption of delegated acts on the green taxonomy

3.1 First delegated act on the EU Climate Taxonomy

After entry into force of the Taxonomy Regulation in July 2020, the Commission initially concentrated on drafting the delegated acts on the first two environmental objectives – climate change mitigation and adaptation to climate change. On 4 June 2021, it submitted an initial delegated act containing the technical screening criteria to determine which economic activities contribute substantially to climate change mitigation or adaptation to climate change (“EU Climate Taxonomy”).¹⁷ This act covers the activities of approx. 40% of listed companies in the EU in sectors which are responsible for almost 80% of direct greenhouse gas emissions in the EU.¹⁸ The act therefore does not yet include all economic activities from which the Commission is expecting a substantial contribution to the two climate objectives. Thus, the Commission explained at the time that the agricultural sector and the natural gas sector were not yet included. In the latter case, there was still a need for clarification, particularly because public feedback had revealed “a wide range of views”. The Commission also refrained from specifying criteria for nuclear power as it wanted to wait for the research results from in-house experts.¹⁹ This initial delegated act on the EU Climate Taxonomy was also fiercely debated, both in Parliament and the Council. Ultimately, however, neither of the EU legislative organs raised any objection, so it came into force on 1 January 2022.²⁰

3.2 Second delegated act on the EU climate taxonomy

On 31 December 2021, the Commission followed up and presented a draft delegated act to complement the first act on the EU Climate Taxonomy. This primarily contains the technical screening criteria for additional economic activities, in particular in the natural gas and nuclear power sectors. With its “preliminary draft”, the Commission has launched a consultation process, within which,

¹² Ibid., Art. 23 (5).

¹³ Ibid., Art. 23 (6).

¹⁴ TFEU, Art. 290 (2).

¹⁵ Ibid.

¹⁶ Ibid., Art. 238 (2).

¹⁷ Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (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.

¹⁸ EU Commission, Communication COM(2021) 188 of 21 April 2021, EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal, p. 1 and 2.

¹⁹ EU Commission, Questions and Answers of 21 April 2021, EU Taxonomy Climate Delegated Act and Amendments to Delegated Acts on fiduciary duties, investment and insurance advice.

²⁰ Official Journal of the European Union, L 442, 9 December 2021.

among other things, Member States could register their responses.²¹ The Commission first set a deadline for contributions of 12 January 2022, but then extended it to 21 January 2022.²² On February 2, the Commission adopted the delegated act officially.^{23,24} The date marks the beginning of the four/six-month scrutiny period during which Parliament and the Council can officially raise objections. A final decision will therefore be taken until summer 2022.

According to the delegated act to supplement the Climate Taxonomy, the Commission classifies nuclear power and natural gas, under precisely specified requirements, as “environmentally sustainable”. According to the Commission, these are “transitional activities” which can “contribute to the transition to climate neutrality”. The Commission bases its assessment on “scientific advice” and justifies the classification based on “current technological progress.”²⁵

3.3 Further delegated acts on the green taxonomy

Even with the two aforementioned delegated acts on the EU Climate Taxonomy, it is still not complete. Thus, further economic sectors such as agriculture still have to be represented in further additions to the Climate Taxonomy. Furthermore, in July 2021, the Commission announced in a strategy paper that it would submit another delegated act for the other four environmental objectives in the first half of 2022. This will then take effect as of 2023.²⁶

4 Assessment

4.1 Politico-economic Assessment

The start of 2022 has seen a powerful reaction in politics and the media to the news that nuclear power and natural gas are to be classified as “environmentally sustainable” in the context of the green taxonomy. Thus, France, Poland, Hungary and Finland advocate the inclusion of nuclear power whilst Germany, Portugal, Denmark, Luxembourg and Austria expressly reject it.²⁷ The submission of the corresponding delegated act did not come as a surprise, however. For months, the Commission had been agonising over the exact wording of the act and has postponed its publication several times. In the run up to submission, there were indications that – subject to conditions – both nuclear power and natural gas would be admitted into the green taxonomy as transitional activities. Importantly, bilateral talks between France and Germany – at the highest level – helped to find a compromise. The current widespread indignation at political level regarding the classifications, particularly in Germany, therefore, seems questionable. Two aspects are worth pointing out in this regard:

²¹ The Commission did not even publish the draft officially but confirmed its existence in a press release: EU Commission, [Press release](#) of 1 January 2022, EU Taxonomy: Commission begins expert consultations on Complementary Delegated Act covering certain nuclear power and gas activities.

²² Euractiv, 11 January 2022, [EU delays deadline on green investment rules for nuclear and gas](#).

²³ EU Commission, [Press release](#) of 2 February 2022, EU Taxonomy: Commission presents Complementary Climate Delegated Act to accelerate decarbonisation.

²⁴ C(2022) 631/3, Commission Delegated Regulation (EU) .../... of XXX 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

²⁵ EU Commission, [Press release](#) of 2 February 2022, EU Taxonomy: Commission presents Complementary Climate Delegated Act to accelerate decarbonisation.

²⁶ EU Commission, Communication COM(2021) 390 of 6 July 2021, Strategy for Financing the Transition to a Sustainable Economy.

²⁷ Handelsblatt of 3 January 2022, [EU-Taxonomie: Welche EU-Länder wollen Gas und Atomkraft als nachhaltig einstufen? Die wichtigsten Antworten auf die Brüsseler Pläne](#).

Firstly, the Member States agreed in the Council and in Parliament, to establishing the green taxonomy and, in so doing, authorised the Commission to specify the technical screening criteria for the “environmentally sustainable” economic activities by way of delegated acts. The two delegated acts on the Climate Taxonomy are the result. The EU legislative organs have already approved the first of these acts and thereby, in principle, given their blessing to this approach. It therefore seems ill-founded to call this into question in relation to the second delegated act on nuclear power and natural gas, even if these do appear to be more politically sensitive.

Secondly, some Member States have now announced that they are going to fight most notably the classification of nuclear power as a sustainable technology. Many, including Germany made this clear in their respective responses to the Commission to be submitted by 21 January 2022.²⁸ However, after the adoption of the delegated act, individual Member States and Members of Parliament are only able to oppose or support it by collective action. An individual rejection of the assertion that nuclear power or natural gas are environmentally sustainable will not be possible. Each Member State and Member of Parliament must then show their colours and undertake a joint assessment of the delegated act.

In the recent discussions, the question frequently being asked is whether it is appropriate to classify nuclear power and certain natural gas technologies as environmentally sustainable under the green taxonomy – particularly in view of the EU’s objective of achieving climate neutrality by 2050. It is argued that classifying nuclear power and natural gas as “environmentally sustainable” may, on the one hand, help to achieve climate neutrality but, on the other, hold back renewable energy. Far less consideration is being given to the question of whether establishing a classification system for environmentally sustainable activities is actually necessary or worthwhile at all. This, however, is precisely the question that needs to be asked. Many actors point out that the green taxonomy could be an important reference point for investors which would help them to invest capital more sustainably. In addition, they say that the taxonomy would help to provide a more uniform understanding of what sustainability means, which would already be of value in itself. And that a taxonomy, which is generally considered to be reliable, could also minimise the risks associated with “green washing”.

These considerations certainly carry weight but they also require critical scrutiny. It is absurd to think that a classification of sustainable activities will take account of the views and preferences of all actors, whether in terms of policy or definition. Irrespective of the decision of the Commission regarding the classification of nuclear energy or natural gas, there will always be actors – whether from science, politics and the real economy or from the financial sector – who consider the decision to be wholly or partly inappropriate. De facto, therefore, the Commission was not able to provide a “correct” classification; what it can do, however, is to use the classification politically to map out the economic and technological energy pathway. **The fundamental error arises from the fact that there is no objective and uniform definition of “sustainability”, nor can there be one. A classification system like the green taxonomy blocks the way for different approaches and leaves no room for alternative assessments. Many actors will not therefore regard it as credible.** Due to the huge importance of the green taxonomy, however, it is virtually impossible for it to make way for alternative competing taxonomies with different screening criteria. The whole situation is after all further complicated by the fact that extensive lists of criteria are still required for the other environmental objectives. These will

²⁸ Bundesministerium für Wirtschaft und Klimaschutz, [Stellungnahme](#) der Bundesregierung zur Taxonomie der Europäischen Union, 22 January 2022.

complicate the taxonomy, which is already several hundred pages long, and pose the risk of further conflicts of interest between the various environmental objectives, such as that which exists, in the case of nuclear power, between the objective of climate change mitigation and that of reducing environmental pollution.

Immediately after submission of the draft of the second delegated act on the EU taxonomy, Austria and Luxembourg,²⁹ as well as environmental groups such as Deutsche Umwelthilfe³⁰, announced that they were ready to sue.³¹ Criticism centres on the claim that, in classifying nuclear power as an “environmentally sustainable economic activity” which “contributes substantially to climate change mitigation”, the Commission has breached numerous requirements of the Taxonomy Regulation. Consequently, the Commission is in breach of the authorisation, conferred upon it by the Taxonomy Regulation pursuant to Art. 290 Treaty on the Functioning of the European Union (TFEU), to adopt delegated acts³² in which it can specify “technical screening criteria” to determine the “environmental sustainability” of a specific economic activity.

4.2 Legal Assessment

Leaving aside how far breaches of the Taxonomy Regulation by the Commission’s second delegated act on the EU Climate Taxonomy, alleged by potential claimants such as Austria,³³ do actually exist as specified, and whether or not such claims ultimately have any chance of success in the ECJ, a far more fundamental question arises from the point of view of European law: **Was the EU legislator – European Parliament and Council – ever in fact entitled, pursuant to Art. 290 TFEU, to authorise the Commission, by way of the Taxonomy Regulation, as a basic legislative act, to decide by means of a delegated act whether certain forms of energy – such as nuclear power or natural gas – can be classified as a “sustainable economic activity”?**

The whole purpose of granting power to the Commission to adopt “non-essential elements” by means of delegated acts pursuant to Art. 290 TFEU, is to ensure that “secondary EU legislation”, enacted by the EU legislator during the complex ordinary legislative procedure, is not overburdened by detailed technical provisions, and to facilitate the fast and flexible adaptation of this “tertiary EU legislation” to take account of new developments.³⁴ Pursuant to Art. 290 (1), para. 1 TFEU, however, the EU legislator may, under the Taxonomy Regulation, as the basic legislative act, delegate to the Commission the power to adopt “non-legislative acts of general application” only to “supplement or amend” certain “non-essential elements”. The fact that “essential” elements can only be regulated by the EU legislator itself, in a basic legislative act, is expressly clarified in Art. 290 (1), para. 2, sentence 2 TFEU, which states that the “essential elements of an area” are “reserved for the legislative act and accordingly

²⁹ Redaktionsnetzwerk Deutschland of 7 January 2022, [Streit um Atomkraft: Luxemburg und Österreich klagen gegen die EU-Kommission](#).

³⁰ Deutsche Umwelthilfe e.V. of 10 January 2022, [Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas: Handlungsnotwendigkeiten der Bundesregierung](#).

³¹ In a [press release](#) from 2. February 2022, the Austrian government repeated its readiness to sue the adopted delegated act.

³² Taxonomy Regulation [(EU) 2020/852], Art. 23 in conjunction with Art. 10 (3), Art. 11 (3), Art. 12 (2), Art. 13 (2), Art. 14 (2), Art. 15 (2) and Art. 19.

³³ Redeker/Sellner/Dahs (2021), Nuclear Power and the Taxonomy Regulation – Final Report on behalf of the Federal Ministry Republic of Austria for Climate Action, Environment, Energy, Mobility, Innovation and Technology, [Legal Analysis and Summary](#) of 2 July 2021.

³⁴ Gellermann in: Streinz, EUV/AEUV, 3rd Edn. 2018, Art. 290 TFEU, para. 1; Schmidt in: von der Groeben / Schwarze / Hatje, Europäisches Unionsrecht, 7th Edn. 2015, Art. 290 TFEU, para. 3.

shall not be the subject of a delegation of power“. The “concept of essential elements” aims to safeguard the institutional balance between the EU organs and prevent the primary task of the European Parliament and the Council as the EU legislator, from being eroded by the transfer of legislative powers to the Commission.³⁵ This arises from the principle of democracy which states that essential decisions should be made by the directly and democratically elected legislator and not by the executive.³⁶

As plausible as the rationale behind this allocation of tasks between the institutions may be, there remains the major challenge of clarifying the unspecific legal term “essential” in the individual case, and of distinguishing the “essential elements of an area”, that are reserved for the EU legislator, from the “non-essential elements”, clarification of which it may delegate to the Commission. Although the EU legislator basically retains a certain scope for discretion in this regard,³⁷ it is not free in the way it exercises its discretion but must be guided by objective criteria that can be verified by the court.³⁸ In this respect, the ECJ has so far applied generous standards in its judicial review of the delegation of powers to the Commission, has allowed the EU legislator a wide scope for discretion and also upheld the delegation of “far-reaching” powers.³⁹

There is at least as yet “no detailed theory of the concept of essential elements” to be found in ECJ case law.⁴⁰ In view of the importance of delegated acts in reducing the procedural burden, considerations relating to economy of procedure play an important role in determining whether a particular issue is “non-essential” and therefore open to regulation by the Commission by means of a delegated act. This alone, however, cannot be used as a basis for the decision on whether legislation must be enacted by the EU legislator in the complex ordinary legislative procedure or by the Commission in a “slimmed down” procedure. **In general, provisions are considered to be “essential” when – rather than a “non-political executive clarification”⁴¹ – they require a political decision in the sense of a fundamental alignment of EU policy.**⁴² “The more political the decision, the more likely it will be regarded as essential.”⁴³ A sign that a decision is of a political nature may be, e.g., its relevance to social values or its potential for conflict.⁴⁴

The intensity of the current debate on the EU climate taxonomy shows that there can hardly be a more political and conflict-prone decision in the area of European climate and energy policy than

³⁵ Gellermann in: Streinz, EUV/AEUV, 3rd Edn. 2018, Art. 290 TFEU, para. 7 citing further references; Schmidt in: von der Groeben / Schwarze / Hatje, Europäisches Unionsrecht, 7th Edn. 2015, Art. 290 TFEU, para. 25 citing further references.

³⁶ Ibid.

³⁷ Schmidt in: von der Groeben / Schwarze / Hatje, Europäisches Unionsrecht, 7th Edn. 2015, Art. 290 TFEU, para. 25 citing further references.

³⁸ Ibid.; Nettesheim in: Grabitz/Hilf/Nettesheim, Das Recht der EU, 74th Update 2021, Art. 290 TFEU, para. 38 citing further references.

³⁹ Settled case law, cf. e.g. ECJ, Case C-159/96, *Portugal v. Commission*, Judgement of 19 November 1998, ECLI:EU:C:1998:550, para. 40 et seq.; Case C-23/75, *Rey Soda*, Judgement of 30 October 1975, ECLI:EU:C:1975:142, para. 10/14; Case C-22/88, *Vreugdenhil*, Judgement of 29 June 1989, ECLI:EU:C:1989:277, para. 16; Case C-478/93, *Netherlands v. Commission*, Judgement of 17 October 1995, ECLI:EU:C:1995:324, para. 30; Case C-9/95, C-23/95, C-156/95, *Belgium and Germany v. Commission*, Judgement of 4 February 1997, para. 36; Schmidt in: von der Groeben / Schwarze / Hatje, Europäisches Unionsrecht, 7th Edn. 2015, Art. 290 TFEU, para. 27; Nettesheim in: Grabitz/Hilf/Nettesheim, Das Recht der EU, 74th Update 2021, Art. 290 TFEU, para. 38 citing further references.

⁴⁰ Nettesheim in: Grabitz/Hilf/Nettesheim, Das Recht der EU, 74th Update 2021, Art. 290 TFEU, para. 38.

⁴¹ Ibid., para. 41.

⁴² ECJ, Case C-240/90, *Germany v. Commission*, Judgement of 27 October 1992, ECLI:EU:C:1992:408, para. 37; Ruffert in: Callies/Ruffert, EUV/AEUV, 6th Edn. 2022, Art. 290 TFEU, para. 15 citing further references; Gellermann in: Streinz, EUV/AEUV, 3rd Edn. 2018, Art. 290 TFEU, para. 38 citing further references.

⁴³ Nettesheim in: Grabitz/Hilf/Nettesheim, Das Recht der EU, 74th Update 2021, Art. 290 TFEU, para. 41.

⁴⁴ Ibid.

the question of whether nuclear power or natural gas “contribute substantially to climate change mitigation” as “environmentally sustainable activities”. It is not without good reason that each EU Member State retains the right to choose between the different energy sources under Art. 194 (2), sub-para. 2 TFEU (“reservation of sovereignty on energy-policy”). Thus, due to varying national circumstances, preferences and assessments of the consequences of environmental policy and risks to safety, as well as conflict-prone discussions lasting for decades, Germany, for example, decided to phase-out nuclear power whilst France opted to expand it. Even if the EU taxonomy’s classification of this form of energy as “environmentally sustainable” or conversely as “not environmentally sustainable” does not, at least formally, affect the Member States’ fundamental decisions in this regard, it does have far-reaching consequences – which were in fact the express aim of the EU taxonomy – when it comes to directing the corresponding investments. **Consequently, in the overall analysis, such a classification cannot be described as a non-political, “non-essential” issue within the meaning of Art. 290 TFEU.**

Ultimately, with its proposal for the EU taxonomy itself and the graded legislative procedure to specify “environmentally sustainable economic activities”, the Commission has set a trap for itself in two respects, at least as regards the evaluation of energy types based on climate-policy considerations: It emerges that, in this respect, (1) there is no objective, EU-wide uniform definition of “sustainability” and (2) the politically highly contentious issue of the sustainability of certain types of energy is anything but “non-essential” – and certainly cannot therefore be decided by the Commission in the context of a delegated act. Right from the outset, therefore, the EU legislator misconstrued the Taxonomy Regulation in breach of Art. 290 TFEU when it delegated such classification powers to the Commission. Delegating the decision on these sensitive issues to the Commission may have been an easy way out for the Member States – particularly France and Germany with their conflicting views on nuclear power. **Under European law, however, the Commission cannot under any circumstances be empowered to decide on the highly contentious political issue of the environmental sustainability of e.g. nuclear power. Only the EU legislator itself, if anyone, can rule on such “essential” fundamental issues. The ECJ should therefore declare the corresponding delegation of decision-making power to the Commission as invalid. Its classification of nuclear energy as “environmentally sustainable”, being based on such delegation of power, would then automatically become legally invalid.** Whether, in the event of a claim being brought on this basis, the ECJ could bring itself to make such a ruling, however, is another matter entirely, in view of the reticence so far shown in its case law.

5 Outlook

Member States could respond to the draft delegated act on the EU climate taxonomy by 21 January 2022. Unsurprisingly, Germany⁴⁵ has decided against classifying nuclear power as “environmentally sustainable” and in favour of classifying natural gas as a sustainable “bridging technology” for achieving climate neutrality. The final sentence of the German response is worthy of attention however: “In view of the fundamental and political importance of the issues being considered, the Federal Government believes that an ordinary legislative procedure and a public consultation would be appropriate because this would ensure that the Member States and the European Parliament have a reasonable possibility of exerting influence.”⁴⁶ This can be interpreted as a – diplomatically phrased but still clear – warning to the Commission that Germany is not excluding the option of bringing a claim in the ECJ for breach

⁴⁵ Deutsche Bundesregierung, [Stellungnahme zur Taxonomie der Europäischen Union](#) of 21 January 2022.

⁴⁶ Ibid., end of p. 3.

of the concept of essential elements under Art. 290 TFEU. Whether this will persuade the Commission to refrain from adopting the delegated act as drafted remains to be seen. There is no indication that the opponents of nuclear power and natural gas will achieve the necessary majorities in Parliament and the Council to prevent the delegated act from coming into effect. Aside from whether the claims against a delegated act, announced by Austria et al, would succeed in the ECJ, it is already clear: one way or another, the Commission is stuck in a taxonomy trap of its own making and has succeeded in deeply dividing Europe on climate and energy policy.

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