

Dr. Simone Lünenbürger and Dr. Korbinian Reiter, Brussels and Berlin, 06.04.2022

Legal opinion:

Nuclear Power and the Taxonomy Regulation

REDEKER | SELLNER | DAHS

Focal points

Categories of nuclear power to be classified as ‘green’ under the Delegated Regulation C(2022)631 final (DR)

Procedural issues

First criterion (Article 10 and 11 TR)

- Substantial contribution to climate change mitigation/adaptation?

Second criterion (Article 17 TR):

- No significant harm to any of the other environmental objectives of the TR?

Legal action (Article 263, 267 TFEU)

- Direct action/indirect review and standard of judicial review

Categories of nuclear power to be classified as 'green' under the DR

- **Pre-Commercial stages** of advanced technologies to produce energy from nuclear processes with minimal waste from the fuel cycle (Annex I, 4.26):
- Construction and safe operation of **new nuclear power plants**, for the generation of electricity or heat, including for hydrogen production (Annex I, 4.27):
 - construction permit has been issued **by 2045** by Member States' competent authorities
- Electricity generation from nuclear energy in **existing installations** (Annex I, 4.28):
 - authorised by Member States' competent authorities **by 2040** in accordance with applicable national law
- **Mining and milling activities** have **expressly not been included** in the Delegated Regulation.

Procedural issues

Good reason to argue that DR is procedurally flawed:

- **lack of impact assessment**
 - contrary to Article 23(4) TR, Point 13 Interinstitutional Agreement on Better Law-Making (IA)
- **lack of public consultation**
 - contrary to Article 23(4) TR, Point 19 IA
- **simultaneous consultation of MSEG and Platform**
 - contrary to Article 24(1) and Recital 53 TR
- **insufficient time allowed to Platform and MSEG to prepare their comments**
 - contrary to Article 23(4) TR, Annex point 4 IA

First criterion (Article 10 TR): Substantial contribution to climate change mitigation?

Article 10

Substantial contribution to climate change mitigation

1. An economic activity shall qualify as contributing substantially to climate change mitigation where that activity contributes substantially to the stabilization of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system consistent with the long-term temperature goal of the Paris Agreement through the avoidance or reduction of greenhouse gas emissions or the increase of greenhouse gas removals, including through process innovations or product innovations, by:

- (a) generating, transmitting, storing, distributing or using renewable energy in line with Directive (EU) 2018/2001, including through using innovative technology with a potential for significant future savings or through necessary reinforcement or extension of the grid;
- (b) improving energy efficiency, except for power generation activities as referred to in Article 19(3);
- (c) increasing clean or climate-neutral mobility;
- (d) switching to the use of sustainably sourced renewable materials;
- (e) increasing the use of environmentally safe carbon capture and utilization (CCU) and carbon capture and storage (CCS) technologies that deliver a net reduction in greenhouse gas emissions;
- (f) strengthening land carbon sinks, including through avoiding deforestation and forest degradation, restoration of forests, sustainable management and restoration of croplands, grasslands and wetlands, afforestation, and regenerative agriculture;
- (g) establishing energy infrastructure required for enabling the decarbonization of energy systems;
- (h) producing clean and efficient fuels from renewable or carbon-neutral sources; or
- (i) enabling any of the activities listed in points (a) to (h) of this paragraph in accordance with Article 16.

2. For the purposes of paragraph 1, an economic activity for which there is no technologically and economically feasible low-carbon alternative shall qualify as contributing substantially to climate change mitigation where it supports the transition to a climate-neutral economy consistent with a pathway to limit the temperature increase to 1,5 0C above pre-industrial levels, including by phasing out greenhouse gas emissions, in particular emissions from solid fossil fuels, and where that activity:

- (a) has greenhouse gas emission levels that correspond to the best performance in the sector or industry;
- (b) does not hamper the development and deployment of low-carbon alternatives; and
- (c) does not lead to a lock-in of carbon-intensive assets, considering the economic lifetime of those assets.

For the purpose of this paragraph and the establishment of technical screening criteria pursuant to Article 19, the Commission shall assess the potential contribution and feasibility of all relevant existing technologies.

First criterion (Article 10 TR): Substantial contribution to climate change mitigation?

- EC acknowledges that nuclear power is **neither a green, nor an enabling activity (Article 10(1) TR)**
 - low carbon ≠ renewable, green
- EC qualifies three nuclear energy related economic activities as **transitional activities (Article 10(2) TR)**

First criterion (Article 10 TR): Substantial contribution to climate change mitigation?

- specific requirements for **transitional activities** set out in Art. 10(2) TR (literal, systemic and purposive interpretation):
 - scope covers **only carbon-intense activities** (which are so far **‘best in class’**)
 - consistent with a pathway to limit the temperature to 1.5 °C above preindustrial levels
 - no technologically and economically feasible low-carbon alternatives
 - no obstacle to low-carbon alternatives

First criterion (Article 10 TR): Substantial contribution to climate change mitigation?

Nuclear power does not meet the requirements:

- Not covered by the scope, because considered as ‘low-carbon activity’ (by EC); EC can only flesh out, but not extend the scope of Article 10 TR (Art. 290 TFEU)
- There are ‘feasible’ alternatives: renewables, combined with smart grids and storage technology; inasmuch as DR is based on the finding that alternatives ‘*may not yet be commercially available at a sufficient scale*’, EC relies on incorrect criterion
- Considerable doubt regarding contribution to climate neutrality in 2050 (construction permits possible until 2040, 2045 – or without time limit, given the usual construction times).
- At least lack of investigation regarding lock-in and ‘cannibalising’ effects

First criterion (Article 11 TR): Substantial contribution to climate change adaptation?

Article 11

Substantial contribution to climate change adaptation

1. An economic activity shall qualify as contributing substantially to climate change adaptation where that activity:
 - (a) includes adaptation solutions that either substantially reduce the risk of the adverse impact of the current climate and the expected future climate on that economic activity or substantially reduce that adverse impact, without increasing the risk of an adverse impact on people, nature or assets; or
 - (b) provides adaptation solutions that, in addition to satisfying the conditions set out in Article 16, contribute substantially to preventing or reducing the risk of the adverse impact of the current climate and the expected future climate on people, nature or assets, without increasing the risk of an adverse impact on other people, nature or assets.
2. The adaptation solutions referred to in point (a) of paragraph 1 shall be assessed and ranked in order of priority using the best available climate projections and shall, at a minimum, prevent or reduce:
 - (a) the location-specific and context-specific adverse impact of climate change on the economic activity; or
 - (b) the potential adverse impact of climate change on the environment within which the economic activity takes place.
3. The Commission shall adopt a delegated act in accordance with Article 23 to:
 - (a) supplement paragraphs 1 and 2 of this Article by establishing technical screening criteria for determining the conditions under which a specific economic activity qualifies as contributing substantially to climate change adaptation; and
 - (b) supplement Article 17 by establishing, for each relevant environmental objective, technical screening criteria for determining whether an economic activity in respect of which technical screening criteria have been established pursuant to point (a) of this paragraph causes significant harm to one or more of those objectives.
4. Prior to adopting the delegated act referred to in paragraph 3 of this Article, the Commission shall consult the Platform referred to in Article 20 regarding the technical screening criteria referred to in paragraph 3 of this Article.
5. The Commission shall establish the technical screening criteria referred to in paragraph 3 of this Article in one delegated act, taking into account the requirements of Article 19.
6. The Commission shall adopt the delegated act referred to in paragraph 3 by 31 December 2020, with a view to ensuring its application from 1 January 2022.

First criterion (Article 11 TR): Substantial contribution to climate change adaptation?

- Requirements of Article 11 TR:
 - Article 11 TR covers also adaptation solutions that ‘substantially reduce the risk of the adverse impact of the current climate and the expected future climate on **that** economic activity’.
- Applied to nuclear power :
 - Insufficient investigation, as the statements of experts/opinions referred to in Article 10 or, above all, Article 17 TR.
 - The explanatory memorandum of the Delegated Regulation 2021/2139 of 4 June 2021 states that only the expenditure related to implementing the adaptation solution counts as Taxonomy aligned. But only expenditure in separate climate adaptation solution can be determined easily. It seems highly probable that integrated safety requirements for the construction of nuclear power plants could be seen as climate adaptation solution. Hence, the climate adaption investment could be easily seen as the total or nearly total investment costs of a power plant. There seems to be at least a lack of guidance.

Second criterion (Article 17 TR): No significant harm to any of the other environmental objectives of the TR?

- **Art. 17(1) TR: Do No Significant Harm (DNSH) to:**
 - climate change mitigation
 - climate change adaptation
 - sustainable use and protection of water and marine resources
 - transition to a circular economy
 - pollution prevention and control
 - protection and restoration of biodiversity and ecosystems
- **Art. 17(2) TR: Environmental impact of**
 - the activity itself
 - the products and services provided throughout their life cycle

Second criterion (Article 17 TR): No significant harm to any of the other environmental objectives of the TR?

Current status:

Highly contentious scientific controversy, especially about the risks of nuclear energy and the fact that no final repositories for highly radioactive waste are available yet.

Room for legal guidance?

- Article 17(2)TR
- Precautionary principle

Second criterion (Article 17 TR): No significant harm to any of the other environmental objectives of the TR?

Article 17(2) TR:

- EC explicitly excludes uranium mining and milling from Taxonomy and emphasizes that these activities are predominantly carried out outside the EU. Apparently, a significant risk of adverse effects on environmental objectives is assumed.
- Assessment:
Uranium mining and milling are **necessarily in the first place in the life cycle of nuclear energy**. Therefore, there are good reasons that – in the framework of a lifecycle assessment – nuclear energy as a whole has to be regarded as incompatible with Article 17 TR.

Second criterion (Art. 17 TR): No significant harm to any of the other environmental objectives of the TR?

The precautionary principle (laid down in Art. 191 TFEU):

- **Article 19 (1)(f) TR:**
‘The technical screening criteria established pursuant to Articles 10(3), 11(3) [...] shall be based on conclusive scientific evidence and the precautionary principle enshrined in Article 191 TFEU.’
- **Recital 40 TR:**
‘Where a risk cannot be determined with sufficient certainty on the basis of a scientific assessment, the precautionary principle under Article 191 TFEU should apply.’

Second criterion (Art. 17 TR): No significant harm to any of the other environmental objectives of the TR?

Burden of proof:

EC, T-13/99, paragraph 142: ‘[...] in a situation in which the precautionary principle is applied [...] a risk assessment cannot be required to provide the Community institutions with conclusive scientific evidence of the reality of the risk [...]’ – unless the risk is merely hypothetical.

- In the light of the precautionary principle, the DNSH-criterion in Art. 17 TR requires an assessment of the **risk of ‘significant harm’** caused by nuclear power.
- In order to classify nuclear power as sustainable, EC cannot rely on lack of proof of risks of significant harm, unless the risks are merely hypothetical.

Second criterion (Art. 17 TR): No significant harm to any of the other environmental objectives of the TR?

Ascertaining what level of risk is deemed unacceptable:

EC, T-13/99, paragraph 149: *‘Risk assessment involves, **first, determining what level of risk is deemed unacceptable** and, **second, conducting a scientific assessment of the risks.**’*

Application to nuclear energy under the TR:

- Good reasons for an ‘increased’ level of protection because of the ambitious approach of ‘ecologically sustainable’ in the TR – which goes beyond the target of the nuclear safety regulations to make nuclear power as safe as possible.
- Otherwise Article 17 TR would be superfluous
- This is supported by the fact that the entire TR does not refer to Euratom law and nuclear safety regulations.

Second criterion (Art. 17 TR): No significant harm to any of the other environmental objectives of the TR?

Conducting a scientific assessment of the risk:

EC, T-13/99, paragraph 162: *‘Notwithstanding the existing scientific uncertainty, the scientific risk assessment must enable the competent public authority to ascertain, on the basis of the best available scientific data and the most recent results of international research, whether matters have gone beyond the level of risk that it deems acceptable for society.’*

Application to nuclear energy under the TR:

Due to the identified ‘increased level of protection’, it is plausible that it must be assessed (on the basis of the best available scientific data and the most recent results of international research), if risks (of significant harm) remain **despite compliance with EU nuclear safety regulations**. Since the Commission's technical assessment criteria are essentially based on compliance with nuclear safety regulations, there are doubts as to whether this examination or assessment has been carried out.

Second criterion (Art. 17 TR): No significant harm to any of the other environmental objectives of the TR?

In particular, the following aspects militate for risks of significant harm:

- Resilience to climate change, especially with respect to conflicts of interests regarding the use of water.
- Empirically proven (and therefore not hypothetical) risk of severe accidents (whereby the probability of an accident and possible long-term consequences (also) for contaminations of ecosystems and wildlife are subject of intense scientific dispute).
- No empirical examples when it comes to disposal facilities for high-level radioactive waste.

Legal action

- **Direct action (Article 263 TFEU): privileged standing for EP (Article 149 RoP), Council, Member States**
- **Indirect review by means of preliminary reference (Article 267 TFEU), for instance in context of claim based on law of unfair competition**
- **Standard of review:**
 - full judicial review of questions of law, notably Article 10 (2) TR, implications of precautionary principle, level of protection required
 - EC's discretion regarding complex technical appraisals does not exclude meaningful judicial review of Article 17 TR

Legal action

- **The ,manifest error‘-test for reviewing complex technical appraisals of the EC**
(for example ECJ, C-405/07 P, paragraph 55):

The court examines whether

- the evidence relied on is factually accurate, reliable and consistent,
- the evidence contains all information which must be taken into account in order to assess a complex situation,
- it is capable of substantiating the conclusions drawn from it.
- **Applied to present case:** Especially the before mentioned aspects militate for manifest errors.

Conclusion

- It is doubtful whether nuclear energy can fall within the scope of Article 10(2) TR. In addition, it seems to be doubtful, if in particular ‘pre-commercial stages’ and ‘new nuclear power plants’ can be considered as ‘transitional activities’ to achieve climate neutrality by 2050.
- The technical screening criteria regarding to Article 11 TR could make the discussion on Article 10 TR largely superfluous (through a broad understanding of investment costs based on climate adaptation measures for the installations).
- With regard to Article 17 TR, the risks of nuclear energy which may exist even if nuclear safety regulations are complied with, do not seem to be sufficiently evaluated at present.
- Unless EP or Council raise objections, EU-courts may have to decide, most likely upon action filed by a Member State. Courts will examine legal requirements resulting from Article 10, 11, 17 TR and precautionary principle and control complex technical appraisals for manifest errors of assessment.
- Significance and consequences in practice remain exciting: Transitional activities are to be reported separately according to Article 5 TR, furthermore ‘should’ be defined for nuclear energy and gas special disclosure obligations (C(2022)631 final, recital 15).

Thank you very much for your attention!

Your contacts:

Dr. Simone Lünenbürger
luenenbuerger@redeker.de

Dr. Korbinian Reiter, LL.M.
reiter@redeker.de



Rechtsanwälte, Partnerschaftsgesellschaft mbB, Sitz Bonn, Essen PR 1947



Berlin · Bonn · Brüssel · Leipzig · London · München

www.redeker.de

REDEKER | SELLNER | DAHS

Berlin

Leipziger Platz 3
10117 Berlin
Tel +49 30 885665-0
Fax +49 30 885665-99
berlin@redeker.de

Bonn

Willy-Brandt-Allee 11
53113 Bonn
Tel +49 228 72625-0
Fax +49 228 72625-99
bonn@redeker.de

Brüssel

172, Av. de Cortenberg
1000 Brüssel
Tel +32 2 74003-20
Fax +32 2 74003-29
bruessel@redeker.de

Leipzig

Stentzlers Hof
Petersstraße 39-41
04109 Leipzig
Tel +49 341 21378-0
Fax +49 341 21378-30
leipzig@redeker.de

London

4 More London Riverside
London SE1 2AU
Tel +44 20 740486 41
Fax +44 20 743003 06
london@redeker.de

München

Maffeistraße 4
80333 München
Tel +49 89 2420678-0
Fax +49 89 2420678-69
muenchen@redeker.de

Rechtsanwälte, Partnerschaftsgesellschaft mbB, Sitz Bonn, Essen PR 1947



Berlin · Bonn · Brüssel · Leipzig · London · München

www.redeker.de

REDEKER | SELLNER | DAHS