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Defining Sustainability: Who Can Solve the Discord on the Taxonomy Regulation?

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Author Léo Gotarda

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1. Abstract

The Taxonomy Regulation is an example of mainstreaming of the climate objectives of the European Union and a perfect candidate to study its boundaries. It notably raises the question to which extent the legislator and the European Commission have the possibility to shape the definition of what is sustainable when it comes to climate. This issue is highlighted in a context where Member States have conflicting views and interests on what should be sustainable, with the inclusion of nuclear and gas being challenged by some Member States in front of the Court of Justice of the European Union. This paper argues that the Treaties give the legislator a wide margin of discretion in defining what is sustainable and that the Commission's ability to define activities as sustainable is limited by the powers delegated to it by the legislature in the basis act, in this case the Taxonomy Regulation.

Keywords: Taxonomy Regulation – Sustainability – Sustainable Activities – Article 11 TFEU – Article 194 TFEU – Energy Rights of Member States – Delegation of powers.

2. Introduction

Regulation (EU) 2020/852, the so-called 'Taxonomy Regulation' or 'Green Taxonomy', adopted in June 2020, is a classification instrument that sets out uniform criteria at the Union level for determining whether an economic activity can qualify as 'environmentally sustainable'.[1] With this instrument, the Union legislator wishes to give more clarity and increase transparency for the investors, with the aim of redirecting finance flows towards more sustainable investments, i.e., compatible with a path towards climate neutrality.[2] However, the Taxonomy Regulation does not prescribe nor prohibit certain types of investment and an activity that does not fulfil the Taxonomy criteria may still be pursued without being labelled as 'sustainable'.[3]

Under the Taxonomy Regulation, for an activity to be recognised as sustainable it must respect the following four criteria contained in Art. 3: i) contribute substantially to one or more of the environmental objectives; ii) not significantly harm any of the environmental objectives, i.e., comply with the 'Do No Significant Harm' (thereafter 'DNSH') principle; iii) be carried out in compliance with minimum social safeguards and iv) comply with technical screening established by the European Commission (hereafter 'the Commission').

The Commission adopted the first batch of technical screening criteria with the Climate Delegated Act,[4] identifying therewith activities contributing substantially to climate change mitigation or adaptation and to be therefore qualified as 'sustainable'. However, the Commission could not establish technical screening criteria for gas and nuclear activities and include them in the Climate Delegated Act since it considered that it lacked sufficient science-

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1 *Taxonomy Regulation* is referring to 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, OJ, L 198, 2020.

2 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM(2018) 97 final, 2018 at 4; Recitals (3) and (6) of Taxonomy Regulation, *supra* note 1; Already in 2001 did the Commission underline that the sustainable development goal need 'major reorientation of public and private investment towards new, environmentally-friendly technologies' and that one of the main threats would be emission of greenhouse gases, see Communication from the Commission to the Council and the European Parliament, A sustainable Europe for a better world: A European Union strategy for sustainable development, COM (2001) 264 final, 2001 at 3.

3 CHRISTOPH BRÖMMELMEYER, 'Nachhaltige Finanzmärkte für eine Renaissance der Kernenergie?' (2022) 2022:2 *EWS* 70 at 74.

4 *Climate Delegated Act* is referring to 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, C/2021/2800, OJ, L 442, 2021.

based data on whether nuclear power and gas activities could respect the DNSH principle under the criteria of the Taxonomy Regulation[5].

After seeking the Report of the Joint Research Centre,[6] and two further opinions[7] on the latter report, to assess the sustainability of nuclear power energy in light of the DNSH principle, the Commission, in accordance with the delegation of powers accorded to it by the Taxonomy Regulation,[8] proposed a draft for a Complementary Climate Delegated Act on gas and nuclear energies on the 31st of December 2021, shortly before new year's eve, and left it open for review by the experts of the Platform for Sustainable Finance and the Member States Expert Group on Sustainable Finance initially until the 12th of January before extending to the 21st of January 2022 after complaints concerning the insufficient time for review had been received. The draft was approved in principle by the European Commission on 2nd February 2022 and was formally adopted on 9th March 2022, when all language versions were made available.[9] The Complementary Climate Delegated Act[10] entered into force on 1st January 2023 since neither the Council of the European Union (thereafter 'the Council') nor the European Parliament (thereafter, 'the EP') opposed their veto within the 4 month-delay provided for in the Taxonomy Regulation,[11] despite the failed attempt of the EP to reach a majority to do so.[12]

The Complementary Climate Delegated Act has attracted attention from many sides[13] as it raises some concerns regarding the legality of the inclusion of gas and nuclear energy. There seems to be a scission between member states, with on one side the anti-nuclear led by Austria,[14] which in addition to challenging state aid measures authorised for nuclear power,[15] has also launched

5 Art. 17 of the Taxonomy Regulation, *supra* note 1.
6 *Technical assessment of nuclear energy with respect to the 'do no significant harm' criteria of Regulation (EU) 2020/852 ('Taxonomy Regulation') Publications Office*, by R KONINGS ET AL (2021).
7 *SCHEER review of the JRC report on Technical assessment of nuclear energy with respect to the 'do no significant harm' criteria of Regulation (EU) 2020/852 ('Taxonomy Regulation')* (SCIENTIFIC COMMITTEE ON HEALTH, ENVIRONMENTAL AND EMERGING RISKS, 2021); *Opinion of the Group of Experts referred to in Article 31 of the Euratom Treaty on Joint Research Centre's report technical assessment of nuclear energy with respect to 'do no significant harm' criteria of Regulation (EU) 2020/852 ('Taxonomy Regulation'), Ref. Ares(2021)4263701* (GROUP OF EXPERTS REFERRED TO IN ARTICLE 31 OF THE EURATOM TREATY, 2021).
8 Art. 23 of the Taxonomy Regulation, *supra* note 1.
9 Commission Delegated Regulation (EU) .../... of 9 March 2022 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, C(2022) 631 final.
10 *Complementary Climate Delegated Act* is referring to Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 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, C/2022/631 OJ L 188, 2022.
11 Art. 23 of the Taxonomy Regulation, *supra* note 1.
12 'Taxonomy: MEPs do not object to inclusion of gas and nuclear activities | News | European Parliament', (6 July 2022), online: <https://www.europarl.europa.eu/news/en/press-room/20220701IPR34365/taxonomy-meps-do-not-object-to-inclusion-of-gas-and-nuclear-activities>; Complementary Climate Delegated Act, *supra* note 10.
13 CHRISTOPH LAMY & INGA SOPHIA BACH, 'Die EU-Taxonomie-Verordnung und ihre Auswirkungen auf die Energiewirtschaft' 2020:10 *EnWZ* 348–354; FLORIAN KLIMSCHA & MATHIAS LEHNER, 'EU-Taxonomie' (2021) 1:3 *Nachhaltigkeitsrecht* 302–313; *Nuclear Power and the Taxonomy Regulation, On behalf of the Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and technology, Final Report*, by SIMONE LÜNENBÜRGER, MATTHIAS KOTTMANN & KORBINIAN REITER (2021); *Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas: Handlungsnotwendigkeiten der Bundesregierung*, by CORNELIA ZIEHM, Deutsche Umwelthilfe e.V. (2022); BRÖMMELMEYER, 'Nachhaltige Finanzmärkte für eine Renaissance der Kernenergie?', *supra* note 3.
14 Which together with Denmark, Germany, Portugal and Luxembourg renewed their position that nuclear cannot be part of the EU Taxonomy 'EU green label should be nuclear-free, Luxembourg urges', online: <https://delano.lu/article/eu-green-label-should-be-nucle>.
15 First against the development of a third nuclear reactor at Hinkley Point in the United-Kingdom, see Judgment of the General Court of 12 July 2018, *Republic of Austria v European Commission*, Case T-356/15, EU:T:2018:439, [Case T-356/15 *, Hinkley Point C* [2018]]; Judgment of the Court of 22 September 2020 [GC], *Republic of Austria v European Commission*, Case C-594/18 P, EU:C:2020:742, [Case C-594/18 P*, Hinkley Point C* [2020]]; and then against the development of two nuclear reactors at the Paks II plants in Hungary, see Judgment of the General Court of 30 November 2022, *Republic of Austria v European Commission*, Case T-101/18, EU:T:2022:728, [Case T-101/18*, Paks II* [2022]].

an annulment action against the European Commission's Complementary Climate Delegated Act.[16] On the other side, eleven countries, led by France, are urging for the inclusion of nuclear energy in the Taxonomy Regulation[17] and signed on 28th February 2023 a declaration in Stockholm launching an alliance for nuclear power in Europe.[18] Although nuclear power retains a lot of attention, gas has its fair share of opponents as well. Four NGOs are suing the Commission and contest either one or both inclusions in the Taxonomy Regulation.[19] A Member of the European Parliament has also brought an action for annulment against the Complementary Delegated Act, arguing that it infringed the Parliament's legislative competence.[20] The inclusion of nuclear power and gas in the Taxonomy Regulation is highly controversial, the delay that the Commission took to release the draft after having received three reports on the compatibility of nuclear energy with the Taxonomy criteria and the numerous positions against or in favour of the Complementary Climate Delegated Act and the pending legal actions show how contentious the matter is.

Although the decision should be based on science and the principle of technological neutrality, as foreseen by the Taxonomy Regulation, it seems that defining which activities qualify as environmentally sustainable under the Taxonomy Regulation has taken a political turn. For this reason, this article seeks to question who is to define what 'sustainability' is and which activities in the end are 'sustainable' under the framework of EU law, especially taking into consideration the Treaties[21] and the criteria of the Taxonomy Regulation itself. All the fuss around the inclusion of nuclear energy (and gas) in the Complementary Climate Delegated Act added to the fact that the situation around nuclear energy does not seem as straightforward as it could be and that it has many opponents and proponents, make it an excellent case study for defining what is sustainable.[22] It will therefore be analysed here whether nuclear energy can legally be defined as sustainable within the ambit of the Commission's delegation of powers.

In the first part, this article will seek to answer the question by looking at the Treaty level to see if there are any constitutional limits to the inclusion of a source of energy into the Taxonomy

16 CAMILLA HODGSON, 'Challenge against EU "green" label for gas and nuclear energy steps up', *Financial Times* (10 October 2022); Action brought on 7 October 2022, *Austria v Commission*, Case T-625/22, [Action brought on 7 October 2022, *Austria v Commission*, Case T-625/22].

17 The economy and energy ministers from Bulgaria, Croatia, Czech Republic, Finland, France, Hungary, Poland, Romania, Slovakia, and Slovenia pressed for the inclusion of nuclear energy in the Taxonomy in a press box that they commonly signed, see '«Nous, Européens, avons besoin du nucléaire!»', (10 October 2021), online: *Le Figaro* <https://www.lefigaro.fr/vox/societe/nous-europeens-avons-besoin-du-nucleaire-20211010>.

18 The above-mentioned countries and the Netherlands have signed the declaration in Stockholm, see FRÉDÉRIC SIMON, 'Eleven EU countries launch alliance for nuclear power in Europe', *Euractiv* (1 March 2023), online: <https://www.euractiv.com/section/energy-environment/news/eleven-eu-countries-launch-alliance-for-nuclear-power-in-europe/>.

19 After having requested an internal review of the Complementary Climate Delegated Act, see KATE ABNETT, 'Greenpeace to sue EU over "green" label for gas and nuclear', *Reuters* (9 February 2023), online: <https://www.reuters.com/business/sustainable-business/greenpeace-sue-eu-over-green-label-gas-nuclear-2023-02-09/>; *Request for internal review*, by RODA VERHEYNEN & JOHN PETERS, 0049/22 /R /R/jp (GREENPEACE E. V., 2023), ClientEarth, Greenpeace, WWF, Friends of the Earth Germany, and Transport & Environment, decided to bring the matter in front of the General Court, see Action brought on 18 April 2023, *ClientEarth and Others v Commission*, Case T-215/23, .

20 It must be underlined that it is the first time that the Court had to rule on the legal standing of a Member of the EP to challenge delegated acts of the Commission. In its Order, the General Court denied the lack of standing and found the action inadmissible since the exercise of the applicants' rights connected with the exercise of the EP legislative competence are to be exercised according to the Parliament's internal procedures and might not be affected, in this regard, by the adoption of the Complementary Climate Delegated Act, see Order of the General Court of 21 June 2023, *Repasi v Commission*, Case T-628/22, EU:T:2023:353, [Case T-628/22, *Repasi v Commission*[2023]].

21 The "Treaties" refer to the Treaty on European Union (hereafter "TEU") and the Treaty on the Functioning of the European Union (hereafter "TFEU").

22 Gas, as a fossil fuel, is less interesting for the case study as it seems clear from the premises that it is unsustainable as supported by the IPCC reports and the IEA that indicate that a pathway compatible with a climate neutral world in 2050 cannot include any new investment in fossil energy, see IEA, 'Net Zero by 2050 – A Roadmap for the Global Energy Sector. Flagship Report', (May 2021), online: *IEA* <https://www.iea.org/reports/net-zero-by-2050> at 11.

and which margin the Treaties leave to define what is 'sustainable.' In the second part, the focus will be made on the procedural aspect of recognising an activity as sustainable, especially the limits of the powers of each actor, i.e., the Council and the EP as co-legislators, the Commission, and the Court of Justice of the European Union (hereafter 'the Court'), and how the definition of what is sustainable could be defined through secondary and primary law. Along these two parts, the nuclear test case will be assessed in light of the different findings.

3. The Existence of a Competence to Regulate on Sustainability and to Define Some Energy Sources as Sustainable

Secondary legislation needs to comply with the primary law that constitutes the Treaties of the European Union and its functioning. Specific clauses may limit the extent of the legislative and delegated powers attributed to the different institutions when it comes to defining which activities, especially energy-related activities, are deemed environmentally sustainable. The first element of importance is the scope of the clauses relating to environment and sustainable development. Their scope may (not) limit the discretion of the power of the legislator when adopting a legislative act defining what sustainability is, such as the Taxonomy in this case (1). The second element concerns the rights that Member States retain in the energy field which have the potential to limit the power of the legislator when it adopts an act that may affect the energy mix and the general structure of the energy supply of Member States, as understood under Arts. 192(2)(c) and 194(2) TFEU (2). The last element with which the legislator must be concerned when legislating in this domain regards the adoption of the legislative act on the appropriate legal basis (3).

1.1. The scope of sustainable development as defined by the Treaties

1.1.1. The Definition of the Principle of Sustainable Development

The discretion that the legislator has when defining what is sustainable depends on the scope entailed by the principle, as it is called in the preamble of the Treaties, of sustainable development.[23] The 'principle' is mentioned various times in the Treaties and a literal interpretation may indicate the existence of obligations for the Union, e.g., the Union shall establish an internal market that shall work for sustainable development[24] and must integrate environmental protection requirements into all EU policies with a view to promoting sustainable development.[25]

23 The preamble of the Treaty on the European Union states that the Member States are "DETERMINED to promote economic and social progress for their peoples, taking into account the *principle of sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields" (emphasis added).
24 Art. 3(3) TEU.
25 Art. 11 TFEU.

Despite the absence of a definition of this principle in the Treaties, and although some found the term 'sustainable development' to be rarely defined and used as a substitute for 'positive, favourable development' thereby losing its environmental content,[26] the concept was nevertheless defined in the 80s with the Brundtland report, which defined it as a development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[27] It is considered an overarching societal or long-term goal that integrates the three following dimensions: environmental protection, social justice, and economic development.[28] The different provisions in the Treaties and their practical application suggest that 'sustainable development' could be more a guideline for policies than a meaningful legal concept,[29] and this is, at least, the position of the Commission that treats 'sustainable development' as a global objective.[30] The concept of 'sustainable development' may lack the clarity needed in a legal context when found in a legal provision[31] and the integration of the three dimensions of sustainable development do not clarify whether one dimension has to prevail over the other and how conflicts are to be resolved.

1.1.2. The Law of Physics in Favor of a Non-Derogable Ecological Core for Sustainable Development

It has been argued that sustainable development has a core content according to which development should not exceed the objective 'planet boundaries'[32] in order to preserve the life-supporting ecological system and be sustainable.[33] The concept of 'planetary limits'[34] is to be found in the natural science literature and may be for a physicist what legal boundaries are for a lawyer, limits that one ought not to exceed. The concept states that humans are significantly affecting 'planetary limits' that once superseded may endanger the possibility for the planet to remain a safe and viable space. If one is to interpret the concept of sustainable development in relation to the law of physics, then it could mean that 'the concept inhabits a non-derogable ecological core. At this core lie the 'unchanging and universal laws of nature'[35] and the absence of this core would render the concept meaningless.[36] In the same vein, it has been argued that there are 'non-negotiable ecological limits of our planet' and that 'the environmental integration core of the principle of sustainable development is the key'[37] to respect them. Under this

26 LUDWIG KRÄMER, *EU Environmental Law* (SWEET & MAXWELL, 2012) at 11.
27 GRO HARIEM BRUNDTLAND, 'World commission on environment and development' (1985) 14:1 *Environmental policy and law* 26–30 at para 27.
28 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mainstreaming Sustainable development into EU policies: 2009 Review of the European Strategy for Sustainable Development, COM(2009) 400 final, 2009 at 2; BEATE SJÅFJELL, Quo vadis, Europe? The significance of sustainable development as objective, principle and rule of EU law in *Non-State Actors, Soft Law and Protective Regimes: From the Margins*, Cecilia M. Bailliet ed (CAMBRIDGE UNIVERSITY PRESS, 2012) 318 at 254.
29 KRÄMER, *EU Environmental Law, supra* note 26 at 11.
30 A sustainable Europe for a better world, COM (2001) 264, *supra* note 2 at 2.
31 JULIAN NOWAG, *Environmental integration in competition and free-movement laws* (OXFORD UNIVERSITY PRESS, 2016) at 26.
32 JOHAN ROCKSTRÖM ET AL, 'Planetary boundaries: exploring the safe operating space for humanity' (2009) 14:2 *Ecology and society*.
33 CHRISTINA VOIGT, 'Article 11 in Light of the Principle of Sustainable Development in International Law' in *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* Routledge, Beate Sjåfjell and Anja Wiesbrock ed (2014) at 31.
34 In 2009, nine planetary boundaries were proposed: Climate change; Ocean acidification; Stratospheric ozone depletion; Atmospheric aerosol loading; Biogeological chemical flows: interference with Phosphorus and Nitrogen; Global freshwater use; Land-system use, Rate of biodiversity loss; and Chemical pollution, ROCKSTRÖM ET AL, 'Planetary boundaries: exploring the safe operating space for humanity', *supra* note 32.
35 VOIGT, 'Article 11 in Light of the Principle of Sustainable Development in International Law', *supra* note 33 at 45.
36 *Ibid* at 46.
37 BEATE SJÅFJELL, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, Beate Sjåfjell and Anja Wiesbrock ed (ROUTLEDGE, 2014) at 53.

acceptation, secondary legislation would have to be compatible with this ecological core and ensure that it does not cross the planet's boundaries in order for humanity to remain on a safe and liveable planet.

1.1.3. The Mere Integration of EU Environmental Considerations

Others have argued that the concept of sustainable development does not require more than integrating environmental considerations on the same footing as social and economic considerations.38 The principle, contained in Art. 11 TFEU as well, can be construed, as an objective or an autonomous principle, as a rule of reference.[39] As a rule of reference, 'environmental protection requirements' could be defined by other norms and not the principle itself, Art. 11 TFEU would then refer to the environmental objectives contained in Art. 191(1) TFEU and environmental legislations pursuing these objectives[40]. Therefore, the Union legislator, when enacting legislation that is directly pursuing environmental objectives, should take into account the objective to 'deal with regional or worldwide environmental problems, and in particular combating climate change'.[41]

The legally binding objective of climate neutrality by 2050 contained in the 'EU Climate Law',[42] adopted on the basis of Art. 192(1) TFEU that permits the legislator to adopt legislation according to the ordinary legislative procedure that follows the environmental objectives of Art. 191(1) TFEU including the fight against climate change, would therefore qualify as an 'environmental protection requirement' that is to be integrated into all EU policies, including the Taxonomy Regulation, which is part of the internal market policy that should be, as the Treaties remind, sustainable.[43] Art. 6(4) of the 'EU Climate Law'[44] also abounds in this direction and states that '[t]he Commission shall assess the consistency of any draft measure or legislative proposal, including budget proposals, with the climate-neutrality objective set out in Art. 2(1) [of the Climate Law].' Even if this represents more a procedural requirement rather than a substantive requirement, it puts an obligation on the Commission to explain the compatibility of any new proposal with the climate neutrality objective. Moreover Art. 7 TFEU, the Coherence principle, also argues in that direction since it requires coherence between the different policies of the EU.[45] By extension, the Taxonomy Regulation, which pursues a market objective, would

38 CHRISTOPHE VERDURE, 'La protection de l'environnement à la suite du traité de Lisbonne: quelles conséquences liées à la consécration du principe de cohérence?' (2017) 53:2 *Cahiers de droit européen* 467–495 at 473.
39 ANDRÉ NOLLKAEMPER, 'Three conceptions of the integration principle in international environmental law' in *Environmental Policy Integration* (ROUTLEDGE, 2012) 34 at 25.
40 *Ibid* at 26; NOWAG, *Environmental integration in competition and free-movement laws, supra* note 31 at 25.
41 Art. 191(1) TFEU.
42 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ L 243, 2021.
43 Arts. 26 TFEU and 3(3) TEU.
44 This article is relied on by Austria in the first plea of its action for annulment that it brought against the Complementary Climate Delegated Act, see Action brought on 7 October 2022, *Austria v Commission*, Case T-625/22, *supra* note 16.
45 Art. 7 TFEU states that 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers', for an explanation see VERDURE, 'La protection de l'environnement à la suite du traité de Lisbonne', *supra* note 38.

nevertheless have to take into consideration Arts. 11 and 191(1) TFEU and be consistent with the 'environmental protection requirements'[46] that include the climate neutrality objective.

1.1.4. Compatibility of the Taxonomy Regulation with the Principle of Sustainable Development

Considering the above, the Taxonomy Regulation shall at least ensure that the environmental objectives of the EU, in a spirit of coherence and considering the mainstreaming clause mandating the integration of environmental requirement, i.e., the climate neutrality objective and other environmental objectives established in secondary legislation are respected. In a stricter interpretation of the sustainable development principle, the Taxonomy Regulation should ensure that it does not have for consequence to overshoot the planetary boundaries and derail planet earth from a safe trajectory.

In practice, this would mean that the climate neutrality compatible threshold of 100g of CO2/kWh, which was recommended by the Technical Expert Group,[47] for an energy to contribute substantially to climate change mitigation would have to be interpreted strictly or at least, when the emissions are higher, be limited in time and coherent with a trajectory ensuring climate neutrality by 2050. For these reasons, the inclusion of gas could contradict Art. 11 TFEU since emitting emissions above the determined threshold is incompatible with the legally binding objective of climate neutrality.

On the same ground, certain activities in emission-intensive sectors showing thresholds that are not compatible with the legally binding objective of climate neutrality could be declared incompatible with the principle of sustainable development. In the basic material industry, such as steel or cement production, the criteria are based on the EU-ETS threshold and do not present a path to climate neutrality.[48]

The inclusion of nuclear energy would also have to respect this threshold and ensure that the storage of highly radioactive waste does not infringe the norms that would constitute the 'environmental protection requirements. Nuclear energy emits few carbon dioxides (CO2)[49] and therefore complies with the threshold.

In the end, the principle of sustainable development, even when interpreted in its stricter version, i.e., having a 'non-derogable ecological core'. leaves some margin of appreciation for the legislator within the criteria that are defined by science. Different paths towards neutrality can be sustainable when it comes to climate, as long as the total emission does not overcome the remaining carbon budget and is aligned with the objective of climate neutrality by 2050. An activity emitting greenhouse gases can be sustainable if final emissions are neutral in the end, i.e., emissions are compensated by enough absorptions from carbon sinks. Different countries may as well have different notions of what is sustainable and the risks that they are willing to

46 NOWAG, *Environmental integration in competition and free-movement laws, supra* note 31 at 20.
47 *Taxonomy: Final report of the Technical Expert Group on Sustainable Finance* (EU TECHNICAL EXPERT GROUP ON SUSTAINABLE FINANCE, 2020) at 21.
48 FRANZISKA SCHÜTZE ET AL, 'EU taxonomy increasing transparency of sustainable investments' (2020) 10:51 *DIW Weekly Report* 485–492 at 492.
49 *Rapport d'information fait au nom de la Commission des affaires européennes sur l'inclusion du nucléaire dans le volet climatique de la taxonomie européenne des investissements durables*, by DANIEL GREMILLET, CLAUDE KERN & PIERRE LAURENT, Sénat, Session ordinaire 2021-2022, No 213 (2021) at 23–24.

assume. Some countries may consider the effects of renewables more acceptable than the ones of nuclear energy, but it is for Member States to decide which compatible path they intend to take, as they remain free to determine their energy mix as long as they respect the climate objectives of the Union. For this reason, defining sustainability at the EU level should permit the establishment of a broad framework defining which activities are sustainable. Their identification should not compel Member States to follow a specific path, only a sustainable one.

1.2. The limitation of the Union's energy competence

It has been argued that the (non-)inclusion of different sources of energy in the Taxonomy Delegated Acts may affect the energy rights of Member States under Art. 194(2) TFEU.[50] The Taxonomy, having as its objective redirecting financing towards green investments, could have the effect of hindering new investments for nuclear energy in the case that this source of energy was not considered to be taxonomy-aligned anymore, since it is the most capital-intensive energy supply,[51] and is therefore sensible to the cost of financing. This raises the question of whether the reserve of competence of Member States contained in Art. 194(2) TFEU could limit the competence of the EU to establish a Taxonomy that defines some energy-related activity as non-sustainable, therefore having the potential to affect the energy mix of certain Member States. Although Member States retain the right to determine their energy mix according to Art. 194(2) TFEU, the EU may still regulate this matter (A). Moreover, the scope of Art. 194(2), read together with Art. 192(2)(c) TFEU, indicates that the Taxonomy Regulation does not infringe these energy rights (B).

1.2.1. The Limits to the Scope of the Caveat in Article 194(2) TFEU

1.2.1.1. The absence of an absolute limit

The Union was formally endowed with an energy legal basis with the Lisbon Treaty,[52] Art. 194 TFEU, although it already used to regulate energy matters through the environmental legal basis.[53] As it is stated in Art. 194(2) TFEU, measures pursuing the objectives of the energy policy,[54] as provided for in Art. 194(1) TFEU, 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Art. 192(2)(c)'. Member States

50 *Ibid* at 43.
51 KONINGS ET AL, 'Joint Research Centre Technical Assessment of Nuclear Energy with respect to the 'do no significant harm' criteria', *supra* note 6 at 38.
52 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 2007.
53 The successive reforms of the energy market intended to achieve the liberalisation of the latter, and the regulation of the EU regarding energy efficiency or renewable energy where adopted before the 'constitutionalisation' of the energy competence, see PATRICK THIEFFRY, 'Les politiques européennes de l'énergie et de l'environnement: rivales ou alliées?' (2009) 4 *Revue des affaires européennes* 783–810 at 788; PATRICK THIEFFRY, 'Suites de l'accord de Paris *(bis)* : la proposition de paquet legislatif "Une énergie propre pour tous les Européens"' (2017) 2 *RTDEur* (Chroniques Droit européen de l'environnement) 275 at 282.
54 The objectives of the Energy Policy, as provided for in Art. 194(1) TFEU are: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

retain 'energy rights'[55] that limit the action of the Union in the field of energy.[56] However, these rights are not absolute as the wording of Art. 194(2) TFEU indicates, they should be applied without prejudice to Art. 192(2)(c) TFEU. The latter provides that the Union may interfere with these rights when pursuing environmental policy objectives, up to a certain threshold, that if reached has for consequence the use of the special legislative procedure with unanimity. The Court observed in the case *Poland v Parliament and Council*[57], that measures taken to pursue environmental objectives 'necessarily affect the energy sector of Member States', and that for this reason Art. 192(2)(c) TFEU has to be interpreted in a strict manner. The contrary 'would risk having the effect of making recourse to the special legislative procedure, which the Treaty FEU intended as an exception, into the general rule'.[58] Unanimity is only for situations where 'the primary outcome sought by that measure is to significantly affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State.'[59]

It seems highly unplausible that Art. 194(2) TFEU provides for an absolute competence for Member States, thereby excluding that of the Union.[60] The objectives of reducing greenhouse gases would be rendered unimplementable[61] and the adoption of the Energy Union governance[62] and the Climate Law[63] would not have been permitted. If 194(2) TFEU were not interpreted as a threshold, as is the case for 192(2)(c) TFEU, it would dramatically amputate the competence of the EU in the energy field.[64] It would be paradoxical that the Lisbon amendment intended to restrict the energy competence ex-post.[65] Therefore, the 'energy rights' of Member States shall not be understood as prohibiting any measure that hinders them in their energy choices.

1.2.1.2 A caveat limited to measures taken under the energy policy clause

However, it remains to be seen whether the caveat of Art. 194(2) TFEU apply beyond the scope of this article, and whether it can limit the action of the Union when adopting measure pursuing different objectives, such as the establishment or the functioning of the internal market. It has

55 ANGUS JOHNSTON & EVA VAN DER MAREL, 'Ad Lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194 (2) TFEU' (2013) 22:5 *European Energy and Environmental Law Review* at 181.
56 F. PERALDI LENEUF, 'La Politique Européenne Sur Les ENR et l'Efficacité Énergétique : Éclatement Des Responsabilités Ou Politique Intelligente ?' in *Vers une politique européenne de l'énergie*, Claude Blumann, Bruylant, 2012, 87.
57 Judgment of the Court of 21 June 2018, *Republic of Poland v European Parliament and Council of the European Union*, Case C-5/16, EU:C:2018:483, [Case C-5/16, *Poland v Parliament and Council* [2018]].
58 *Ibid* at para 44.
59 *Ibid* at para 46.
60 JOHNSTON & VAN DER MAREL, 'Ad Lucem? Interpreting the new EU energy provision', *supra* note 55 at 197.
61 FRÉDÉRIQUE BERROD & ANTOINE ULLESTAD, *La mutation des frontières dans l'espace européen de l'énergie* (LARCIER, 2015) at 128; KAISA HUHTA, 'The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector' (2021) 70:4 *International & Comparative Law Quarterly* 991–1010 at 993.
62 Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ L 328, 2018.
63 *EU Climate Law*, *supra* note 42.
64 JOHNSTON & VAN DER MAREL, 'Ad Lucem? Interpreting the new EU energy provision', *supra* note 55 at 184; HUHTA, 'The Scope of State Sovereignty under Article 194(2) TFEU', *supra* note 61 at 1008.
65 VIKTOR SZABO, 'The EU Member States' Right to Electricity Mix' (2016) 10:1 *Masaryk University Journal of Law and Technology* 23–45 at 32.

been argued that the caveat of the Art. 194(2) TFEU applies solely when this legal basis is used.[66] This answer can be inferred from the reasoning of the General Court in the case *Poland v Commission*[67], where Poland argued that its energy rights under Art. 194(2) TFEU were infringed by a decision of the Commission. The General Court recognised the applicability of the caveat in the framework of the energy policy. However, since the legal basis of the decision was Art. 192 TFEU, the applicable caveat was the one of Art. 192(2)(c) TFEU solely. Therefore, the caveat of Art. 194(2) TFEU was not applicable.[68] The General Court stated in another paragraph of the decision in clearer terms that 'there is no reason to suppose that the second subparagraph of Art. 194(2) TFEU establishes a general prohibition to assign that right that is applicable in European Union policy in the area of the environment.'[69]

In consequence, measures adopted under Art. 114 TFEU would not be concerned by the limitation contained in Art. 194(2) TFEU. Nevertheless, a measure still must be adopted on the right legal basis which is to be determined through the aim and the content of the measures at stake since a different legal basis may necessitate the use of a different legislative procedure. This will be the concern of the next part.

1.2.2. The Innocuity of the Taxonomy Regulation Towards Member States' Energy Rights

Since the action for annulment against the inclusion of nuclear and gas energies in the Complementary Climate Delegated Act from Austria[70] and several NGOs[71] are still pending, the question of whether the non-inclusion of nuclear power in the Taxonomy could affect the Member States' 'energy rights' protected under Art. 192(2)(c) TFEU is not hypothetical.

1.2.2.1. The incapacity of the Taxonomy alone to affect Member States' energy rights

In the actual framework, the Taxonomy Regulation aims to increase the transparency of companies and financial products[72] by merely labelling the condition for activities to qualify as sustainable as a means to fight 'greenwashing'[73] without prescribing or prohibiting any private and institutional investors to invest in specific energy.[74] The Taxonomy Regulation does not aim to significantly affect the energy mix of Member States, as it is not a decision about the energy policy but rather a cornerstone of the Capital Markets Union of the EU, which plan to create a

66 *Ibid* at 31; for a detailed explanation, see HUHTA, 'The Scope of State Sovereignty under Article 194(2) TFEU', *supra* note 61 at 1000; LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at para 222ff.
67 Judgment of the General Court of 7 March 2013, *Republic of Poland v European Commission*, T-370/11, EU:T:2013:113, [Case T-370/11*, Poland v Commission* [2013]].
68 *Ibid* at para 13.
69 *Ibid* at para 17.
70 Action brought on 7 October 2022, *Austria v Commission*, Case T-625/22, *supra* note 16; HODGSON, *supra* note 16; JULIA VOSKOBOINIKOVA ET AL, 'EU: Austria files legal challenge in CJEU against the Commission for inclusion of nuclear and natural gas in the Taxonomy', (25 October 2022), online: <https://sustainablefutures.linklaters.com//post/102hzym/eu-austria-files-legal-challenge-in-cjeu-against-the-commission-for-inclusion-of>.
71 *Action brought on 18 April 2023,* ClientEarth and Others v Commission*, Case T-215/23*, *supra* note 19.
72 KLIMSCHA & LEHNER, 'EU-Taxonomie', *supra* note 13 at 311.
73 GREMILLET, KERN & LAURENT, 'Rapport sur l'inclusion du nucléaire dans le volet climatique de la taxonomie européenne des investissements durables', *supra* note 49 at 17.
74 BRÖMMELMEYER, 'Nachhaltige Finanzmärkte für eine Renaissance der Kernenergie?', *supra* note 3 at 74.

single market for capital, without any direct influence on the energy policy of Member States.[75] It rather aims at labelling which activities are to be considered sustainable. Moreover, it does not affect, at least not directly, the cost or price of the financing of activities that are not aligned with the Taxonomy. The market may decide on its own to cease investing in activities that are not taxonomy-aligned, yet the financing of energy producers through the market is not the sole solution available, therefore it may not significantly encroach on the energy right of Member States.

This solution seems to be supported by the interpretation of the General Court in the case *Poland v Parliament and Council*[76], where it found that an instrument that has no direct effect on the price of financing certain activities cannot affect the energy rights of Member States protected in Art. 192(2)(c) TFEU[77]. In this case, Poland was contesting the decision creating the Market Stability Reserve.[78] a measure that aims to correct the supply-demand imbalances of the Emission Trading system[79] and to adjust the annual amount of carbon allowances.[80] The latter, argued Poland, would create a consequential increase in the price of emission allowances and affect its energy sector, therefore it necessitated resort to the unanimity procedure provided for by Art. 192(2)(c) TFEU[81] instead of Art. 192(1) TFEU and its ordinary legislative procedure. The Court, to reject the argument of Poland, stated that a measure is able to affect 'significantly' a Member States' energy choice 'only if it follows from the aim and content of that measure that the primary outcome sought by that measure is to significantly affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State.'[82] The Market Stability Reserve, which would indeed create a price signal for emission allowances at the EU level, did not have as a primary aim to set their price, which was to be determined exclusively by market forces.[83] Although the decision correcting the deficiency of the European Trading System was logically affecting the price of allowances[84] this was only an indirect consequence due to the close relation between the two instruments,[85] the Market Stability Reserve remaining neutral in this respect.[86]

Even in the event of a complementary measure that increases the cost for non-taxonomy-aligned activities, the latter may nevertheless be compatible with the energy caveat, since Member States are still able to finance nuclear energy through other ways, inter alia state aids

75 *Ibid*.
76 Case C-5/16, *Poland v Parliament and Council* [2018], *supra* note 57.
77 *Ibid* at para 63.
78 Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC, OJ L 264, 2015.
79 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 2003.
80 Recital (5) of *Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC, OJ L 264*, *supra* note 78.
81 Case C-5/16, *Poland v Parliament and Council* [2018], *supra* note 57 at para 26.
82 *Ibid* at para 46.
83 *Ibid* at para 63.
84 *Ibid* at para 67.
85 *Ibid* at para 68.
86 *Ibid* at para 64.

for example as the *Hinkley Point C*[87] cases showed. In these cases, Austria contested the decision of the Commission to authorise the grant of a state aid in the United-Kingdom for the construction of a third nuclear reactor at Hinkley Point. The Court recognised the legality of the aid that was partly justified in the Commission Decision on the malfunction of the Emission Trading System that created a residual market failure.[88]

In the light of the above, the Taxonomy alone, may not affect the energy rights of Member States protected in Art. 192(2)(c).

1.2.2.2. The obligation to consider the energy rights of Member States in the event of the impossibility to finance nuclear energy activities

The impossibility to finance nuclear energy in the future could arise from a tightening of the conditions to grant state aid or, on an even harder line, from a ban on activities that are not aligned with the conditions of the Taxonomy Regulation.

i) The precarious financing of nuclear power. As nuclear power is sensible to the cost of financing, a negative evaluation of the sustainability of this energy source could have repercussions on its development. It could mean that nuclear energy could only be subsidised through state aid in the future, which would still respect the right of Member States to determine their energy mix if the Commission accepts such aid. However, in the eventuality that nuclear energy is not declared sustainable and that the Commission changes its parameters when assessing the effect on competition of such aids, this could have a negative impact on the right of Member States to determine their energy mix. Indeed, the Commission could refuse State aid in favour of nuclear energy stating that the difficulties encountered by this source of energy in finding financing do not constitute a market failure since this source of energy is not sustainable and is therefore disadvantaged by the market. Complementary measures should be assessed within the general framework of the EU to avoid the impossibility for Member States to follow their energy choices.

ii) Banning of non-taxonomy-aligned activities. This event seems highly unplausible in the actual framework since many activities that are not covered by the Taxonomy Regulation are not unsustainable per se but highly necessary, e.g., the activity of a hospital may not be sustainable per se, yet necessary in our societies. However, it is envisaged to broaden the scope of the Taxonomy Regulation and to introduce new categories as the European Platform on Sustainable Finance proposed on March 29, 2022, in the report for an Extended Environmental Taxonomy.[89] The new category of 'activities that need to be decommissioned to avoid significant harm'[90] makes it clear that certain activities are to be terminated. A banning from certain activities, if it

87 The decision of the Commission to approve the state aid for nuclear energy, Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142), OJ L 109, 2015; which was contested by the Republic of Austria was deemed to be legal according to the General Court, see Case T-356/15 , *Hinkley Point C* [2018], *supra* note 15; This decision was confirmed in appeal in front of the Grand Chamber, see Case C-594/18 P, *Hinkley Point C* [2020], *supra* note 15.
88 Commission Decision (EU) 2015/658 on the aid measure to the Hinkley Point C, *supra* note 87 at para 378.
89 *The Extended Environmental Taxonomy: Final Report on Taxonomy extension options supporting a sustainable transition*, by PLATFORM ON SUSTAINABLE FINANCE (2022).
90 *Ibid* at 40.

includes energy-related activities, may trigger the right contained in Art. 192(2)(c) TFEU and require the adoption of the measure through the special legislative procedure that imposes unanimity.

1.3. The Right Legal Basis

1.3.1. The Environmental Objective of the Taxonomy Regulation as Predominant Aim

The choice of the right legal basis has its importance since it can lead to the annulment of an act of the legislator by the Court.[91] The choice to adopt the Taxonomy Regulation on the internal market legal basis, i.e., Art. 114 TFEU, may be questioned since the Taxonomy Regulation has a strong environmental component, as the first recitals of the regulation suggest. Indeed, the Taxonomy Regulation tackles first the fact that the Union strives for the establishment of an internal market that is sustainable in accordance with Art. 3(3) TEU[92] and then mention all the environmental objectives that are to be followed, namely the '2030 Agenda' and its materialisation in the Union's agenda with the European Green Deal,[93] the 'Paris Agreement' and the concomitant objective of making finances flows aligned with such objectives,[94] the reaffirmation of sustainability, and within it the transition to a climate neutral economy.[95] To achieve these environmental objectives, the Union considers the channelling of capital flows towards sustainable investment as a necessity and is therefore determined to 'exploit the potential of the internal market' to 'remove obstacles to the efficient movement of capital.'[96] The Union pursues this objective by establishing uniform 'criteria for determining whether an economic activity qualifies as environmentally sustainable' that should be 'harmonised at the Union level in order to remove barriers to the functioning of the internal market' and 'facilitate cross-border sustainable investment in the Union'.[97]

With these objectives, the Taxonomy Regulation objectives are twofold, on one hand, it follows an environmental objective with the aim of defining which activities are sustainable, on another hand, it enhances the removal of barriers in the internal market. However, as the recitals suggest, the Taxonomy Regulation seems to primarily follow a non-market objective, namely environmental protection and this asks whether the Taxonomy Regulation, defining which energy-related activities are indeed sustainable, can be adopted on the internal market legal basis, that is Art. 114 TFEU. An encroachment on Member States' energy rights could for example have for consequence the requirement to resort to the environmental legal basis, Art. 192(2)(c) TFEU and its unanimity procedure.[98] In the case that the Treaties contain several

91 Judgment of the Court of 11 June 1991, *Commission of the European Communities v Council of the European Communities*, Case C-300/89, EU:C:1991:244, [Case C-300/89*, Titanium dioxide* [1991]].
92 Recital (1) of the Taxonomy Regulation, *supra* note 1.
93 *Ibid*, Recital (2).
94 *Ibid*, Recital (3).
95 *Ibid*, Recital (4).
96 *Ibid*, Recital (9).
97 *Ibid*, Recital (12).
98 As the Commission of European Affairs of the French Sénat noted, see GREMILLET, KERN & LAURENT, 'Rapport sur l'inclusion du nucléaire dans le volet climatique de la taxonomie européenne des investissements durables', *supra* note 49 at 43.

options for the adoption of an EU measure, the legislator must choose the more specific legal basis.[99]

1.3.2. The Use of Art. 114 TFEU for Non-Market Objectives

The scope of Art. 114 TFEU is not easy to discern[100] and its use as a general legal basis for objectives that differ from market objectives can raise the question of whether the Union is acting ultra vires or intra vires. For the legislator to pursue non-market objectives through Art. 114 TFEU, it must first establish the existence of such competence.[101] This existence can be defined accordingly with the principle of conferral[102] which means that the Union can solely use the competence conferred upon it by the member states. In the case of environment and therefore climate,[103] the Union has a shared competence[104] which significates that the Union has the competence to regulate climate issues. However, this could mean that the legislator would be limited by the limitations of Art. 192(2)(c) TFEU, i.e., if a measure significantly affects the right of Member States to determine its energy mix, then the measure would have to be adopted by unanimity through a special legislative procedure.

The practice of the legislator using the internal market legal basis to follow non-market objectives seems to be legitimated constitutionally[105] and this conclusion seems to be supported by the different mainstreaming clauses present in the Treaties, for example, Art. 11 TFEU.[106] The jurisprudence of the Court goes along this line as well, stating that a measure adopted on Art. 114 TFEU and having a non-market objective (public health in these cases) as a decisive factor can be considered intra vires[107] if the measure is contributing to the internal market objectives, namely its functioning and establishment.[108] The Court seem to come to the same conclusion when it comes to environment and finds that the environmental integration clause[109] and Arts. 191 and 192 TFEU do not limits the power of the Union to adopt measures 'under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at

99 HUHTA, 'The Scope of State Sovereignty under Article 194(2) TFEU', *supra* note 61 at 999.
100 PAUL CRAIG, 'The ECJ and *ultra vires* action: A conceptual analysis' (2011) 48:2 *Common Market Law Review*.
101 MALIN WÅLLGREN, *Exploring the Outer Limits of Article 114 TFEU-towards a general power?* (Master thesis in European Union Law under the supervision of Professor Vladimir Bastidas, Uppsala Universitet, Department of Law, 2016) at 52.
102 Art. 5 TEU.
103 Climate change is part of the objectives of the environmental policy of the Union, as stated in art. 191(1) TFEU.
104 Art. 4 TFEU includes (e) environment in the list of shared competences of the EU.
105 Art. 114(3) TFEU offers a clear support for the integration of non-market objectives with the mention made for the Commission to strive for a high level of protection regarding health, safety, environmental protection and consumer protection, see BRUNO DE WITTE, 'A competence to protect: the pursuit of non-market aims through internal market legislation' in *The judiciary, the legislator and the internal market* (CAMBRIDGE, 2012) 25 at 30–31.
106 *Ibid* at 32.
107 Judgment of the Court of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Case C-491/01, EU:C:2002:741, at para 62 [Case C-491/01*, British American Tobacco (Investments) and Imperial Tobacco* [2002]]; Judgment of the Court of 14 December 2004 [GC], *Arnold André GmbH & Co KG v Landrat des Kreises Herford*, Case C-434/02, EU:C:2004:800, at para 32 [Case C-434/02*, Arnold André* [2004]]; Judgment of the Court of 14 December 2004 [GC], *The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, Case C-210/03, EU:C:2004:802, at para 31 [Case C-210/03*, Swedish Match* [2004]]; Judgment of the Court of 12 December 2006 [GC], *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-380/03, EU:C:2006:772, at para 39 [Case C-380/03*, Tobacco Advertising II* [2006]]; Judgment of the Court of 4 May 2016, *Republic of Poland v European Parliament and Council of the European Union*, Case C-358/14, EU:C:2016:323, at para 34 [Case C-358/14*, Poland v Parliament and Council* [2016]].
108 Case C-380/03*, Tobacco Advertising II* [2006], *supra* note 107 at para 36.
109 Judgment of the Court of 23 October 2007 [GC], *Commission of the European Communities v Council of the European Union*, Case C-440/05, EU:C:2007:625, at para 60.

the same time any of the objectives of environmental protection'.[110] Which means that environmental protection measures can be adopted under any legal basis of the Treaties.[111] The Court explicitly stated that the environmental objectives of Art. 191 TFEU may be pursued by means of harmonizing measures on the basis of Art. 114 TFEU.[112] Therefore, Art. 114 TFEU may be used to adopt measures contributing to the internal market objectives and pursuing one of the objectives of the environmental policy, in this case climate and sustainability.

The centre of gravity doctrine, a threshold requirement, and the principle of subsidiarity permit the Court to determine which legal basis is the right one.[113] Regarding the centre of gravity, even if environmental objectives seem decisive in this case, the Court accepted in tobacco-related cases the fact that health was a decisive factor in the adoption of a Directive or Regulation.[114] Moreover, as the section above demonstrated, the Taxonomy Regulation does not significantly interfere with the energy rights of Member States protected under Art. 194(2) read together with Art. 192(2) TFEU, therefore, the use to Art. 192(2)(c) TFEU is not required and leaves the possibility to the legislator to adopt the measure on the internal market legal basis.

The threshold requirement establishes that it suffices for the measure at stake to improve the conditions for the establishment and functioning of the market,[115] in this case the capital market. Since a common language for sustainable investment will ensure the freedom of movement of sustainable capital between Member States, its aim to improve the functioning of the market is clear, and this, in accordance with the principle of subsidiarity would be better realised at the Union level with a common definition that permits free movement between different Member States as different definitions for sustainability would hinder the free movement of sustainable capital. In consequence, the Taxonomy Regulation was rightfully based on Art. 114 TFEU, since it follows the compatible aims of environmental protection and the functioning of the internal market.

Art. 114 TFEU is a legal basis that permits the Union to enjoy a discretion when harmonising states divergences and to legislate on a variety of issues such as health and environment, as underpinned earlier in this section, as well as to regulate on transparency of political advertising,[116] which demonstrates how greatly the legal basis can be stretched by the legislator. The Taxonomy Regulation is very much in this vein as another example of environmental objectives pursued through the internal market clause of the Union. The definition by the Taxonomy Regulation of activities as sustainable is restricted by the constitutional limits that the Treaties provide, to which are added the intrinsic limits of the Taxonomy Regulation in the definition of such activities by the Commission that will be discussed next.

110 Judgment of the Court of 29 March 1990, *Hellenic Republic v Council of the European Communities*, Case C-62/88, EU:C:1990:153, at para 19.
111 SJÅFJELL, 'Quo vadis, Europe?', *supra* note 28 at 264.
112 Case C-300/89*, Titanium dioxide* [1991], *supra* note 91.
113 DE WITTE, 'A competence to protect', *supra* note 105 at 35.
114 *Ibid* at 36; see Case C-210/03*, Swedish Match* [2004], *supra* note 107 at para 31.
115 DE WITTE, 'A competence to protect', *supra* note 105 at 36.
116 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM(2021) 731 final, 2021.

4. The Extent of the Commission's Discretion in the Identification of Activities That Qualify as Sustainable Under the Taxonomy Regulation

The qualification of an activity as sustainable must respect the criteria that have been defined in the Taxonomy regulation on the one hand (1). On the other, the Commission, when acting through delegated acts, is constrained by procedural limits defined by the delegation of powers and the jurisprudence (2). The role of the Court of Justice of the EU is rather limited when it comes to delegated acts (3). These rules constrain the Commission in defining the Technical Screening Criteria necessary to recognise an activity, in this case nuclear energy, as sustainable.

2.1. The limits to the definition of sustainable activities from the legislator

The Taxonomy Regulation[117] in its Art. 3 has laid down the four criteria for an activity to qualify as sustainable: i) must contribute to one or more of the environmental objectives; ii) does not harm any of the environmental objectives; iii) is carried out in compliance with minimum social safeguards; and iv) complies with the minimum Technical Screening Criteria that have been established by the Commission in the ambit of the delegation of powers consented to it.

The first criterion, when it comes to climate change mitigation, is further detailed in the Taxonomy Regulation at Art. 10 and defines which categories of activities can qualify as contributing substantially to climate change mitigation (1.1). The second (1.2) and last (1.3) categories are defined in general terms in the Taxonomy Regulation, and it remains the task of the Commission, through delegated acts, to determine the minimum requirements to be met in order for an activity to qualify as sustainable. The third category, which is considered as an alien entity in the Taxonomy Regulation[118] as it mainly refers to international instruments concerning minimum human and labour rights and standards,[119] is not relevant to this article.

2.1.1. Contribution to One or More of the Environmental Objectives

The environmental objectives are laid down in Art. 9 of the Taxonomy Regulation, and concerns (a) climate change mitigation and (b) adaptation, (c) water protection, (d) the transition to a circular economy, (e) pollution prevention and control and (f) the protection and restoration of

117 Taxonomy Regulation, *supra* note 1.
118 LAMY & BACH, 'Die EU-Taxonomie-Verordnung', *supra* note 13 at 351.
119 KLIMSCHA & LEHNER, 'EU-Taxonomie', *supra* note 13 at 308; Recital (35) of Taxonomy Regulation, *supra* note 1.

biodiversity and ecosystems. At the moment, the Commission has only published the delegated acts concerning the first environmental objective, which is climate change mitigation. For an energy such as nuclear power to qualify as sustainable, it must, first, contribute substantially to the objective of climate change mitigation, i.e., it must qualify under one of the categories of activities that may qualify as sustainable. Either as a contributing activity, i.e., making a substantial contribution to climate change mitigation as provided in Art. 10(1), as a transitional activity, i.e., an activity for which no technologically and economically feasible low-carbon alternative exists, as provided in Art. 10(2), or as an enabling activity, i.e., enabling another activity to make a substantial contribution to the environmental objective, as provided in Art. 16 of the Taxonomy Regulation.[120] To be considered as sustainable, nuclear energy power must first qualify under one of these three categories.

2.1.1.1. Contributing activity

In the Complementary Climate Delegated Act, the Commission had no choice but to qualify nuclear power as a transitional activity since, in its actual formulation, Art. 10(1)[121] does not permit nuclear power to qualify as an activity contributing substantially to climate change mitigation.[122]

This sounds odd as it is well known that nuclear energy is one energy that emits near to zero carbon dioxide.[123] The explanation can be found in the legislative process that led to the adoption of the Taxonomy Regulation.[124] Indeed, the first version of the Taxonomy Regulation did qualify 'climate neutral energy (including carbon neutral energy)' as contributing to climate change mitigation. However, the EP decided to erase this mention from the Taxonomy Regulation to specify that only energy sources in line with Art. 2, second subparagraph, point (1) of the Renewable Energy Directive[125] could qualify as such[126.] As a compromise,[127] the legislator mentioned 'climate-neutral energy' and 'low carbon activities' in the preamble of the Taxonomy

120 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at para 31.
121 Art. 10(1) of the Taxonomy Regulation only permits the following activities to qualify as contributing activities: (a) renewables, (b) energy efficiency, (c) clean or climate-neutral mobility, (d) switching to sustainably sourced renewable materials, (e) carbon capture and storage, (f) carbons sinks, (g) energy infrastructures necessary for decarbonation, (h) producing clean and efficient fuels from renewable or carbon neutral sources or (i) enabling one of these activities. Nuclear energy does not fit any of these categories.
122 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 15–21; Recital 6 of Complementary Climate Delegated Act, *supra* note 10.
123 Recital (6) of the Complementary Climate Delegated Act, *supra* note 10.
124 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 5.
125 Which states that "'energy from renewable sources' or 'renewable energy' means energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas", see Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, 2018.
126 European Parliament legislative resolution of 28 March 2019 on the proposal for a regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment (COM(2018)0353 – C8-0207/2018 – 2018/0178(COD)); LÜNENBÜRGER, KOTTMANN & REITER, *supra* note 13 at para 31.
127 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at para 38.

Regulation[128] which is not legally binding but could be used to interpret other dispositions of the Taxonomy Regulation.

2.1.1.2. Transitional Activity

For an energy to qualify as a transitional activity, and therefore as contributing to the aim of decarbonisation, must fulfil three conditions: (a) it has the greenhouse gas emission levels that corresponds 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.

The Commission qualified nuclear energy as a transitional activity explaining that nuclear energy could indeed not qualify under Art. 10(1),[129] however, this choice is contested.[130] The first condition concerning the identification of the sector or industry needs however some clarification. If the sector or industry is limited to nuclear power, i.e., the fuel combustible that is used, then only the nuclear plants that have the best emission rates would be eligible to qualify under these categories and the transitional aspect would be from one type of nuclear plants to more modern ones.[131] On the contrary, if the industry or sector is not referring to the combustible used but to the aim, which is providing a stable baseload of energy supply, nuclear power would therefore be in competition with gas, coal, and biomass plants. In this case, nuclear power in general would be the combustible that has the best performance in the sector or industry and gas would not be able to qualify as sustainable since nuclear has a better performance in the furniture of a stable baseload with near to zero emission, which is not the case of gas. The argument that Art. 10(2) must apply only to CO2 intensive activities must be set aside, as the preamble seems to include of climate-neutral energies as part of the transition along activities that require substantial reductions in emissions and where there are no feasible alternatives.[132] In light of the objectives of the Taxonomy Regulation, which includes the fight against climate change as well, Art. 10(2) shall include climate-neutral energy in its scope.[133]

The second condition is also fulfilled, as nuclear energy does not hamper the development and deployment or renewable and both are part of the scenarios assessed by the Commission.[134] The third condition is easily fulfilled since nuclear energy has near to zero emission.[135]

Nevertheless, this leaves an open question about the role of transitional energies, such as nuclear and gas, if the latter is considered as a different sector, in the future and after 2050

128 Recital (41) reads as follow: "*In addition to the use* of *climate-neutral energy* and more investments in already *low-carbon economic activities* and sectors, the transition requires substantial reductions in greenhouse gas emissions in other economic activities and sectors for which there are no technologically and economically feasible low-carbon alternatives" (emphasis added).
129 Recital (6) of the Taxonomy Regulation, *supra* note 1.
130 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 27–32.
131 The Commission seems to support the move towards Generation IV reactors once available and reactors using the most advanced solutions according to Recitals (10) and (13) of the Complementary Climate Delegated Act, *supra* note 10.
132 Recital (41) of the Taxonomy Regulation, *supra* note 1.
133 BRÖMMELMEYER, 'Nachhaltige Finanzmärkte für eine Renaissance der Kernenergie?', *supra* note 3 at 75.
134 Recital (10) of the Complementary Climate Delegated Act, *supra* note 10.
135 BRÖMMELMEYER, 'Nachhaltige Finanzmärkte für eine Renaissance der Kernenergie?', *supra* note 3 at 75.

when the transition is theoretically accomplished. When it comes to fossil gas, there seems to be a natural exclusion from the technical screening criteria of fossil gas with the time, since it cannot fulfil the threshold 100g of CO2/kWh even with the best technologies[136] and any new investment would be incompatible with the climate neutrality objective by 2050.[137] For nuclear power the answer is unclear when it comes to its role during and after the transition. The Commission justifies the choice of the transitional category by arguing that in the absence of technologically and economically feasible low-carbon alternative at a sufficient scale to cover the energy demand in a continuous and reliable manner, nuclear energy can fulfil this role,[138] which sounds odds since nuclear energy is already this technologically and economically low-carbon alternative which produces energy at a sufficient scale in a continuous and reliable manner.[139]

Moreover, the transitional aspect of this energy seems incoherent with Recital (10) of the same proposition stating that '[n]uclear energy is part of the future energy sources in a number of Member States, as part of their decarbonisation efforts. The scenarios assessed by the Commission lead to a decarbonised energy system based on renewables to a very large extent and on nuclear energy with a stable installed capacity compared to current levels. […] Accordingly, significant investments in nuclear energy will be needed throughout the period until 2050 and beyond.'[140]

This confusion created around the statute of nuclear energy is certainly due to the contentiousness that it raises and the divide that exists between Member States regarding nuclear energy. It may be for this reason that the Taxonomy Regulation does not permit to qualify nuclear energy as a contributing activity even if it fulfils this function. The Commission having a more technical role, and not a political one when it comes to defining which activities are sustainable, has therefore less pressure (in theory) than the legislator to adopt contentious decisions. It may be for this reason that the Commission tried to fit nuclear energy in the second category, the transitional activities. I would argue that true place of nuclear energy should be in the contributing category regarding its credential in term of emissions, due to the limits of the delegation of powers to the Commission to adopt delegated acts, the Commission could make nuclear activities fit for transitional activities.

2.1.1.3. Enabling activities

136 'Platform on Sustainable Finance's response to the consultations on the taxonomy draft complementary Delegated Act', (21 January 2022), online: *European Commission - European Commission* <https://ec.europa.eu/info/files/220121-sustainable-finance-platform-response-taxonomy-complementary-delegated-act_en> at 31.
137 IEA, 'A Roadmap for the Global Energy Sector', *supra* note 22.
138 Recital (6) of the Complementary Climate Delegated Act, *supra* note 10.
139 The legal opinion for the Austrian government interpreted Art. 10(2) of the Taxonomy Regulation, by requiring that there is no 'low-carbon alternatives', as excluding low-carbon itself from the scope of this article. If we agree to this position, then it would be it odd that the low-carbon alternatives do not find itself in the contributing activities. As long as nuclear does not fit Art. 10(1), its place as transitional activity seems justifiable, even if it needs further clarity, see LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 27.
140 Recital (10) of the Complementary Climate Delegated Act, *supra* note 10.

According to Art. 16 of the Taxonomy Regulation, the last possibility for an activity to be considered as contributing to the objective of climate mitigation is the case in which an activity enables another activity to make a substantial contribution to one or more of the environmental goals set out in Art. 9. It has been argued that nuclear energy cannot be considered as an enabling activity.[141] Indeed, nuclear energy and renewables, when used together, seem to have the tendency to cannibalise.[142] This conclusion may differ with the development of Small Modular Reactors that could permit the nuclear and renewable energies to play complementary roles in hybrid energy systems, but we are not there yet.[143]

2.1.2. The Do No Significant Harm Condition

The DNSH condition or principle[144] that comes from international environmental and water law[145] began to be used by the Commission in the European Green Deal Communication[146] and is now increasingly mentioned in legislative acts of the Union.[147] The Taxonomy Regulation seems to put into practice the principle in the framework of the regulation and in relation to other instruments when expressly mentioned.[148] Under the Taxonomy Regulation, the DNSH principle becomes a condition for the recognition of an activity as sustainable and requires for an activity to be defined as such to pursue one of the environmental objectives and not to harm significantly one of the other environmental objectives.[149]

Nuclear energy has engendered a lot of discussion as whether it do respect the DNSH condition. I do not intend to enter the scientific discussion on the topic whether deep geological storage[150] of nuclear waste is safe and will keep with the opinions of the group of experts that have been consulted by the Commission and have given in various reports.[151]

The Joint Research Centre reports was not conclusive whether nuclear energy and deep geological storage would be sufficient for nuclear energy to respect the DNSH condition,

141 See LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 21–27.
142 *Ibid* at para 64.
143 'Nuclear and Renewables: Playing Complementary Roles in Hybrid Energy Systems', (18 September 2019), online: <https://www.iaea.org/newscenter/news/nuclear-and-renewables-playing-complementary-roles-in-hybrid-energy-systems>.
144 The legislature and the Commission alternatively use the term 'condition' and 'principle' to designate the DNSH.
145 OWEN MCINTYRE, 'The current state of development of the no significant harm principle: How far have we come?' (2020) 20:4 *Int Environ Agreements* 601–618 at 602.
146 A section of the European Green Deal is entitled "A green oath: 'do no harm'" and sustains that "[a]ll EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future", see Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 final, 2019 at 19.
147 For example, Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 2021.
148 *Ibid*, Art. 5 expressly mentions the DNSH principle as a horizontal principle applicable to all measure under the Facility, even if the DNSH condition defined under the Taxonomy Regulation is not binding for the Recovery and Resilience Facility, see; Information from European Union institutions, bodies, offices and agencies, Commission Notice, Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation, (2021/C 58/01), 2021.
149 Art. 17 of the Taxonomy Regulation, *supra* note 1.
150 A deep geological repository is a way of storing hazardous or radioactive waste within a stable geologic environment (typically 200–1000 meter deep). See 'The Geological Society of London - Geological Disposal of Radioactive Waste', online: <https://www.geolsoc.org.uk/gdrw>.
151 KONINGS ET AL, 'Joint Research Centre Technical Assessment of Nuclear Energy with respect to the 'do no significant harm' criteria', *supra* note 6; Opinion of the Group of Experts referred to in Article 31 of the Euratom Treaty, *supra* note 7; SCHEER Review, *supra* note 7.

however it found that this method would not be more harming than any of the energy sources already present in the Taxonomy and therefore esteemed that nuclear energy could be included.[152] This opinion was shared by the Scientific Committee on Health, Environmental and Emerging Risks report, but the latter nevertheless argued that the Joint Research Centre report had not been made in terms of 'do no significant harm', but in term of 'do less harm' than other energies present in the first delegated act, meaning that this could be insufficient.[153] The last group of experts whose opinion was required, the Group of experts referred to in Art. 31 of the Euratom Treaty, esteemed that nuclear power plants respect the 'do no significant harm condition' and that the precautionary principle was used during the development of the requirement for nuclear energy.[154] The compliance with these requirements, which are sufficiently conservative,[155] regarding safety level, the protection of humans and the environment, would permit the technical screening criteria and the 'do no significant harm' condition to be automatically fulfilled.[156] In the end all these reports esteem that nuclear energy when combined with deep geological storage is not significantly harming any of the environmental objectives and this approach has been adopted by the Commission after having considered the reports.[157]

It is argued against the comparative approach argument stating that nuclear energy is not harming more than any of the energy sources already present in the Taxonomy that this does not ensure that no significant harm is done, and that such an approach would mean that these comparative energies would have to be excluded from the Taxonomy as well.[158] This argument seems valid, either all in or all out. However, having a too conservative requirement for the DNSH condition would be detrimental to the Taxonomy and would render the instrument unusable if none of the energy present in the Taxonomy could comply with the criteria. Moreover, the condition is that the harm shall not be 'significant', which is less strict than no harm at all. Therefore, energies in the Taxonomy do not have to be innocuous to the environment to respect the DNSH condition.

2.1.3. Technical Screening Criteria

The Commission has been delegated some powers for the establishment of the Technical Screening Criteria which permits to define 'the conditions under which a specific economic activity qualifies as contributing substantially to climate change mitigation.'[159] In doing so, the Commission must respect the principle of technological neutrality,[160] base its decision on conclusive scientific evidence and respect the precautionary principle in case of inconclusive

152 KONINGS ET AL, 'Joint Research Centre Technical Assessment of Nuclear Energy with respect to the 'do no significant harm' criteria', *supra* note 6.
153 SCHEER Review, *supra* note 7 at 2.
154 KONINGS ET AL, *supra* note 6; Opinion of the Group of Experts referred to in Article 31 of the Euratom Treaty, *supra* note 7 at 2.
155 *Ibid* at 10.
156 *Ibid* at 11.
157 Recital (14) of Complementary Climate Delegated Act, *supra* note 10.
158 LÜNENBÜRGER, KOTTMANN & REITER, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13, 56, para. 173.
159 Art. 10(3)(a) of Taxonomy Regulation, *supra* note 1.
160 *Ibid*, Art. 19(1)(a).

scientific evidence.[161] The different energy sources in the Taxonomy Regulation should also be treated equally and it should be ensured that none is unfairly disadvantaged compared to another if it contributes to the same extent to the achievement of one of the environmental objectives.[162]

When it comes to nuclear power, it seems that the Commission has based its decisions on conclusive scientific evidence, i.e., the three reports that it received, and the precautionary principle,[163] which was used during the development of the criteria for nuclear energy.[164] However, when it comes to treating each energy equally and in accordance with the principle of technological neutrality, it is not sure whether the Commission respected the latter requirements.

Indeed, the Commission set the threshold of 100g of CO2/kWh, which was recommended by the Technical Expert Group,[165] for an energy to contribute substantially to climate change mitigation and yet nuclear energy cannot qualify as a contributing activity and gas can be considered as sustainable with a threshold which is different, i.e., 270g CO2/kWh. Therefore, it seems that renewable energies and fossil gas are treated in a more favourable way than nuclear energy although it has better performances when it comes to contributing to the environmental objective of climate change mitigation. This could lead to the invalidity of the delegated act regarding the recognition of fossil gas as sustainable.

2.2. The limits of the delegation of powers to the Commission

The limits to the delegation of powers to the Commission to adopt delegated act, according to Art. 290 TFEU, is defined in the legislative acts which grant delegated powers, in this case the Taxonomy Regulation, itself. The latter defines the procedural limits that the Commission must respect when adopting a delegated act (1.), whereas the substantial limits of these delegated acts, which are defined in the legislative act as well, have been clarified in the jurisprudence of the Court (2.).

2.2.1. Procedural Limits

The limits to the delegation of powers to the Commission are defined in the delegating act, i.e., the Taxonomy Regulation. Concerning the first environmental objective, climate change mitigation, the Commission must consult the Platform referred to in Art. 20 of the Taxonomy

161 *Ibid*, Art. 19(1)(f).
162 *Ibid*, Recital (45).
163 It is debatable whether the precautionary principle should be part of the conditions for the definition of the Technical Screening Criteria, since it is not a question of authorising the use of an energy, but of labelling it as sustainable. In the case of nuclear energy, for example, whether or not it is labelled will have no impact on the recognition of its dangerousness and the fact that nuclear energy is already legally authorised in the EU and as such is in line with the precautionary principle. The Taxonomy Regulation is not the right place for this kind of argument, as it does not concern the authorisation of the use of nuclear energy.
164 Opinion of the Group of Experts referred to in Article 31 of the Euratom Treaty, *supra* note 7 at 2 and 9.
165 Taxonomy: Final report of the Technical Expert Group on Sustainable Finance, *supra* note 47 at 21.

Regulation.[166] It shall establish the Technical Screening Criteria in accordance with the criteria of Art. 19,[167] in 'one delegated act' (emphasis added)[168] to be adopted by 31 December 2020.[169] For this aim, the legislator has given a delegation of power to the Commission for an indeterminate period from 12 July 2020.[170]

Ziehm argues that the Commission has lost its delegation of power since the deadline for adopting the delegated act has passed and that the Taxonomy Regulation does not foresee any extension. Moreover, the delegation foresees the Technical Screening Criteria to be adopted in one single act, which would mean that the Commission cannot adopt a complementary delegated act, since it already 'used' this possibility and could only revise the Technical Screening Criteria that it already adopted.[171] However, if this opinion were right, this would mean that neither the first delegated act nor the complementary delegated act would be legal. This would seriously undermine the usefulness of the Taxonomy Regulation in its globality and go contrary to the effet utile of the indeterminate delegation of power. On the contrary, these deadlines allow the failure to adopt a decision to be recognised when they expire. These mark the beginning of the period from which interested applicants may bring an action against the Commission before the Court for the non-adoption of an act which it was supposed to adopt. Therefore, it does not mean that the Commission has lost its delegation of power. The Commission is also invited to regularly review the Technical Screening Criteria and to amend them if necessary[172] and the delegation is to be revoked under the conditions of Art. 23(3), i.e., by the EP or the Council. It would be odd if a new technology that would qualify under the Taxonomy Regulation could not be included in the delegated act later since the Commission could only modify existing Technical Screening Criteria.

Last but not least, the legislator has the power to oppose a delegated act of the Commission. Indeed, the EP or the Council have the veto power by a qualified majority vote for the latter or a simple majority for the former. This opposition can be expressed within four months from the adoption of the act by the Commission with a possible extension of two months.[173] Whereas the Climate Delegated Act was adopted without contestation from the EP nor from the Council, the Parliament's Committees on Economic and Monetary Affairs and on Environment, Public Health and Food Safety, adopted on the 14th of June 2022 an objection to the inclusion of gas and nuclear planned by the Commission's Complementary Climate Delegated Act. A resolution to decide whether to veto the Commission's delegated act proposal was scheduled during the plenary session of 4-7th July 2022. If an absolute majority of MEPs had rejected to the Commission's proposal, the Commission would have had to withdraw or amend it.[174] As this

166 Art. 10(4) of Taxonomy Regulation, *supra* note 1.
167 See, 1.2. and 1.3.
168 Art. 10(5) of Taxonomy Regulation, *supra* note 1.
169 *Ibid*, Art. 10(6).
170 *Ibid*, Art. 23(2).
171 ZIEHM, 'Taxonomie-Verordnung und geplanter Rechtsakt der Europäischen Kommission zu Atomenergie und Erdgas', *supra* note 13 at 10.
172 Art. 19(5) of Taxonomy Regulation, *supra* note 1.
173 *Ibid*, Art. 23(6).
174 'Taxonomy: MEPs object to Commission's plan to include gas and nuclear activities | News | European Parliament', (14 June 2022), online: <https://www.europarl.europa.eu/news/en/press-room/20220613IPR32812/taxonomy-meps-object-to-commission-s-plan-to-include-gas-and-nuclear-activities>.

absolute majority was not reached, and the Council did not the proposal, the Complementary Climate Delegated Act entered into force on 1st January 2023.[175] Formally, this means that the EP and the Council have endorsed nuclear energy as sustainable.

2.2.2. The Substantial Limits of a Delegation of Power to the Commission

The extent of the Commission's powers when it comes to adopting delegated acts is defined by the basic act, in this case the Taxonomy Regulation, which defines the contours of this delegation (2.2.1.). The case law has also defined the extent of the delegation of powers to the Commission (2.2.2.).

2.2.2.1. The limits of the powers delegated to the Commission in the adoption of delegated acts

In accordance with the principle of the separation of powers, both legislators the EP and the Council define the limits of the power of delegation and retains the right of revocation and objection,[176] as provided for in the basic act. In this case, a clear mandate was given to the Commission to adopt delegated acts to complement the proper application of the Taxonomy Regulation. The Commission must establish, according to Art. 10(3), 'technical screening criteria for determining the conditions under which a specific economic activity qualifies as contributing substantially to climate change mitigation' to supplement the criteria for contributing and transitional activities,[177] and 'technical screening criteria for determining whether an economic activity […] causes significant harm to one or more of those objectives' in accordance with Art. 17 of the Taxonomy Regulation.[178] These Technical Screening Criteria must be established in accordance with the exhaustive list of requirements established in Art. 19 of the Taxonomy Regulation, from which it must respect technological neutrality, be based on conclusive scientific evidence, and respect the precautionary principle.

As such, there is no requirement or condition that expressly excludes or includes nuclear energy in the list of sustainable activities to be defined by the Commission when establishing the Technical Screening Criteria. The Commission seems a priori to have the possibility to declare sustainable any activity that complies with the criteria. Regarding nuclear energy, the Commission has established the Technical Screening Criteria under which it can contribute to the objective of climate mitigation as a transitional activity and the Technical Screening Criteria under which nuclear energy does not significantly harm one of the environmental objectives. When it comes to fossil gas, the same solution seems more complicated to find, since Art. 10(2) clearly specifies that transitional activities must support 'the transition to a climate-neutral economy consistent with a pathway to limit the temperature increase to 1,5°C.'

175 MEPs do not object to inclusion of gas and nuclear activities, *supra* note 12.
176 GIJS JAN BRANDSMA, 'Holding the European Commission to account: the promise of delegated acts' (2016) 82:4 *Revue Internationale des Sciences Administratives* 695–712 at 661.
177 Taxonomy Regulation, *supra* note 1, Art. 10(3)(a).
178 *Ibid*, Art. 10(3)(b).

2.2.2.2. The extent of the discretion of the Commission's powers and the control of the Court

According to Art. 290 TFEU, the Commission has 'the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act' and may thus participate to some extent in the legislative function.[179] However, in doing so, the Commission is not entitled to modify an 'essential element' of the content of the basic act.[180] The Court stated that the delegation of power in a legislative act is 'only meant to flesh out that act'[181] and that the Commission's discretion 'must be delimited by bounds fixed in the basic act,'[182] i.e., the specific requirements of the Taxonomy Regulation. To understand whether the Commission could include nuclear energy in the delegated acts, it is necessary to determine whether the recognition of nuclear energy as a transitional energy concerns an essential element of the Taxonomy Regulation or whether it concerns a specificity requirement.[183]

Because of the variety of possible subjects for delegation, the Court has dealt on case-by-case basis regarding the definition of 'essential elements.'[184] The Court stated that the 'essential elements' must be 'based on objective factors amenable to judicial review'[185] and moreover 'provisions which in order to be adopted, require political choices falling within the responsibilities of the EU legislature cannot be delegated.'[186] Although the Court did not define these objectives factors,[187] Advocate General Mengozzi, in his opinion in case *DK Recycling v Commission*, stated that these factors include many elements such as 'the characteristics of the policy in question, the greater or lesser latitude enjoyed by the Commission in implementing that policy, the wording of the delegating provisions, the content and purpose of the basic act, and the overall scheme thereof.'[188] In the same case, the Court referred to the objectives and sub-objectives of the basic act at issue in order to determine its essential elements.[189]

In the case of the Taxonomy Regulation, an essential element appears to be to make financial flows compatible with the climate objectives[190] through the establishment of uniform criteria for

179 SEBASTIEN PLATON, 'La Cour de justice limite son contrôle à l'erreur manifeste d'appréciation quant au choix du législateur européen entre acte délégué et acte d'exécution' (2014) *Journal d'actualité des droits européens*, online: <https://revue-jade.eu/article/view/583>.
180 Judgment of the Court of 5 September 2012 [GC], *European Parliament v Council of the European Union*, Case C-355/10, EU:C:2012:516, at para 64 [Case C-355/10*, Parliament v Council* [2012]].
181 Judgment of the Court of 17 March 2016, *European Parliament v European Commission*, Case C-286/14, ECLI:EU:C:2016:183, at para 41.
182 Judgment of the Court of 26 July 2017, *Czech Republic v European Commission*, Case C-696/15 P, EU:C:2017:595, at para 52.
183 In the case that the Commission adopted an act on an essential element, the Commission would have gone beyond the powers delegated to it and would manifest itself such as a lack of competence in breach of the *essential element requirement*, whereas a breach of the *specificity requirement* significates that the delegated act adopted by the Commission is in breach of a higher ranking rule, in this case the regulation delegating the powers to the Commission, which goes to the internal legality of an act, see MERIJN CHAMON, 'The legal framework for delegated and implementing powers ten years after the entry into force of the Lisbon Treaty' (2021) 22:1 *ERA Forum* 21–38 at 29.
184 Judgment of the Court of 10 September 2015, *European Parliament v Council of the European Union*, Case C-363/14, EU:C:2015:579, at para 47 [Case C-363/14*, Europol* [2015]].
185 Case C-355/10*, Parliament v Council* [2012], *supra* note 180 at para 67.
186 *Ibid* at para 65; Judgment of the Court of 22 June 2016, *DK Recycling und Roheisen GmbH v European Commission*, Case C-540/14 P, EU:C:2016:469, at para 47 [Case C-540/14 P, *DK Recycling v Commission* [2016]]; Judgment of the Court of 11 May 2017, *Dyson Ltd v European Commission*, Case C-44/16 P, EU:C:2017:357, at para 61 [Case C-44/16P*, Dyson v Commission* [2017]].
187 CHAMON, 'The legal framework for delegated and implementing powers', *supra* note 183 at 26; Case C-355/10*, Parliament v Council* [2012], *supra* note 180 at para 68.
188 Opinion of Advocate General Mengozzi delivered on 8 March 2016, *DK Recycling und Roheisen GmbH v European Commission*, C-540/14 P, EU:C:2016:147, at para 41.
189 Case C-540/14 P*, DK Recycling v Commission* [2016], *supra* note 186 at para 49.
190 Recital (3) of the Taxonomy Regulation, *supra* note 1.

environmentally sustainable investments.[191] In particular, activities that pursue the environmental objective of climate change mitigation should be consistent with the objective of the Paris Agreement[192] and respect another element of the uniform criteria, which is the avoidance of significant harm to any of the environmental objectives of the Taxonomy Regulation.[193] The Taxonomy also mentions in its preamble that the use of climate-neutral energy is part of the transition required by the Paris Agreement.[194]

Therefore, the Commission would be modifying an essential element of the Taxonomy Regulation if it were to change the criterion that an energy must support the transition to a climate-neutral economy consistent with a pathway to limit the temperature increase to 1,5°C, by recognising that an emissions threshold inconsistent with such a goal would allow an activity to be recognised as sustainable, or if it were to recognise an activity as transitional if an economically viable low-carbon alternative existed. In the case of fossil gas for example, it could be argued that the Commission has regulated an essential element, the threshold for gas is higher than that set for a climate-neutral aligned transition. In the case of nuclear energy, the Commission has not changed an essential element of the Taxonomy Regulation, as the transitional activity category does not explicitly exclude low-carbon energies from its scope. This would have been the case if the Commission had recognised nuclear energy as a contributing activity, as nuclear energy does not fit into any of the categories listed in Art. 10(1) of the Taxonomy Regulation.

Considering the argument that the inclusion of nuclear energy is political and should therefore be understood as an essential element of the Regulation. This interpretation is unacceptable for two reasons. First, although the case law excludes 'political choices falling within the responsibilities of the EU legislature' from being delegated to the Commission,[195] it does not go so far as to classify a decision involving 'compromises with technical and political dimensions' as such.[196] In the present case, it would be burdensome for the legislator to define precisely which activities are sustainable. The policy choice, which falls within the responsibilities of the EU legislature, was to clearly define the aim and the framework of the basic act, namely that activities contribute to the different environmental objectives and to set criteria such as technological neutrality or the DNSH criteria,[197] and then to delegate the definition of sustainable activities to the Commission. This argument is supported by the *Europol* Case[198,] where the EP argued that the modification of a list of countries by the Council amounted to an essential element. The Court denied the listing as constituting an essential element of the basic act

191 *Ibid*, Recital (12).
192 *Ibid*, Recital (24).
193 *Ibid*, Recital (34).
194 *Ibid*, Recital (41): "In addition to the *use of climate-neutral energy* and more investments in already low-carbon economic activities and sectors, the transition requires substantial reductions in greenhouse gas emissions in other economic activities and sectors for which there are no technologically and economically feasible low-carbon alternatives" (emphasis added).
195 Case C-355/10*, Parliament v Council* [2012], *supra* note 180 at para 65; Case C-540/14 P*, DK Recycling v Commission* [2016], *supra* note 186 at para 47; Case C-44/16P*, Dyson v Commission* [2017], *supra* note 186 at para 61; Judgment of the Court of 26 July 2017, *Czech Republic v European Commission*, Case C-696/15 P, EU:C:2017:595, at para 78; Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019, (2019/C 223/01), OJ C 223, *ST/8559/2019/REV/1* 2019 at para I.1.
196 Case C-363/14*, Europol* [2015], *supra* note 184 at para 51.
197 Art. 19 of the Taxonomy Regulation, *supra* note 1.
198 Case C-363/14*, Europol* [2015], *supra* note 184.

referring to its aims and framework. Further, it stated that 'even if a decision amending the list involves certain compromises with technical and political dimensions, such a decision cannot be regarded as requiring political choices falling within the responsibilities of the EU legislature.'[199] Both cases – adding third countries to a list or adding activities to the list of sustainable activities – involves certain technical and political trade-offs, as certain Member States may have preferences. As explained above, this is not characterised as an essential element, leaving it to the Commission to decide, within the framework of the basic act, which activities meet the criteria defined by the EU legislator.

Secondly, the qualification of nuclear energy as a transition energy rather concerns a specificity requirement of the Taxonomy Regulation than an essential requirement, i.e., whether the Complementary Climate Delegated Act respects the Taxonomy Regulation itself. Since nuclear energy is in line with the other requirements expressed in the Taxonomy Regulation, it does not appear to infringe either the essential or specificity requirement, which would allow the Court to annul an act of the Commission if the latter had made a manifest error of appreciation. Moreover, the Taxonomy Regulation left the choice to the Commission to decide which activities could be labelled as sustainable without specifically excluding nuclear energy from its scope, and the Commission was therefore entitled to adopt a delegated act on nuclear energy.

199 *Ibid* at para 51.

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6. Additional information

Léo Gotarda – Paper: Defining Sustainability: Who Can Solve the Discord on the Taxonomy Regulation?

Information about the author:

Léo Gotarda, Ph.D. Candidate

Institutional affiliation:

Salzburg Centre of European Union Studies (SCEUS), Paris Lodron Universität Salzburg (PLUS).

Full Postal and email address:

Mönchsberg 2, 5020 Salzburg, Austria. leo.gotarda@plus.ac.at

Other contact info:

Tel. +4366280447632

Biography:

Léo Gotarda is a PhD Candidate at the Salzburg Centre of European Union Studies, PLUS (Paris Lodron Universität Salzburg). He holds a Master's in European Union Studies from the same institute, a Master's in International Relations from the University of LUISS (Rome), and an LL.M. from the Universities of Strasbourg, Freiburg i.B. and Basel respectively (Trinational Programme). In his dissertation, he focuses on the mainstreaming of climate change in different areas of EU law, namely in the internal market, monetary policy, competition law and State aid.

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Luiss
School of Government

Via di Villa Emiliani 14
00197 Roma
T +39 85 225052
sog@luiss.it