

## REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION

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**Of 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<sup>1</sup> (the “**Contested Act**”)

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To

**European Commission, Directorate General for Financial Stability, Financial Services and Capital Markets Union (FISMA)**

According to Article 10 of Regulation 1367/2006<sup>2</sup> and Commission Decision 2008/50/EC of 13 December 2007.<sup>3</sup>

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<sup>1</sup> OJ L 188, 15.7.2022, p. 1–45.

<sup>2</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13–19) as amended by Regulation (EU) 2021/1767 (OJ L 356, 8.10.2021, p. 1-7) (the “Aarhus Regulation”).

<sup>3</sup> Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (OJ L 13, 16.1.2008).

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## BACKGROUND

1. In December 2019 the Commission published the European Green Deal (“the EGD”), setting out the EU’s policy response to tackling the urgent climate and ecological crises, which the Commission characterised as “this generation’s defining task”.<sup>4</sup>
2. The EGD recognises that the “the private sector will be key to financing the green transition”<sup>5</sup>. Its opening paragraphs commit the EU to “increased efforts to direct private capital towards climate and environmental action, while avoiding lock-in into unsustainable practices”. The adoption of a taxonomy for classifying environmentally sustainable activities is listed among its flagship initiatives.
3. Regulation (EU) 2020/852<sup>6</sup> (“the Taxonomy Regulation”) was duly adopted by the co-legislators in 2021, putting in place the legal framework for establishing a unified classification system for sustainable activities. Its objective is to incentivise the channelling of private investments into activities classified as sustainable by enhancing investor confidence and awareness of the environmental impact of financial products; by creating greater visibility for such products; addressing “greenwashing”, whereby market actors can gain an unfair competitive advantage through false claims of environmental sustainability; and by removing barriers to the functioning of the internal market with regard to raising funds for sustainable activities.<sup>7</sup> Furthermore, although the Taxonomy Regulation applies, in principle, to private investments, “*it could also serve as the basis for other economic and regulatory measures*”<sup>8</sup>; notably, it is also referred to in relation to public finance instruments.<sup>9</sup>
4. The Regulation defines six environmental objectives (the “Environmental Objectives”), including climate change mitigation, and lays down stringent requirements that must be fulfilled for an activity to be labelled as environmentally sustainable. These requirements are obviously critical because the consequence of an activity being classified as sustainable is that the activity may receive incentives and advantages (including advantages relative to other activities). In laying down these requirements, the co-legislators recognised the very real danger of classifying certain activities as sustainable when, in fact, they do more harm to the

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<sup>4</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, COM/2019/640 final, p. 1.

<sup>5</sup> *Ibidem*, p. 1.

<sup>6</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

<sup>7</sup> *Ibidem*, recitals 11 and 12.

<sup>8</sup> *Ibidem*, recital 16.

<sup>9</sup> See Commission Notice Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01) 9); see also Communication from the Commission ‘Sustainable Europe Investment Plan / European Green Deal Investment Plan’ COM/2020/21 final, section 4.1: “The Commission will also explore how the EU taxonomy can be used in the context of the European Green Deal by the public sector, beyond InvestEU”.

environment than good<sup>10</sup>. Not only do such mis-categorisations have a directly negative impact on the environment by encouraging and locking in harmful environmental effects for the future; they also undermine several of the objectives of the Taxonomy Regulation itself, including investors' confidence in the taxonomy framework and allowing distortions of the internal market by sanctioning greenwashing. Mis-categorisation would also divert finite resources from other activities that are actually sustainable. Therefore, strong safeguards were built into the decision-making process, including the requirement for an activity to “do no significant harm” (‘DNSH’) to any of the Environmental Objectives defined in the Regulation, taking account of the entire life cycle of the activity itself as well as of the products and services it provides, during production, use and end of life.

5. The Taxonomy Regulation delegates to the Commission the task of establishing detailed technical screening criteria (“TSC”) for specific economic activities. Again, given the importance of ensuring that only truly sustainable activities are incentivised, the Regulation provides a very narrow margin of discretion to the Commission, laying down detailed requirements to be met in its decision-making. Significantly, the Commission is obliged to define technical criteria that are based on “conclusive scientific evidence” that the economic activity contributes substantially to one or more of the six Environmental Objectives, and does no significant harm to any of the Environmental Objectives, and in compliance with the precautionary principle enshrined in Article 191 TFEU.
6. By Delegated Regulation (EU) 2021/2139 of 4 June 2021<sup>11</sup>, the Commission classified as sustainable certain activities.<sup>12</sup> As far as activities relying on fossil gas are concerned, this delegated regulation provided that *“Where natural gas activities fulfil [the requirement to qualify as a transitional activity under Article 10(2) of the Taxonomy Regulation], they will be included in a future delegated act. For these activities, the technical screening criteria for assessing substantial contribution to climate change mitigation and ‘do no significant harm’ to other environmental objectives will be specified in that future delegated act. Activities that do not meet these requirements cannot be recognised under the Regulation (EU) 2020/852.”*<sup>13</sup>
7. The Contested Act was adopted to complement Delegated Regulation (EU) 2021/2139 in relation to activities relying on nuclear energy and fossil gas to produce electricity, or heating/cooling or both through cogeneration. The Applicants underline that while the Annexes to the Contested Act use the expression “fossil gaseous fuels” to designate gas of fossil origin, this Request will refer to “fossil gas” to designate such gas, as used in the preamble to the

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<sup>10</sup> Recital (34) Taxonomy Regulation.

<sup>11</sup> 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, OJ L 442, 9.12.2021, p. 1.

<sup>12</sup> ClientEarth filed a request for internal review of this delegated regulation insofar as it classifies as sustainable activities which rely on the use of forest biomass, the manufacture of Organic Basic Chemicals and the manufacture of plastics in primary form made out of biomass. ClientEarth's request for internal review was registered under reference Ares(2022)871745. See also ClientEarth's and other NGOs' requests for internal review on the [Commission's register](#), items 62 and 64.

<sup>13</sup> Commission Delegated Regulation (EU) 2021/2139, recital (28).

Contested Act. The Applicants will also refer to the activities that fall within the scope of Article 10(2) Taxonomy Regulation as "transitional activities".

8. The present Request for Internal Review will show that, in adopting the decision in the Contested Act relating to activities related to fossil gas, the Commission did not comply with several of the mandatory requirements and safeguards built into the Taxonomy Regulation under Articles 3, 10(2), 17 and 19(2). The Contested Act also contravenes various requirements of the EU Treaties and the European Climate Law. As a result, the Contested Act is vitiated by lack of competence, infringement of essential procedural requirements, manifest errors and misuse of power. This unlawfulness leads to the very consequence that the co-legislators intended to avoid in setting out the essential elements of the Taxonomy Regulation: that several economic activities have been classified as sustainable (making them eligible for incentives) despite the fact they do more environmental harm than good.

## 1 LEGAL FRAMEWORK

### 1.1 The Contested Act and the Taxonomy Regulation

9. The Contested Act is a delegated regulation, supplementing the Taxonomy Regulation, which aims to establish the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable.<sup>14</sup> Article 3 of Taxonomy Regulation provides that an economic activity qualifies as environmentally sustainable only where it:
- a) contributes substantially to one or more of the environmental objectives set out in Article 9 (the “Environmental Objectives”) Taxonomy Regulation in accordance with Articles 10 to 16 thereof;
  - b) does not significantly harm any of the Environmental Objectives in accordance with Article 17 thereof;
  - c) is carried out in compliance with the minimum safeguards laid down in Article 18 Taxonomy Regulation; and
  - d) complies with technical screening criteria that have been established by the Commission in accordance with Article 10(3), 11(3), 12(2), 13(2), 14(2) or 15(2) of the Taxonomy Regulation.<sup>15</sup>
10. Article 9 Taxonomy Regulation lists the six Environmental Objectives: climate change mitigation, climate change adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems. Articles 10 to 15 Taxonomy Regulation set out the conditions under which an economic activity qualifies as contributing substantially to each of those environmental objectives.
11. In particular, Article 10 addresses the conditions qualifying an economic activity as contributing substantially to climate change mitigation. Article 10 provides that an activity qualifies as contributing substantially to **climate change mitigation** where it “*contributes substantially to the stabilisation 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 [...]*”.<sup>16</sup> For this purpose, an “*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*

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<sup>14</sup> Article 1 Taxonomy Regulation.

<sup>15</sup> Article 3 Taxonomy Regulation.

<sup>16</sup> Article 10(1) Taxonomy Regulation.

increase to 1,5 °C above pre-industrial levels, including by phasing out greenhouse gas emissions, in particular emissions from solid fossil fuels, and where that activity: (a) has greenhouse gas emission levels that correspond to the best performance in the sector or industry; (b) does not hamper the development and deployment of low-carbon alternatives; and (c) does not lead to a lock-in of carbon-intensive assets, considering the economic lifetime of those assets. 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”.<sup>17</sup> We will refer to the latter category of activities as “transitional activities” throughout this submission. **The Contested Act classifies activities relating to nuclear energy generation and fossil gas within this category.**

12. The Taxonomy Regulation (Article 17) sets out the conditions under which an economic activity is considered to **significantly harm** the Environmental Objectives and cannot, therefore, be considered environmentally sustainable under Article 3 thereof. In particular, it provides that:

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

- (a) *climate change mitigation, where that activity leads to significant greenhouse gas emissions;*
- (b) *climate change adaptation, where that activity leads to an increased adverse impact of the current climate and the expected future climate, on the activity itself or on people, nature or assets;*
- (c) *the sustainable use and protection of water and marine resources, where that activity is detrimental:*
  - (i) *to the good status or the good ecological potential of bodies of water, including surface water and groundwater; or*
  - (ii) *to the good environmental status of marine waters;*
- (d) *the circular economy, including waste prevention and recycling, where:*
  - (i) *that activity leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources such as non-renewable energy sources, raw materials, water and land at one or more stages of the life cycle of products, including in terms of durability, reparability, upgradability, reusability or recyclability of products;*

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<sup>17</sup> Article 10(2) Taxonomy Regulation.



- (ii) *that activity leads to a significant increase in the generation, incineration or disposal of waste, with the exception of the incineration of non-recyclable hazardous waste; or*
    - (iii) *the long-term disposal of waste may cause significant and long-term harm to the environment;*
  - (e) *pollution prevention and control, where that activity leads to a significant increase in the emissions of pollutants into air, water or land, as compared with the situation before the activity started; or*
  - (f) *the protection and restoration of biodiversity and ecosystems, where that activity is:*
    - (i) *significantly detrimental to the good condition and resilience of ecosystems; or*
    - (ii) *detrimental to the conservation status of habitats and species, including those of Union interest.*
2. *When assessing an economic activity against the criteria set out in paragraph 1, both the environmental impact of the activity itself and the environmental impact of the products and services provided by that activity throughout their life cycle shall be taken into account, in particular by considering the production, use and end of life of those products and services.*

13. Articles 10(3) Taxonomy Regulation mandates the Commission to adopt a delegated act to establish technical screening criteria (a) supplementing paragraphs 1 and 2 of Articles 10 to determine the conditions under which a specific economic activity qualifies as contributing substantially to climate change mitigation; and (b) supplementing Article 17 thereof to determine whether an economic activity causes significant harm to one or more of the Environmental Objectives. The Taxonomy Regulation accordingly requires that any TSC that concern the Environmental Objective of climate change mitigation must give effect to and reflect the requirements set out in Articles 10(1) and 10(2); and any TSC must also give effect to and reflect the requirement under Article 17 that any activity does no significant harm to any Environmental Objective.

14. In establishing technical screening criteria, the Commission must also comply with the requirements specifically laid out in Article 19 Taxonomy Regulation.<sup>18</sup> Accordingly, the technical screening criteria shall:

- “(a) identify the most relevant potential contributions to the given environmental objective while respecting the principle of technological neutrality, considering both the short- and long-term impact of a given economic activity;*
- (b) specify the minimum requirements that need to be met to avoid significant harm to any of the relevant environmental objectives, considering both the short- and long-term impact of a given economic activity;*

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<sup>18</sup> See Articles 10(5) and 11(5) Taxonomy Regulation respectively.

- (c) *be quantitative and contain thresholds to the extent possible, and otherwise be qualitative;*
- (d) *where appropriate, build upon Union labelling and certification schemes, Union methodologies for assessing environmental footprint, and Union statistical classification systems, and take into account any relevant existing Union legislation;*
- (e) *where feasible, use sustainability indicators [...];*
- (f) *be based on conclusive scientific evidence and the precautionary principle enshrined in Article 191 TFEU;*
- (g) *take into account the life cycle, including evidence from existing life-cycle assessments, by considering both the environmental impact of the economic activity itself and the environmental impact of the products and services provided by that economic activity, in particular by considering the production, use and end of life of those products and services;*
- (h) *take into account the nature and the scale of the economic activity, including: [...] (ii) whether it is a transitional activity as referred to in Article 10(2);*
- (i) *take into account the potential market impact of the transition to a more sustainable economy [...];*
- (j) *cover all relevant economic activities within a specific sector and ensure that those activities are treated equally if they contribute equally towards the environmental objectives [...] to avoid distorting competition in the market; and*
- (k) *be easy to use and be set in a manner that facilitates the verification of their compliance. [...]*<sup>19</sup>.

15. Moreover, Article 19 provides that the technical screening criteria must include criteria for activities related to the clean energy transition consistent with a pathway to limit the temperature increase to 1,5°C above pre-industrial levels;<sup>20</sup> must ensure that power generation activities that use solid fossil fuels do not qualify as environmentally sustainable economic activities<sup>21</sup>; must include criteria for activities related to the switch to clean or climate-neutral mobility, including through modal shift, efficiency measures and alternative fuels, to the extent that those are substantially contributing to any of the environmental objectives.<sup>22</sup>

16. In the present case, the Commission exercised its delegated powers to establish technical screening criteria for activities relying on nuclear energy generation and fossil gas by adopting the Contested Act, which thereby amends Delegated Regulation (EU) 2021/2139 where those activities were not included. It follows that the Contested Act is accompanied by two annexes which specify the technical screening criteria under which certain economic activities qualify as contributing substantially to climate change mitigation (Annex I) and climate change

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<sup>19</sup> Article 19(1) Taxonomy Regulation.

<sup>20</sup> Article 19(2) Taxonomy Regulation.

<sup>21</sup> Article 19(3) Taxonomy Regulation.

<sup>22</sup> Article 19(4) Taxonomy Regulation.

adaptation (Annex II) and for determining the associated DNSH criteria.<sup>23</sup> The Contested Act also includes an Annex III adding a new Annex XII to the Taxonomy Disclosures Delegated Act, which is not included in the scope of this Request.

## 1.2 Other relevant legislation

17. It is also relevant to briefly introduce other legal instruments that are linked to the Taxonomy Regulation and the Contested Act because they set EU climate commitments and rules, including on financing: the Paris Agreement, climate commitments included in the EU Taxonomy Regulation, the Communication from the European Commission on the European Green Deal, the European Climate Law, the 8th Environmental Action Programme and the EU Governance Regulation.

### The Paris Agreement

18. The 2015 Paris Agreement provides for the parties to it to take steps to limit increases in global temperatures to specified levels. Article 2(1) provides:

*“This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*

*(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; ...*

*(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”*

### EU legislation

19. The EU<sup>24</sup> and, specifically, the Commission<sup>25</sup> have repeatedly committed to reducing greenhouse gas emissions as required by the Paris Agreement.

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<sup>23</sup> Commission Delegated Regulation, Explanatory Memorandum, p. 2. In accordance with Article 31 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1–14), the Contested Act combined in a single act two interrelated empowerments of the Taxonomy Regulation, namely Articles 10(3) and 11(3).

<sup>24</sup> For example, Regulation (EU) 2018/842 of the European Parliament and of the Council expressly describes the emissions reductions measures it enacts as “contributing to climate action to meet commitments under the Paris Agreement.”

<sup>25</sup> The Commission has also affirmed the duties of the EU to reduce GHGs in order to meet the temperature objectives defined by the Paris Agreement: “*The EU has been at the forefront of addressing the root causes of climate change and strengthening a concerted global response in the framework of the Paris Agreement. The Paris Agreement, ratified by 181 parties, requires strong and swift global action to reduce greenhouse gas emissions, with the objective to hold global temperature increase to well below 2°C and to pursue efforts to limit it to 1.5°C*”: see page 4 of Communication from the Commission to the European Parliament, the

20. The Taxonomy Regulation itself affirms these requirements and explains the steps taken to give effect to them, including in particular the adoption of an objective of climate neutrality by 2050:

Recitals 3-4:

*“The Paris Agreement adopted under the United Nations Framework Convention on Climate Change (the ‘Paris Agreement’) was approved by the Union on 5 October 2016. Article 2(1)(c) of the Paris Agreement aims to strengthen the response to climate change by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, among other means. In that context, on 12 December 2019, the European Council adopted conclusions on climate change. In light thereof, this Regulation represents a key step towards the objective of achieving a climate-neutral Union by 2050.*

*Sustainability and the transition to a safe, climate-neutral, climate-resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the Union economy.”*

Recital 24:

*“An economic activity that pursues the environmental objective of climate change mitigation should contribute substantially to the stabilisation of greenhouse gas emissions by avoiding or reducing them or by enhancing greenhouse gas removals. The economic activity should be consistent with the long-term temperature goal of the Paris Agreement. That environmental objective should be interpreted in accordance with relevant Union law, including Directive 2009/31/EC of the European Parliament and of the Council.”*

21. In December 2019, the Commission proposed a European Green Deal entailing a commitment to a ‘climate-neutral Europe’ by 2050.<sup>26</sup>

22. Climate neutrality by 2050 has now also been adopted as a binding objective in pursuit of the long-term temperature goals of the Paris Agreement, as enshrined in the European Climate Law. Article 1 of the European Climate Law states:<sup>27</sup>

*“This Regulation sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global*

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European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, “A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy”, COM(2018) 773 final (28 November 2018).

<sup>26</sup> Section 2.1.1 of Communication from the Commission of 11 December 2019, The European Green Deal, COM(2019) 640 final.

<sup>27</sup> European Parliament legislative resolution of 24 June 2021 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)).

*adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030.”*

23. Article 4(1) first sub-paragraph sets the binding Union 2030 climate target as “a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55% compared to 1990 levels”

24. The European Climate Law not only sets binding climate objectives and targets but also sets rules facilitating and enabling their achievement. In particular, it requires a climate-neutrality consistency assessment of all EU draft measures and legislative proposals. Article 6(4) of the European Climate Law provides:

*“The Commission shall assess the consistency of any draft measure or legislative proposal, including budgetary proposals, with the climate-neutrality objective set out in Article 2(1) and the Union 2030 and 2040 climate targets before adoption, and include that assessment in any impact assessment accompanying these measures or proposals, and make the result of that assessment publicly available at the time of adoption. The Commission shall also assess whether those draft measures or legislative proposals, including budgetary proposals, are consistent with ensuring progress on adaptation as referred to in Article 5. When making its draft measures and legislative proposals, the Commission shall endeavour to align them with the objectives of this Regulation. In any case of non-alignment, the Commission shall provide the reasons as part of the consistency assessment referred to in this paragraph.”*

25. The importance of ensuring that sufficient funding is available to achieve climate goals is stressed in the 8th Environmental Action Programme. Reduction of greenhouse gas emissions is one of its six interlinked thematic priority objectives for the period up to 31 December 2030. Article 2(2)(a) describes this objective as:

*“swift and predictable reduction of greenhouse gas emissions and, at the same time, enhancement of removals by natural sinks in the Union to attain the 2030 greenhouse gas emission reduction target as laid down in Regulation (EU) 2021/1119, in line with the Union’s climate and environment objectives, whilst ensuring a just transition that leaves no one behind”*

26. Mobilising investment from public and private funds is indicated in Article 3(u) of the 8th Environmental Action Programme as one of enabling conditions to attain its priority objectives:

*“mobilising resources and ensuring sufficient sustainable investments from public and private sources, including of funds and instruments available under the Union budget, via the European Investment Bank and at national level, consistent with the Union’s sustainable finance policy agenda;”*

## 2 SCOPE OF THE REQUEST

27. This Request covers the technical screening criteria set out in Annexes I and II to the Contested Act for the following categories of economic activities:

4.29. Electricity generation from fossil gaseous fuels

4.30. High-efficiency co-generation of heat/cool and power from fossil gaseous fuels

4.31. Production of heat/cool from fossil gaseous fuels in an efficient district heating and cooling system

(further referred to as “fossil gas based activities” or “activities 4.29, 4.30 and 4.31”).

28. For the avoidance of any doubt, TSC applying to economic activities based on nuclear energy are not within the scope of this Request.

## 3 ADMISSIBILITY

29. Article 10 Aarhus Regulation, as amended, entitles any non-governmental organisation that meets the criteria set out in Article 11 Aarhus Regulation to make a request for internal review to the Union institution or body that adopted an administrative act, as defined in Article 2(1)(g) Aarhus Regulation, on the grounds that such an act or omission contravenes environmental law.

### 3.1 The Applicants meet the criteria set out in Article 11 Aarhus Regulation

30. The present request fulfils the requirements of this provision because: (i) the Applicants meet the criteria set out in Article 11 Aarhus Regulation; (ii) the Contested Act constitutes an administrative act in the sense of Article 2(1)(g) Aarhus Regulation and (iii) the legal grounds raised in this request (which the Contested Act contravenes) constitute environmental law. The Applicants meet the **criteria set out in Article 11 Aarhus Regulation**

31. Upon the Commission's advice, the Applicants are hereby jointly submitting the Request and have appointed ClientEarth as "lead NGO" for handling this Request.<sup>28</sup> We nonetheless provide details below demonstrating that each Applicant is individually admissible to file the Request.

#### ClientEarth

32. Since the Aarhus Regulation entered into force, ClientEarth has submitted a number of internal review requests and the EU institutions and bodies have always accepted that ClientEarth fulfils the criteria under Article 11(1) Aarhus Regulation. In line with Article 3(1) and point 4 of the Annex to Decision 2008/50, ClientEarth is submitting the replies to three of its most recent internal review requests, as evidence that it fulfils the criteria under Article 11 Aarhus Regulation.<sup>29</sup>

33. For the avoidance of any doubt, ClientEarth also submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:

- A. Statute of ClientEarth AISBL in its current form, as published in the Belgian Official Journal (Moniteur belge) – see **Annexes 1 and 2**, in French;

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<sup>28</sup> See Commission's replies of 1 April 2022 to requests for internal reviews numbered 49 to 58 in the [internal review requests register](#).

<sup>29</sup> [Commission decision of 6 July 2022, ref. fisma.b.2\(2022\)5339092](#);  
[Council of the European Union decision of 10 June 2022, ref. 9303/2/22 REV 2](#);  
[Council of the European Union decision of 14 July 2022, ref. 10616/2/22 REV 2](#).

- B. Annual activity reports of ClientEarth for the years 2019 and 2020 (the annual activity report for 2021 has not yet been finalised at the time of submission but can be sent at a later date on request) – see **links to ClientEarth’s website**<sup>30</sup>, in English;
  - C. An official extract of the Belgian Companies Register, dated 10 January 2022, which proves ClientEarth’s incorporation as a legal person under Belgian law since 25 October 2018, i.e. for well over 2 years at the time of submission – see **Annex 3**, in French.
34. These documents demonstrate that ClientEarth meets all the criteria under Article 11(1) Aarhus Regulation.
35. In particular as to Article 11(1)(b) and Article 11(1)(d) Aarhus Regulation, the present request seeks to ensure that the Contested Act only defines as environmentally sustainable those activities which contribute to climate mitigation and do not significantly harm the environment. This objective is fully in line with ClientEarth’s statutory purpose described in Article 4 of its Statute, as the mitigation of climate change and the prevention of environmental harm directly and indirectly ensure environmental protection and the protection of human health. It is also in line with ClientEarth’s activities aimed at decarbonising the internal energy market and phasing out fossil fuel subsidies as reflected in its annual activity reports and publications. To name but a few examples, these activities include ClientEarth’s advocacy on the revision of the TEN-E Regulation and on the 4<sup>th</sup> and 5<sup>th</sup> PCI lists adopted thereunder<sup>31</sup>, on the adoption of the Clean Energy for all Europeans Package, on the promotion of the ‘energy efficiency first’ principle<sup>32</sup>, on the proposal for a hydrogen and gas decarbonisation package<sup>33</sup>, on the proposal for a legislative act to reduce methane emissions in the oil, gas and coal sectors<sup>34</sup> and on the classification of fossil gas as a sustainable activity under the Sustainable Finance Taxonomy<sup>35</sup>; court actions against infrastructure that contributes to climate change and pollution, such as coal plants all over Europe,<sup>36</sup> a gas plant in the UK<sup>37</sup> a biomass plant in

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<sup>30</sup> Annual report 2019, accessible at : <https://www.clientearth.org/media/tibh5cls/clientearth-annual-reports-for-the-year-ended-31-dec-2019.pdf>.

Annual Report 2020, accessible at: <https://www.clientearth.org/media/gkraj42g/clientearth-2020-annual-report.pdf>.

<sup>31</sup> ClientEarth’s blog “The EU keeps spending money on fossil fuel infrastructure – why?”, November 2021, available at: <https://www.clientearth.org/latest/latest-updates/news/the-eu-keeps-spending-money-on-fossil-fuel-infrastructure-why/>; ClientEarth “Non-compliance of the 4th PCI List with EU Law and the Paris Agreement”, January 2020, available at: <https://www.clientearth.org/media/of1pdfim/clientearth-non-compliance-with-the-4th-pci-list-ce-en.pdf>.

<sup>32</sup> 2020 Annual Report, p. 15 and 2019 Annual Report, p. 14.

<sup>33</sup> [ClientEarth’s reply to the public consultation on the hydrogen and gas market decarbonisation package](#), June 2021; [ClientEarth’s reply to the roadmap/inception impact assessment on the hydrogen and gas decarbonisation package](#), March 2021.

<sup>34</sup> ClientEarth and other NGOs’ [Feedback on the Proposal for a Legislative Act to Reduce Methane Emissions in the Oil, Gas and Coal Sectors](#), January 2021.

<sup>35</sup> ClientEarth “[Exclusion of natural gas activities from the EU Taxonomy Regulation](#)”, October 2021.

<sup>36</sup> 2020 Annual Report, pp. 7, 10 and 14-15 and 2019 Annual Report, pp. 12-13.

<sup>37</sup> 2019 Annual Report, p. 11.



Spain,<sup>38</sup> as well as its litigation and advocacy work to prevent public<sup>39</sup> and private<sup>40</sup> financing for fossil fuels.

## Transport & Environment

36. Transport & Environment submitted an internal review request to the Commission in 2014 and the Commission accepted that Transport & Environment fulfils the criteria under Article 11(1) Aarhus Regulation. In line with Article 3(1) and point 4 of the Annex to Decision 2008/50, Transport & Environment is submitting the reply to its previous internal review request, as evidence that it fulfils the criteria under Article 11 Aarhus Regulation.<sup>41</sup>
37. For the avoidance of any doubt, Transport & Environment also submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:
1. Statute of Transport & Environment (*Fédération européenne pour le Transport et l'Environnement* AISBL) in its current form, as published in the Belgian Official Journal (Moniteur belge) – see **Annex 4**, in French;
  2. Annual activity reports of Transport & Environment for the years 2020 and 2021 – see **links to Transport & Environment's website**<sup>42</sup>, in English;
  3. An extract of the Belgian Companies Register which proves Transport & Environment's incorporation as a legal person under Belgian law under the name *Fédération européenne pour le Transport et l'Environnement* AISBL since 7 March 1991, i.e. for well over 2 years at the time of submission – see **link to the Belgian Companies Register**<sup>43</sup>, in French.
38. These documents demonstrate that Transport & Environment meets all the criteria under Article 11(1) Aarhus Regulation.
39. As to Article 11(1)(a) Aarhus Regulation, Article 1 of its Statute (Annex 4, p. 1) proves that Transport & Environment is incorporated in the form of an international, non-profit organisation ("*association internationale sans but lucratif*", AISBL). This is confirmed by the extract of the Belgian Companies Register. Both documents also show that Transport & Environment is a legal person in accordance with a Member State's national law.
40. In relation to Article 11(1)(b) Aarhus Regulation, Article 3 of Transport & Environment's Statute demonstrates that its primary stated objective is promoting environmental protection in the context of environmental law.<sup>44</sup> In particular, Article 3 enshrines the objective of promoting

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<sup>38</sup> 2019 Annual report, p. 8.

<sup>39</sup> 2020 Annual report, p. 15 and 2019 Annual report, pp. 15-16.

<sup>40</sup> 2020 Annual Report, pp. 13-14 and 2019 Annual Report, p. 14.

<sup>41</sup> [Commission decision of 7 April 2014, C\(2014\)2465 final.](#)

<sup>42</sup> Annual report 2020, accessible at: <https://www.transportenvironment.org/annual-report-2020/documents/TE-Annual-Report-2020.pdf>.

Annual Report 2021, accessible at: <https://www.transportenvironment.org/wp-content/uploads/2022/03/06-TE-AR21.pdf>.

<sup>43</sup> [Données de l'unité d'établissement | BCE Public Search \(fgov.be\).](#)

<sup>44</sup> See Annex 4.

transport and mobility policy based on the principle of sustainable development, that minimises negative impacts on the environment and health, energy consumption and land use, and economic and social costs. Article 3 further lists the objective of promoting, undertaking and coordinating research studies, disseminate information to the public and institutions, make recommendations to the attention of institutions in particular at Union level and promoting sustainable transport initiatives.

41. The Extract of the Belgian Companies Register demonstrates that Transport & Environment has existed for more than two years, as required by Article 11(1)(c) Aarhus Regulation.<sup>45</sup> The activity reports provide evidence that Transport & Environment is actively pursuing the objectives mentioned above. As these reports show, all of Transport & Environment's activities are directly aimed at environmental protection.
42. As to Article 11(1)(d) Aarhus Regulation, the present request seeks to ensure that the Contested Act only defines as environmentally sustainable those activities which contribute to climate mitigation and do not significantly harm the environment. This objective is fully in line with Transport & Environment's statutory purpose described above, as the deployment of, and continuous reliance on fossil gas in the EU hamper the deployment of renewable and low-carbon alternatives. It is also in line with Transport & Environment's activities aimed at decarbonising the transport sector and phasing out transport fuel of fossil origin as reflected in its annual activity reports and publications.

## WWF European Policy Programme ('WWF EPO')

43. Although WWF EPO never submitted an internal review request under Article 10 Aarhus Regulation before, there is no doubt it meets the admissibility requirements of Article 11 of that Regulation.
44. WWF EPO submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:
  4. Statute of WWF EPO in its current form, as published in the Belgian Official Journal (Moniteur belge) – see **Annex 5**, in French;
  5. Annual activity reports of WWF EPO for the years 2020 and 2021 – see **links to WWF's website**<sup>46</sup>, in English;
  6. An extract of the Belgian Companies Register which proves WWF EPO's incorporation as a legal person under Belgian law since 31 May 1996, i.e. for well over 2 years at the time of submission – see **link to the Belgian Companies Register**<sup>47</sup>, in Dutch.

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<sup>45</sup> See Annex 5.

<sup>46</sup> WWF EPO annual review 2021:

[https://wwfeu.awsassets.panda.org/downloads/wwf\\_epo\\_2021\\_annual\\_report\\_spreads.pdf](https://wwfeu.awsassets.panda.org/downloads/wwf_epo_2021_annual_report_spreads.pdf);

WWF EPO annual review 2020:

[https://wwfeu.awsassets.panda.org/downloads/wwf\\_epo\\_2020\\_annual\\_report\\_spread.pdf](https://wwfeu.awsassets.panda.org/downloads/wwf_epo_2020_annual_report_spread.pdf).

<sup>47</sup> [Gegevens van de geregistreeerde entiteit | KBO Public Search \(fgov.be\)](#).

45. These documents demonstrate that WWF EPO meets all the criteria under Article 11(1) Aarhus Regulation.
46. As to Article 11(1)(a) Aarhus Regulation, Article 1 of its Statute (Annex A5, p. 1) proves that WWF EPO is incorporated in the form of an international, non-profit organisation (“*association internationale sans but lucratif*”, AISBL). This is confirmed by the extract of the Belgian Companies Register. Both documents also show that WWF EPO is a legal person in accordance with a Member State’s national law.
47. In relation to Article 11(1)(b) Aarhus Regulation, WWF EPO’s Statute demonstrates that its primary stated objective is promoting environmental protection in the context of environmental law.<sup>48</sup> In particular, Article 3 enshrines the objective of protecting the natural environment and ecological processes around the world, develop and implement conservation policies in Europe and stopping and reversing environment degradation, notably by influencing European legislation and policies.
48. The Extract of the Belgian Companies Register demonstrate that WWF EPO has existed for more than two years, as required by Article 11(1)(c) Aarhus Regulation. The activity reports provide evidence that WWF EPO is actively pursuing the objectives mentioned above. As these reports show, all of WWF EPO’s activities are directly aimed at environmental protection.
49. As to Article 11(1)(d) Aarhus Regulation, the present request seeks to ensure that the Contested Act only defines as environmentally sustainable those activities which contribute to climate mitigation and do not significantly harm the environment. This objective is fully in line with WWF EPO’s statutory purpose described above, as the deployment of, and continuous reliance on fossil gas in the EU hamper the deployment of renewable and low-carbon alternatives in particular in the electricity sector. It is also in line with WWF EPO’s activities aimed at decarbonising the electricity sector and phasing out electricity produced from fossil origin as reflected in its annual activity reports and publications. To name but some examples, WWF EPO’s activities in relation to the Taxonomy Regulation and its delegated acts include: providing recommendations to the European Commissions through WWF EPO’s membership in the three successive European Commission’s expert groups working on the taxonomy (HLEG 2017-18, TEG 2018-20, Platform on sustainable finance 2020-present)<sup>49</sup>; policy engagement with the three EU institutions (Commission, Council, Parliament) to ensure the EU taxonomy would be science-based, in particular in the electricity sector<sup>50</sup>; related

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<sup>48</sup> See Annex 5.

<sup>49</sup> WWF membership of the Commission’s expert group on the EU taxonomy: [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/eu-platform-on-sustainable-finance-members\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/eu-platform-on-sustainable-finance-members_en.pdf).

<sup>50</sup> WWF article ‘10 ways the Commission is greenwashing gas and nuclear in the EU Taxonomy’: [https://www.wwf.eu/what\\_we\\_do/sustainable\\_economies/?uNewsID=5701416](https://www.wwf.eu/what_we_do/sustainable_economies/?uNewsID=5701416); WWF briefing against the gas taxonomy Act: <https://www.wwf.eu/?6688941/Five-Reasons-To-Oppose-The-Inclusion-Of-Gas-And-Nuclear-Power-In-The-Eu-Taxonomy>.

communication and media activities<sup>51</sup>; and public campaigning to ask for an EU science-based Taxonomy.

## BUND

50. BUND submitted an internal review request to the Commission in 2015 and the Commission accepted that BUND fulfils the criteria under Article 11(1) Aarhus Regulation. In line with Article 3(1) and point 4 of the Annex to Decision 2008/50, BUND is submitting the reply to its previous internal review request, as evidence that it fulfils the criteria under Article 11 Aarhus Regulation.<sup>52</sup>
51. For the avoidance of any doubt, BUND also submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:
7. Statute of BUND (*Bund für Umwelt und Naturschutz Deutschland e.V.*) in its current form – see **Annex 6**, in German;
  8. Annual activity reports of BUND for the years 2020 and 2021 – see **links to BUND’s website**<sup>53</sup>, in German;
  9. An extract of the German Associations Register, dated 31 March 2022, which proves BUND’s incorporation as a legal person under German law since 20 July 1975, i.e. for well over 2 years at the time of submission – see **Annex 7**, in German.
52. These documents demonstrate that BUND meets all the criteria under Article 11(1) Aarhus Regulation.
53. As to Article 11(1)(a) Aarhus Regulation, Article 1 of its Statutes (Annex 6, p.1) proves that BUND is incorporated in the form of a registered association (*Eingetragener Verein*). This is confirmed by the extract of the Associations Register (Annex A7). Both documents also show that BUND is a legal person in accordance with a Member State’s national law.
54. In relation to Article 11(1)(b) Aarhus Regulation, Article 2 of BUND’s Statute demonstrates that its primary stated objective is promoting environmental protection in the context of environmental law. In particular, Article 2 enshrines the objectives of protecting the environment, informing the public about all issues relevant to the environment and nature conservation and, in particular, to disseminate knowledge of environmental hazards among the general public, enforcing an effective protection of life and the natural environment and informing and advising the consumers about the environmental and health effects of products and services offered on the market, as well as about their behaviour. As paragraph of Article

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<sup>51</sup> WWF press release on the Parliament’s vote on the gas Taxonomy Act: <https://www.wwf.eu/?7031891/This-is-not-over-yet---WWF-will-not-rest-until-the-Taxonomy-is-truly-green>.

<sup>52</sup> [Commission Decision of 8 February 2016, ref. Ares\(2016\)708404](#).

<sup>53</sup> Annual Report 2020, accessible at :

[https://www.bund.net/fileadmin/user\\_upload\\_bund/publikationen/bund/BUND\\_Jahresbericht\\_2020.pdf](https://www.bund.net/fileadmin/user_upload_bund/publikationen/bund/BUND_Jahresbericht_2020.pdf).

Annual Report 2021, accessible at:

[https://www.bund.net/fileadmin/user\\_upload\\_bund/publikationen/bund/bund\\_jahresbericht\\_2021.pdf](https://www.bund.net/fileadmin/user_upload_bund/publikationen/bund/bund_jahresbericht_2021.pdf).

2 shows, advocacy work regarding ongoing legislative procedures is a main part of BUND's activities, including the opposition to activities or plans which are incompatible with the protection of the environment.

55. The Extract of the Associations Register demonstrate that BUND has existed for more than two years, as required by Article 11(1)(c) Aarhus Regulation. The activity reports provide evidence that BUND is actively pursuing the objectives mentioned above. As these reports show, all of BUND's activities are directly aimed at environmental protection.
56. As to Article 11(1)(d) Aarhus Regulation, the present request seeks to ensure that the Contested Act only defines as environmentally sustainable those activities which contribute to climate mitigation and do not significantly harm the environment. This objective is fully in line with BUND's statutory purpose described above, as well as its activities. The protection of the climate by reducing emissions from the energy sector has been a principal part of BUND's activities during the last years. In 2019 BUND was a member of the German federal government expert commission for the phase-out of coal in the energy sector. In 2021 BUND was a co-claimant for a constitutional complaint at the German constitutional court, which led to a landmark ruling, repealing the federal government's climate law, which was deemed insufficient by the court (page 22 of the 2021 activity report). Through its national and European network and its office in Brussels, BUND's activities on the complementary delegated act under the EU Taxonomy included policy engagement with the EU Institutions to ensure the EU taxonomy would be science-based and exclusively focus on the promotion of renewable energies<sup>54</sup>, as well as related communication and media activities; and public campaigning.<sup>55</sup>

## 3.2 The Contested Act is an administrative act in accordance with Article 2(1)(g) Aarhus Regulation

57. Article 2(1)(g) Aarhus Regulation, as amended, defines "administrative act" as "any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)."
58. The Commission already considered that the first Climate Delegated Act was a non-legislative act with legal and external effects and thus could be subject to internal review.<sup>56</sup> The Contested Act also fulfils these requirements for the following reasons.

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<sup>54</sup> Joint coalition letter targeted at the Members of the European Parliament regarding the vote on the CDA: <https://www.bund.net/service/presse/pressemitteilungen/detail/news/buendnis-appell-zur-eu-taxonomie-nein-zu-atom-und-gas/>.

<sup>55</sup> BUND campaign platform on the CDA: <https://aktion.bund.net/eu-taxonomie>.

<sup>56</sup> Commission's reply to internal review requests against the first Climate Delegated Act, 6 July 2022, ARES(2022)4942150, p. 10.

## 3.2.1. The Contested Act is a non-legislative act adopted by a Union institution

59. In accordance with Article 289 TFEU, “[l]egal acts adopted by legislative procedure shall constitute legislative acts”. The contested act was not adopted by such a legislative procedure. Rather, it is a delegated act in accordance with Article 290 TFEU. Article 290(1) TFEU explicitly confirms that delegated acts are considered “non-legislative” acts.
60. The fact that the Contested Act is a delegated act for the purposes of Article 290 TFEU is evident from a number of factors. First, it follows from its title which includes the term “Commission Delegated Act”, as explicitly required by Article 290(3) TFEU. Second, the Contested Act’s preamble states that the act has been adopted based on Articles 10(3) and 11(3) Taxonomy Regulation. These provisions refer in turn to Article 23 Taxonomy Regulation which regulates the terms of delegation as required by Article 290(2) TFEU. Third, the fact that the technical screening powers are adopted based on a delegation of powers in accordance with Article 290 TFEU is confirmed by recital 54 Taxonomy Regulation, which states that “*the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of [...] the technical screening criteria*”.

## 3.2.2. The Contested Act has legally binding and external effects

61. As explained above, the Contested Act is a Commission Delegated Regulation in the sense of Article 290 TFEU. In accordance with Article 288 TFEU, regulations adopted by the EU institutions have general application, are binding in their entirety and are directly applicable in all Member States. Their binding nature derives from Article 10(3) and 11(3), in conjunction with Article 23, Taxonomy Regulation, which delegates the requisite powers to adopt binding acts to the Commission, for a specific period and under certain circumstances, in line with Article 290 TFEU. These provisions confirm that the Contested Act is both legally binding and has external effects.
62. There is nothing in the way the Contested Act is phrased that would support a finding to the contrary. Rather, the Contested Act states itself that it “*shall be binding in its entirety and directly applicable in all Member States*”. Moreover, its two operative provisions provide that Delegated Regulation (EU) 2021/2139 and Delegated Regulation (EU) 2021/2178 “*are amended*” by the Contested Act.
63. Unlike in a challenge based on Article 263(4) TFEU, an applicant in an internal review request under Article 10 Aarhus Regulation is not obliged to demonstrate that the contested act “does not entail implementing measures”. This requirement featured in the Commission Proposal to amend the Aarhus Regulation but it was removed at the insistence of the European Parliament and the Council in the legislative process<sup>57</sup>. Accordingly, the fact that the Contested Act is

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<sup>57</sup> Compare Article 1(1) of the Commission Proposal to amend the Aarhus Regulation (COM/2020/642 final) with the finally adopted text of Article 1(1) Regulation 2021/1767.

legally binding and is of general application is in itself sufficient for it to be the subject of an internal review request.

### 3.2.3. The Contested Act contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1) Aarhus Regulation

64. Pursuant to Article 2(1)(f) Aarhus Regulation, ‘environmental law’ means “*Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems*”. The EU General Court has held that this concept “must be interpreted, in principle, very broadly”.<sup>58</sup>
65. The present request challenges Article 1 of the Contested Act in conjunction with certain points of Annex I and Annex II to the Contested Act, which establish the criteria under which certain activities are purportedly to be considered sustainable, on the basis that these provisions contravene certain provisions of the Taxonomy Regulation as well as certain provisions of other EU secondary law and principles contained in the EU Treaties. As demonstrated below, those legal provisions are ‘environmental law’ within the meaning of Article 2(1)(f) Aarhus Regulation.

#### ***The Taxonomy Regulation***

66. Being a delegated act based on Articles 10(3) and 11(3) Taxonomy Regulation, the contested provisions of the Contested Act must comply with specific provisions of the Taxonomy Regulation. These include, but are not limited to, Article 10(3) itself as well as Article 10(2) Taxonomy Regulation, which provides criteria to qualify an activity as ‘transitional’ and as such ‘sustainable’, Article 17, which requires that an activity does no significant harm to any Environmental Objectives and Article 19 Taxonomy Regulation, which establishes mandatory requirements for the technical screening criteria. This request alleges that the Contested Act contravenes various of these requirements of the Taxonomy Regulation.
67. The Taxonomy Regulation is to be characterised as environmental law for the purposes of Article 2(1)(f) Aarhus Regulation.
68. In accordance with Article 1(1), the Taxonomy Regulation is intended to establish “*criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable*”. The objective of preserving, protecting and improving the quality of the environment is therefore the core objective of the Regulation.

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<sup>58</sup> Judgment of 14 March 2018, T-33/16, *TestBioTech v Commission*, EU:T:2018:135, para. 44-46.

69. This is confirmed by the Regulation’s preamble, which refers to the objective under Article 3(3) TEU to establish an internal market “*that works for the sustainable development of Europe, based, among other things, on balanced economic growth and a high level of protection and the improvement of the quality of the environment*” (recital 1). The preamble further refers to the 2030 Agenda for Sustainable Development, the Commission communication on the EGD and the Paris Agreement (recitals 2 and 3). It explicitly mentions the need to be resource-efficient and to stop the overconsumption of resources and stresses the global nature of the challenges the Regulation seeks to address (recitals 2 and 7).
70. The Taxonomy Regulation is an important enabler for scaling up sustainable investment and therefore implementing the EGD as part of the EU’s response to the climate and environmental challenges.<sup>59</sup> It provides uniform criteria for companies and investors on economic activities that can be considered environmentally sustainable (*i.e.* making a substantial contribution to EU environmental objectives such as climate change mitigation, while doing no significant harm to other environmental objectives), and thus aims to increase transparency and consistency in the classification of such activities and limit the risk of greenwashing and fragmentation in relevant markets.
71. There can therefore be no doubt that the Taxonomy Regulation contributes to the pursuit of the objectives of EU policy to the environment and therefore constitutes environmental law for the purposes of Article 2(1)(f) Aarhus Regulation. Accordingly, the Taxonomy Regulation – both generally and in respect of the specific provisions relied on in this request – constitutes “environmental law” in the relevant sense.

### **Articles 1, 2, 4 and 6 European Climate Law**

72. According to Article 1 European Climate Law, the subject matter and scope of that law is clearly to combat climate change. It states that the Regulation establishes a “*framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law.*” Article 2(2) European Climate Law requires the relevant Union institutions to take the necessary measures at Union level to enable the collective achievement of climate neutrality, Article 4(1) first subparagraph sets the binding Union 2030 climate target, Article 4(3) provides for setting the Union 2040 climate target and Article 6(4) of the same law requires the Commission to assess the consistency of any draft measure with these three Union climate objectives. The European Commission must comply with both these obligations, and all associated provisions, when adopting the Contested Act.
73. The fact that the European Climate Law pursues objectives of the Union policy on the environment follows not only from the above mentioned provisions but also from its recitals which extensively refer to the need to act to combat climate change (Recital (1) etc.). The European Climate Law – both generally and in respect of the specific provisions relied on in this request – clearly establishes rules of “environmental law” in the relevant sense.

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<sup>59</sup> Contested Act, Explanatory Memorandum, p. 1.



## ***Energy Solidarity Principle (Article 194 TFEU)***

74. The energy solidarity principle is directly derived from Article 194(1) as confirmed by the CJEU in the *OPAL* judgments. This case law establishes that the Commission is always required to comply with this principle when it adopts decisions in relation to energy policy and was, thus, also bound by it when adopting the Contested Act.<sup>60</sup>
75. The principle establishes “rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States obligation of solidarity between themselves and with regard to the common interests of the European Union and the policies pursued by it.”<sup>61</sup> (emphasis added) The *OPAL* judgments made clear that the principle of energy solidarity binds the European Union and the Member States in respect to all objectives of the Energy Union,<sup>62</sup> including the objective of promoting energy efficiency and the development of renewable sources of energy,<sup>63</sup> which are clearly contributing to the pursuit of the Union environmental policy objectives.

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<sup>60</sup> Judgment of 15 July 2021, C-848/19 P, *Federal Republic of Germany v. Commission*, EU:C:2021:598, paras 52-53.

<sup>61</sup> *Ibid.*, para. 49.

<sup>62</sup> *Ibid.*, para. 47.

<sup>63</sup> Article 194(1)(c) TFEU.

## 4 STANDARD OF EVIDENCE: “Conclusive scientific evidence and the precautionary principle”

76. Article 3 of the Taxonomy Regulation provides that an activity shall qualify as environmentally sustainable where *inter alia* it complies with technical screening criteria established by the Commission. The TSC are to be applied for the purposes of assessing activities against the requirements of the Taxonomy Regulation, including the requirement that the economic activity contributes substantially to one or more of the six Environmental Objectives and does no significant harm to any of those Environmental Objectives. Article 19(1)(f) in turn provides that any technical screening criteria established must be “based on conclusive scientific evidence and the precautionary principle”.

77. For the reasons developed below, the Applicants submit that the requirement in Article 19(1)(f) for technical screening criteria to be “based on conclusive scientific evidence and the precautionary principle” means as follows:

- The specification of TSC must be supported by conclusive scientific evidence. “Conclusive scientific evidence” entails a particularly high standard of evidence (as explained further in this section).
- Thus, for the Commission to specify a TSC that would allow an activity to be classed as sustainable, there must be conclusive scientific evidence to show that the particular technical screening criteria are consistent with and give effect to the requirements of the Taxonomy Regulation. So, for example, a criterion that sets emissions up to specified levels (as the Contested Act does) is valid only insofar as it is shown, according to conclusive scientific evidence, that those levels of emissions are consistent (as required by Article 10(2) and/or Article 19(2)) with the pathway to limit the temperature increase to 1,5°C.
- Insofar as conclusive scientific evidence is not available to support a particular criterion, such as where there is doubt or uncertainty, then that criterion would not be valid. This is because: (i) the requirement for conclusive scientific evidence is not satisfied; and (ii) in cases of doubt or uncertainty, the precautionary principle requires the Commission to prioritise the protection of the environment and human health, etc, over other factors.

78. The legislature evidently considered that scientific data which did not meet this clear standard of “conclusive scientific evidence” would be insufficient to form the basis for the technical screening criteria. Otherwise, it would not have specified that the scientific evidence had to be “conclusive”.

79. The requirement for “conclusive scientific evidence” sets a very high standard. This is evident both from the language itself and the objectives of the Regulation, and by reference to the different standards established in other legislation.

80. To the Applicants' knowledge, the Taxonomy Regulation is the first EU legislative act that requires this particularly high standard of "conclusive scientific evidence" to be met for a delegated act to be adopted.
81. The specific use of the word "conclusive" by the legislature is all the more relevant given that the term "scientific evidence" – i.e. not necessarily conclusive – is the standard set by the legislature in other legislative texts. An example can be found in Article 57 of Regulation (EC) 1907/200664 ("REACH"), which provides that substances may be identified as being of very high concern when "there is scientific evidence of probable serious effects to human health or the environment [...]".
82. At times, the legislature has qualified the scientific evidence required for an assessment in different terms: this is the case, for instance, in the European Climate Law, which repeatedly refers to "the best available and most recent scientific evidence".<sup>65</sup>
83. Nor has the legislature shied away from using different wording in other legal texts where the standard of scientific evidence is not expressly required to be conclusive: e.g., Article 13(2) of Directive 2001/1866 (on the deliberate release of GMOs into the environment) states "If on the basis of the results of any release notified [...] or on other substantive, reasoned scientific grounds, a notifier considers that the placing on the market and use of a GMO as or in a product do not pose a risk to human health and the environment, he may propose to the competent authority not to provide part or all of the information required [...]".
84. In other cases, the legislature has also set out different standards of evidence within the same legal text. An example is Regulation (EC) No 1924/200667 on nutrition and health claims for food. While Article 16 thereof requires the European Food Safety Authority to verify that a health claim is substantiated by "scientific evidence"<sup>68</sup>, Article 13 sets out a "simplified" procedure applicable to certain health claims that are shown to be "based on generally accepted scientific evidence".<sup>69</sup>
85. If conclusive scientific evidence under the Taxonomy Regulation were to be read as e.g., "scientific evidence" or "the best available and most recent scientific evidence", the legislature would have adopted that wording instead. The particular and specific qualifiers to the standard of scientific evidence prescribed by the legislature must be accorded their clear and natural

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<sup>64</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1–849).

<sup>65</sup> See, for instance, Articles 4 and 8 of the European Climate Law.

<sup>66</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ L 106, 17.4.2001, p. 1–39).

<sup>67</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404, 30.12.2006, p.9).

<sup>68</sup> Article 16(3)(a) of Regulation (EC) No 1924/2006.

<sup>69</sup> Article 13(1) Regulation (EC) No 1924/2006.

meaning. To this end, it is worthwhile confirming the level of evidence required by Article 19(1)(f) in the various language versions of the Taxonomy Regulation.<sup>70</sup>

86. The high standard that is used is justified on several bases:

- a. The purpose and functioning of the Taxonomy Regulation that aims to facilitate the shift of investment towards environmentally sustainable economic activities in line with one of the objectives of the Commission communication “Action Plan: Financing Sustainable Growth”<sup>71</sup> “*to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth*”. Therefore, the purpose of the EU Taxonomy Regulation is to incentivise high environmentally sustainable performance and not simply authorise an activity or set minimum standards giving access to the market.
- b. Different considerations (and thus a lower standard of evidence) may be appropriate where a regulatory scheme is concerned with *permitting* activities (rather than, as here, providing particular incentives for those activities). Even if activities that do not present high environmental standards may be permitted, it does not mean that such activities should qualify for (and benefit from) favourable financing under a pretence of being environmentally sustainable and in particular, as discussed in this particular case, contributing substantially to climate change mitigation. Recital (39) Taxonomy Regulation is clear in this respect, by confirming that despite potentially being lawful under Union law, “*some economic activities have a negative impact on the environment, and [...] it is appropriate to establish technical screening criteria that require a substantial improvement in environmental performance compared with, inter alia, the industry average, but at the same time avoid environmentally harmful lock-in effects, including carbon-intensive lock-in effects, during the economic lifetime of the funded economic activity.*”

87. The high standard set by “conclusive scientific evidence and the precautionary principle” is accordingly appropriate (and should be construed as setting a demanding standard) in view of the severe adverse consequences that arise where an activity is declared environmentally sustainable (and financed accordingly) where it in fact does not substantially contribute to climate change mitigation, and/or rather exacerbates climate change or causes significant harm to other Environmental Objectives.

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<sup>70</sup> See e.g.: the Italian text requires “prove scientifiche irrefutabili”, i.e. scientific evidence which cannot be contested; the French text and the Spanish text require respectively “éléments scientifiques concluants” and “pruebas científicas concluyentes”, i.e. literally conclusive scientific evidence; the German text requires “schlüssige wissenschaftliche Erkenntnisse”, i.e. conclusive scientific knowledge<sup>70</sup>; the Hungarian text requires “meggyőző tudományos eredmények”, i.e. conclusive scientific results; the Greek text wording requires “αδιάσειστα επιστημονικά στοιχεία” i.e. scientific evidence that leaves no doubt.

<sup>71</sup> Communication from the Commission to the European Parliament, the European Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, “Action Plan: Financing Sustainable Growth”; Brussels, 8.3.2018; COM(2018) 97 final.

88. It is therefore clear that the technical screening criteria for an activity that is included in the EU Taxonomy framework must be based on conclusive scientific evidence, in the sense that the evidence shows the activity's characteristics (e.g. certain levels of emissions) to comply with and give effect to the requirements for TSC established by the Taxonomy Regulation; for example, that the activity is shown to contribute to an Environmental Objective (as specified in the Taxonomy Regulation), and that it is shown to cause no significant harm to any of the Environmental Objectives. Since this is a clear choice of the legislator expressed in mandatory terms (“[shall] **be based on conclusive scientific evidence...**”), this criterion does not offer any margin of appreciation to the Commission.
89. In addition to the obligation for the technical screening criteria to be based on “conclusive scientific evidence”, the legislature has explicitly provided that the precautionary principle also applies.<sup>72</sup>
90. As the CJEU has explained: “The precautionary principle requires the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests”.<sup>73</sup>
91. This principle has two related dimensions:
- a. First, it *empowers* the Commission to take precautionary measures where the scientific evidence is not conclusive. Based on this logic, the Court has for instance held that “Where there is scientific uncertainty as to the existence or extent of risks to human health, the precautionary principle allows the institutions to take protective measures without having to wait until the reality and seriousness of those risks become fully apparent or until the adverse health effects materialise”.<sup>74</sup>
  - b. Second, the principle also *requires* the Commission to exercise its conferred powers in a certain manner, so that public health, safety and the environment are given precedence over economic interests. For instance, the “*precautionary principle requires the withdrawal or amendment of an approval of an active substance where new data invalidate the earlier conclusion that that substance satisfies the approval criteria provided for in Article 4 of Regulation No 1107/2009*”.<sup>75</sup> By applying Article 4

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<sup>72</sup> This is to be read in line with Article 3(3) TEU, under which the objectives of the EU include securing “a high level of protection and improvement of the quality of the environment”, with Article 11 TFEU, which states that environmental protection requirements must be integrated into the definition and implementation of all EU policies, in particular with a view to promoting sustainable development, and with Article 37 of the Charter of Fundamental Rights, which likewise requires integrating a high level of environmental protection, improvement of the quality of the environment, and sustainable development into all Union policies.

<sup>73</sup> Judgment of 12 April 2013, T-31/07, *Du Pont de Nemours e.a. v. Commission*, ECLI:EU:T:2013:167, para. 134 and case law cited.

<sup>74</sup> *Ibidem*, para. 135 and case law cited. See also Judgement of 23 September 2003, C-192/01, *Commission v Denmark*, ECLI:EU:C:2003:492, paras 51-52 and case law cited.

<sup>75</sup> Judgment of 17 May 2018, T-429/13, *Bayer CropScience AG and Others v European Commission*, ECLI:EU:C:2014:2310, para. 142 as confirmed on appeal in Judgment of 6 May 2021, *Bayer CropScience AG and Bayer AG v European Commission*, C-499/18 P, ECLI:EU:C:2021:367, para. 91.

Regulation 1107/2009 consistently with the precautionary principle, the Commission is required to take evidence that demonstrates risks to the environment and public health particularly seriously, thus erring on the side of caution. This function of the precautionary principle is relevant to the present internal review request.

92. In light of the above, the powers delegated to the Commission under Article 10(3) Taxonomy Regulation must be exercised “based on conclusive scientific evidence and the precautionary principle”.<sup>76</sup> It follows that the Commission infringes Article 10(3)(a) in conjunction with Article 19(1)(f) if, either without such conclusive evidence or in the face of demonstrated scientific uncertainty, it nonetheless holds that the an activity demonstrates the substantial contribution made by the economic activity to climate change mitigation. Equally, the Commission infringes Article 10(3)(b) in conjunction with Article 19(1)(f) if it finds that a specific economic activity causes no significant harm to the Environmental Objectives, despite either not having such conclusive evidence or in view of demonstrated scientific uncertainty on that point.

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<sup>76</sup> It must be noted that the legislature made that choice of wording instead of supporting the wording proposed by the Commission, which would have made the technical screening criteria “*be based on conclusive scientific evidence and take into account, where relevant, the precautionary principle enshrined in article 191 TFEU*” (emphasis added). The legislature did not agree to make the application of the precautionary principle discretionary (“*where relevant*”), nor merely to have that principle taken into account, as the Commission proposed. The precautionary principle must be enshrined and applied in the assessment of the scientific evidence.

## 5 GROUNDS OF REVIEW

93. The Applicants contend that the Contested Act is vitiated by infringement of an essential procedural requirement (section 5.1), lack of competence (section 5.2) and/or by manifest errors and misuse of power (section 5.3).

### 5.1. First ground of review: Infringement of an essential procedural requirement under Article 6(4) of the European Climate Law consisting in the absence of a climate-consistency assessment

94. Pursuant to settled case law, there is an infringement of an essential procedural requirement when it is “*shown that in the absence of such irregularity the contested decision might have been different.*”<sup>77</sup> The Applicants stress that the relevant legal standard is whether the contested decision might have been different i.e. whether fulfilling the relevant essential procedural requirement might have influenced the outcome of the decision-making process. Under this plea, it is not for the Applicants to demonstrate that the Commission committed a manifest error of assessment in its decision to classify fossil gas based activities as sustainable in the Contested Act – rather, this is demonstrated under the third ground below relating to infringement of the treaties and rules of law (section 5.3). Under the present plea, it is sufficient that during the decision-making procedure leading to the adoption of the Contested Act the Commission failed to undertake an assessment that it was legally required to conduct and which might have affected the content of the Contested Act.
95. The Applicants contend that the Commission infringed such an essential procedural requirement by failing to conduct a climate consistency assessment of the Contested Act pursuant to Article 6(4) of the European Climate Law.
96. The European Climate Law came into force on 29 July 2021. The law provides for a binding objective of climate neutrality in the Union by 2050<sup>78</sup> (in pursuit of the long-term temperature goal set out in the Paris Agreement),<sup>79</sup> a binding Union target of a net domestic reduction in greenhouse gases (“GHGs”) by at least 55% compared to 1990 levels by 2030,<sup>80</sup> as well as the obligation to establish another intermediate Union climate target for 2040.<sup>81</sup>
97. In order to meet the climate-neutrality objective and the intermediate climate targets, the European Climate Law establishes a number of obligations for Member States and the EU Commission. At the heart of these obligations is the requirement for the Commission to establish three kinds of assessments, which serve to:

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<sup>77</sup> Judgment of 29 October 1980, *Heintz van Landewyck SARL*, Joined Cases 209 to 215 and 218/78, EU:C:1980:248, para. 47.

<sup>78</sup> Article 2(1) European Climate Law.

<sup>79</sup> Article 1(a) Paris Agreement.

<sup>80</sup> Article 4(1) European Climate Law.

<sup>81</sup> *Ibid.*, Article 4(2).

- a. Review existing EU legislation to establish that all legislation is consistent with achieving the targets and objectives;<sup>82</sup>
- b. Assess every new measure that is proposed to ensure that any new measures are consistent with the climate targets;<sup>83</sup>
- c. Control the Union's progress by checking the consistency of existing measures at EU and Member State level in five year intervals.<sup>84</sup>

98. Point b in the preceding paragraph is germane to the drafting and adoption of the Contested Act. It is contained in Article 6(4) European Climate Law and reads:

*“4. The Commission shall assess the consistency of any draft measure or legislative proposal, including budgetary proposals, with the climate-neutrality objective set out in Article 2(1) and the Union 2030 and 2040 climate targets before adoption, and include that assessment in any impact assessment accompanying these measures or proposals, and make the result of that assessment publicly available at the time of adoption. The Commission shall also assess whether those draft measures or legislative proposals, including budgetary proposals, are consistent with ensuring progress on adaptation as referred to in Article 5. When making its draft measures and legislative proposals, the Commission shall endeavour to align them with the objectives of this Regulation. In any case of non-alignment, the Commission shall provide the reasons as part of the consistency assessment referred to in this paragraph.”*

99. Several successive or related obligations for the Commission can be extracted from Article 6(4):

- a. Assess the consistency of any draft measure or legislative proposal with the climate-neutrality objective and the Union 2030 and 2040 climate targets, as well as with ensuring progress on adaptation before adoption of the act (we will refer to this exercise as ‘climate consistency assessment’);
- b. Endeavour to align any draft measures and legislative proposals with the climate objectives of the European Climate Law;
- c. Provide the reasons as part of the consistency assessment referred to in this paragraph in case of non-alignment of the draft measures and legislative proposals with the objectives of the European Climate Law; and
- d. Make the result of the climate consistency assessment publicly available at the time of adoption of the draft measure or legislative proposal, in the impact assessment on the measure or proposal or separately.

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<sup>82</sup> *Ibid.*, Article 4(2).

<sup>83</sup> *Ibid.*, Article 6(4).

<sup>84</sup> *Ibid.*, Articles 6(1)-(2) and 7(1).



100. The obligations above apply to any draft measure or legislative proposal of the Commission, regardless of their legal basis or content.<sup>85</sup>
101. The Applicants demonstrate below that conducting a climate consistency assessment constitutes an essential procedural requirement for the adoption of the Contested Act, and that as no such assessment was undertaken the Contested Act is unlawful.

***The obligation to conduct a climate consistency assessment applies to the Contested Act and was infringed***

102. The Contested Act falls within the scope of measures covered by Article 6(4) European Climate Law for the following reasons.
103. First, there is no doubt that the Contested Act is a “measure” within the meaning of Article 6(4) European Climate Law. Neither the EU Treaties nor the European Climate Law define what a “measure” is. Nevertheless, it is generally understood in the EU legal order that any legal act with binding force, such as delegated regulations adopted on the basis of Article 290 TFEU, is a “measure”. Excluding delegated acts adopted on the basis of Articles 290 TFEU from the scope of acts subject to a climate consistency assessment under Article 6(4) European Climate Law would have the absurd outcome of disregarding their impact despite their binding force and effect on the EU legal order.
104. Second, there is also no doubt that Article 6(4) was applicable *ratione temporis* to the Contested Act since the European Climate Law entered into force on 29 July 2021 and the Contested Act was not yet adopted at that time. According to settled case-law:

*“In that regard, it should be borne in mind that a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application. In particular, procedural rules are generally taken to apply from the date on which they enter into force, as opposed to substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, their objectives or their general scheme that such an effect must be given to them.”<sup>86</sup> (emphasis added).*

105. Thus, in principle procedural rules will apply immediately, as soon as the legislative act introducing them entered into force. In the present case, the EU Climate Law entered into force on 29 July 2021, which therefore marks the date from which the Commission was under the procedural obligation to prepare an Article 6(4) climate consistency assessment for “any draft measure”, to “include that assessment in any impact assessment” and “to make the result of that assessment publicly available at the time of adoption” of the draft measure concerned.

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<sup>85</sup> This seems to be the view of the Commission as well, which has recently included a section on the conformity with the ‘climate consistency principle’ in the explanatory memorandum to the proposal for a directive on combating violence against women and domestic violence, COM/2022/105 final.

<sup>86</sup> Judgment of 26 March 2015, *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paras. 32 and 33 and the cited case-law.

106. The fact that the Contested Act was adopted on the basis of a procedure set in the Taxonomy Regulation adopted prior to the European Climate Law does not change this conclusion. There is nothing in the requirements established by the Taxonomy Regulation for setting technical screening criteria under delegated acts that excludes the need to comply with European Climate Law or EU environmental law. On the contrary, the environmental objectives in Article 9 Taxonomy Regulation should be interpreted in accordance with other pieces of EU environmental law<sup>87</sup> and “*when establishing and updating the technical screening criteria, the Commission should take into account relevant Union law*”<sup>88</sup> and “[*build*] on any minimum requirements laid down pursuant to Union law.”<sup>89</sup> The Applicants would note several points as to the procedure established by the Taxonomy Regulation.
107. First, Article 6(4) European Climate Law introduces a new procedure, rather than amending existing procedural rules. There has never previously been a requirement under EU law for the Commission to prepare a specific climate assessment prior to the adoption of any draft measure and legislative proposal. Hence, there is no question as to the “continued effect” of old procedural rules, as opposed to the new rules introduced by the European Climate Law, because the latter does not modify any “old” procedural rules. Rather, it introduced a new procedure that had to be implemented in addition to any procedural rules that continued to apply for establishing a delegated act under the Taxonomy Regulation.
108. Second, even if Article 6(4) European Climate Law were seen as modifying an existing procedure, namely the procedure to adopt the Contested Act, the procedure had not yet become “*definitive*” on 29 July 2021, in the sense of the case law quoted above. The procedure only became definitive with the adoption of the Contested Act on 9 March 2022. Prior to this, the Commission had taken no final, binding determination as to which technical screening criteria for fossil gas projects were to be included in the Contested Act, thus having also not created any rights or obligations on third parties.
109. Third, and related to the previous point, Article 6(4) European Climate Law does not include any exemption for draft measures that were planned or under preparation when the European Climate Law entered into force. As noted above, the fact that procedural rules apply from the date on which they enter into force is a well-established general principle of EU law. If the legislator had intended to deviate from this rule, it would have indicated this by introducing explicit wording on the temporal application of Article 6(4) in the provision itself.
110. Finally on this point, it is the Applicants’ submission that the obligation to prepare a climate consistency assessment is clearly procedural in nature. Nonetheless, for the avoidance of any doubt, the Applicants also submit that the substantive rules introduced by the European Climate Law are fully applicable to any measures adopted after 29 July 2021, whether or not any related procedure was started prior to this date.
111. The obligations in Article 6(4) of the European Climate Law detailed in paragraph 97 above under sub-points (a) to (d) should thus have been fulfilled before the adoption of the Contested Act. However, there is no evidence that a climate consistency assessment was undertaken and published. Neither the Explanatory Memorandum nor the Q&A document published along

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<sup>87</sup> Recitals (24)-(33) Taxonomy Regulation.

<sup>88</sup> Recital (43) Taxonomy Regulation.

<sup>89</sup> Recital (40) Taxonomy Regulation.

with the Contested Act when it was adopted, mention a climate consistency assessment.<sup>90</sup> Those documents only state that “*according to [energy modelling scenarios], natural gas will continue to play an important role in terms of consumption and generation until 2030, after which we expect a decline to 2050. Throughout the transition of our energy system, the function of natural gas-fired electricity generation will change and will increasingly be a facilitator for the spread of renewable electricity and stable supply*”, without explaining “what important role” gas will play, nor providing any information on the expected “decline” of it. Moreover, whereas those documents (vaguely) address the CO<sub>2</sub> emissions of fossil gas, they completely omit methane emissions whereas this should necessarily be part of a climate consistency assessment.<sup>91</sup> Whereas the consistency of TSC proposed for the fossil gas based activities with the trajectory towards climate neutrality pursuant to Article 10(2) Taxonomy Regulation could and – the Applicants submit – should have been demonstrated in an impact assessment for the Contested Act, none was conducted; the Commission simply considered it was “*not necessary*”.<sup>92</sup>

112. In any event, even if a climate consistency assessment meeting the requirements of Article 6(4) European Climate Law was actually conducted by the Commission, the Commission was obliged to make it publicly available at the time of adoption, which it obviously did not do.

**The obligation to conduct a climate consistency assessment constitutes an essential procedural requirement, the infringement of which renders the Contested Act unlawful**

113. As mentioned above under paragraph 94 pursuant to settled case law, there is an infringement of an essential procedural requirement when it is “*shown that in the absence of such irregularity the contested decision might have been different.*”<sup>93</sup>
114. In this instance, the preparation of a climate consistency assessment meets the above mentioned requirement set by the case law. For the reasons developed below, this is because any such assessment would have identified inconsistencies between the TSC and both the climate neutrality objective and the 2030 target. These inconsistencies would plainly undermine the basis on which the Contested Act was advanced. It would therefore follow that the Commission would likely have modified the content of the TSC; at the very least, it “might” have done so.
115. The European Climate Law is an overarching legislative act setting cross-cutting obligations on the EU and its Member States. As mentioned above, Article 6(4) European Climate Law defines one of three crucial types of assessments with which the European Commission is meant to ensure the adequate application and enforcement of the core obligations in the regulation, i.e. the binding climate-neutrality objective and intermediary climate targets for

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<sup>90</sup> Published in the Commission’s website: [https://ec.europa.eu/info/law/sustainable-finance-taxonomy-regulation-eu-2020-852/amending-and-supplementary-acts/implementing-and-delegated-acts\\_en](https://ec.europa.eu/info/law/sustainable-finance-taxonomy-regulation-eu-2020-852/amending-and-supplementary-acts/implementing-and-delegated-acts_en).

<sup>91</sup> For a detailed explanation on why methane emissions must necessarily be part of a climate consistency assessment, see ClientEarth’s request for internal review of the 5<sup>th</sup> PCI List (ref. Ares(2022)871745) and references cited.

<sup>92</sup> Explanatory Memorandum to the Contested Act, p. 5.

<sup>93</sup> Judgment of 29 October 1980, *Heintz van Landewyck SARL*, Joined Cases 209 to 215 and 218/78, EU:C:1980:248, para. 47.

2030 and 2040. It thereby is also a crucial tool to implement Article 7 TFEU and the principle of integration contained in Article 11 TFEU and Article 37 Charter of Fundamental Rights. This assessment is therefore undoubtedly an essential element of the EU's governance system to ensure the achievement of the EU's binding climate objectives and targets, as enshrined in the European Climate Law and flowing from the Paris Agreement.

116. The climate consistency assessment is designed precisely for the purpose of influencing the policy choices of the European Commission when preparing draft measures. As is evident from paragraph 98, the assessment shall not only present factual, scientific data on the greenhouse gas emissions or other climate impacts of the proposed measure, but an assessment of those impacts<sup>94</sup> on the Union's trajectory towards climate-neutrality and on its compliance with the 2030 and 2040 targets. It is on the basis of such assessment that the Commission can fulfil its obligations to "*endeavour to align [measures and legislative proposals] with the objectives of this Regulation*". The Commission must even provide reasons for non-alignment as the case may be.
117. The Applicants submit that had a climate consistency assessment been conducted in the present case, the Contested Act might have been different. Any realistic climate assessment conducted in accordance with the European Climate Law would have made clear the inconsistency between the classification of fossil gas activities as 'sustainable' and the climate neutrality objectives and intermediate climate targets. This is plain from the analysis developed under the remaining grounds set out below. The Applicants would emphasise the following points:
  - a. As further demonstrated under section 5.2.1 below, it is established that fossil fuels are one of the largest contributors to climate change and the Commission itself recognises that for meeting the Union target of 55% reductions of GHG emissions by 2030, the EU must cut its total fossil gas use by more than 25%. However, the designation of fossil gas based activities under the Contested Act as in principle "sustainable" under certain conditions would signal to financiers that investment in new fossil gas activities was compatible with those goals (since that is the purpose of the Taxonomy Regulation), incentivising such investments.
  - b. The Contested Act creates the possibility for facilities that are granted a construction permit by 31 December 2030 to be designated as sustainable even if they emit 270gCO<sub>2</sub>e/kWh at any moment of their lifetime or 550kgCO<sub>2</sub>e/KW on average over 20 years – thus as far in time as 2050. This would obviously risk locking in those carbon-intensive assets and the associated emissions, in plain contradiction of the pathway necessary for meeting the 2030 and 2050 climate targets.
  - c. The TSC adopted by the Commission that would designate fossil gas facilities as sustainable even if they switch to renewable or low-carbon fuels as late as 2035 is plainly not consistent with the 2030 target.

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<sup>94</sup> By analogy, see the definition of "impact assessments" given by the Commission in its Impact Assessment Guidelines, SEC(2009)92, para. 26: a process providing "*evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts.*" (emphasis added).

- d. The TSC take no account of the life cycle emissions of fossil gas facilities. But those emissions (particularly of methane upstream) are plainly inconsistent with the 1,5°C goal and with the 2030, 2040 and 2050 targets.
118. The Applicants submit that a climate consistency assessment conducted pursuant to Article 6(4) European Climate Law would have identified these and other points. It would have identified the multiple inconsistencies between the TSC proposed by the Commission and the Union climate targets. In that circumstance, it is difficult to see how the Commission could have adopted the Contested Act, given that the climate consistency assessment would show that it was legally flawed. The impact assessment accordingly (at the very least) “might” have resulted in the Commission adopting different, compatible criteria (or potentially no TSC for fossil gas at all).
119. In light of the above, the Applicants contend that the Commission breached an essential procedural requirement in adopting the Contested Act without preceding it with a climate consistency assessment and by not publishing such climate consistency assessment with the adopted measure, as required by Article 6(4) European Climate Law.

## 5.2. Second ground of review: lack of competence

120. The Applicants contend that the Commission has not complied with essential elements of the enabling act, i.e. the Taxonomy Regulation, thus exceeding the limits of the delegated powers conferred on it under Articles 10(3), 19(1) and 23 Taxonomy Regulation. Therefore, the adoption of the Contested Act is vitiated by lack of competence.
121. The Applicants submit that the Commission exceeded the powers conferred on it and delimited by these essential rules by: failing to base the technical screening criteria for fossil gas-based activities on conclusive scientific evidence and the precautionary principle (section 5.2.1); not taking into account the life cycle of the activities for setting certain criteria (section 5.2.2); applying *contra legem* its own standard to determine if low carbon alternatives are available (section 5.2.3) and failing to establish criteria for ensuring that the activities do not significantly harm the circular economy objective (section 5.2.4).
122. These grounds are raised against a background framework of principle as to the differences between legislative acts and delegated acts. According to Article 290 TFEU, a delegated act may supplement or amend non-essential elements of the legislative act and “[t]he objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts.” Article 290 TFEU also provides that “The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject to the delegation of power.” As the Court has consistently held, “the possibility of delegating powers provided for in Article 290 TFEU aims to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it finds it appropriate to legislate, while entrusting the Commission with the task of ‘supplementing’ certain non-essential elements of the legislative act adopted or ‘amending’ such elements within the framework of the power delegated to it. [...] It follows that the essential rules on the

*matter in question must be laid down in the basic legislation and cannot be delegated*".<sup>95</sup> Accordingly, the Commission exceeds its delegated competence where it does not comply with an essential element of the enabling act because in doing so, it operates outside the regulatory framework set by the enabling act, in this case the Taxonomy Regulation.<sup>96</sup>

123. As the Court further held, “[t]he essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature [...] Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned”.<sup>97</sup>
124. The objective of the Taxonomy Regulation is to establish a harmonised<sup>98</sup> classification system for environmentally sustainable activities to “reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth”<sup>99</sup> and “[channel] private investments into sustainable activities”<sup>100</sup> with the “aim to enhance investor confidence and awareness of the environmental impact of those financial products or corporate bonds, to create visibility and to address concerns about ‘greenwashing’”.<sup>101</sup>
125. To achieve this objective, the crucial political choice for the legislator was to define criteria on the basis of which certain activities are to be considered “environmentally sustainable”. The legislator chose four criteria, which are listed in Article 3 Taxonomy Regulation. One criterion under Article 3(d) Taxonomy Regulation is compliance with the technical screening criteria. The legislator chose to explicitly limit the discretion of the Commission by establishing certain mandatory requirements under Article 19 Taxonomy Regulation for these criteria to be lawfully adopted. Accordingly, these requirements amount to essential rules determined by political choices of the legislator which the Commission could not disregard.

## 5.2.1. The Commission disregarded the essential requirement to establish technical screening criteria based on conclusive scientific evidence and the precautionary principle, in breach of the mandatory requirements set out under Articles 10(2), 17 and 19(1)(f) Taxonomy Regulation

126. As set out above, an essential function of the Taxonomy Regulation is to determine, on the basis of technical screening criteria, which characteristics an economic activity must present to qualify as environmentally sustainable under each of the six Environmental Objectives. To qualify as environmentally sustainable for the taxonomy purposes, the activity must comply with the requirement of the EU Taxonomy Regulation. In case of climate change mitigation,

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<sup>95</sup> Judgment of 11 May 2017, C-44/16 P, *Dyson v Commission*, ECLI:EU:C:2017:357, paras 58-59 and case law cited.

<sup>96</sup> Compare, *ibid*, para. 68 and 70.

<sup>97</sup> *Ibid*, paras 61-62 and case law cited.

<sup>98</sup> Recital (12) Taxonomy Regulation.

<sup>99</sup> Recital (6) Taxonomy Regulation.

<sup>100</sup> Recital (11) Taxonomy Regulation.

<sup>101</sup> *Idem*.

that means compliance with Article 10(1) and (2) – for “transitional” activities – and Article 19(1) combined with Article 17. The TSC must therefore ensure that any activity complies with those requirements.

127. The legislator made the essential choice to base the EU taxonomy on science. This is expressed in clear terms at Article 19(1)(f), providing that the technical screening criteria to determine if an activity is sustainable “[shall] be based on conclusive scientific evidence and the precautionary principle”; at Article 19(5) pursuant to which the criteria shall be revised as new scientific evidence becomes available; and at Article 23(4) requiring the Commission to gather all relevant expertise in order to establish the criteria. The fact that Article 19 contains further criteria relating to the impact of an activity on the internal market<sup>102</sup> or the usability of the criteria<sup>103</sup>, does not detract from the conclusion that the requirement that the criteria are scientifically-grounded is essential for the purpose and functioning of the Taxonomy Regulation. This emphasis on conclusive scientific evidence is acknowledged by the Commission for justifying that certain economic activities are not (yet) included in a delegated act, and by the Technical Expert Group (TEG) who refrained from proposing technical screening criteria for nuclear based activities in the absence of sufficient scientific evidence for classifying them as sustainable under the Taxonomy Regulation.
128. In light of this, the Applicants submit that the Commission neither demonstrated, nor could it have been satisfied, that there was conclusive scientific evidence that fossil gas based activities in sections 4.29, 4.30 and 4.31 of the Contested Act can be consistent with the requirements of Article 10(1) and (2) (notably, the 1,5°C temperature goal and/or the Union’s emissions targets), such that it could establish technical screening criteria for such activities. Further and in the alternative, the adoption of those technical screening criteria also violated the precautionary principle. As a consequence, the Commission exceeded the competence delegated to it under Article 10(3) in conjunction with Article 23 Taxonomy Regulation.
129. The burden lies on the Commission to act in accordance with conclusive scientific evidence. The Commission has (as set out under our first ground of review above) published very little or no information as to the basis on which the Contested Act was adopted. However, there is ample authoritative scientific evidence that fossil gas based activities are unable to substantially contribute to climate change mitigation given that they contribute to aggravating climate change. As such, it is to be inferred that the Commission could not have reached the *contrary* position with the support of conclusive scientific evidence. To the extent that the Commission considered that there was doubt over the contribution that fossil gas could make either to mitigating or aggravating climate change, the precautionary principle (as reflected in Article 19) barred it from adopting TSC that would permit fossil gas activities to be classified as sustainable. The Applicants expand on these contentions below.

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<sup>102</sup> E.g. Articles 19(1)(a), (h), (i) and (j) Taxonomy Regulation.

<sup>103</sup> Article 19(1)(k) Taxonomy Regulation.

130. A range of authoritative reports and official statements set out plainly that new fossil gas activities are incompatible with the requirements to which TSC must adhere.
131. The Paris Agreement establishes a long-term temperature limit. In furtherance of its obligations under the Paris Agreement, the EU has also established an objective of climate neutrality by 2050. The European Commission and the International Energy Agency (the 'IEA')<sup>104</sup> have calculated that for these objectives to be met, the use of fossil gas must decrease to a fraction of its current level by 2050, while investments into renewable energy sources must increase significantly.
132. In relation to the electricity generation from fossil fuels (not only gas), the International Energy Agency (the "IEA") has modelled the reductions in emissions necessary to achieve the "net zero emissions" ('NZE') outcome by 2050 (which corresponds to the EU's own emissions targets, establishing in view of the Union's obligations under the Paris Agreement). To meet the NZE, the IAE has modelled a reduction in the share of electricity generated from fossil fuels from 61% in 2020 to 25% in 2030, and then less than 1% by 2040.<sup>105</sup> In developed economies (which includes the EU), overall emissions from electricity generation must fall **to zero in the 2030s** (section 3.4.1): *"The transformation of the electricity sector is central to achieving net-zero emissions in 2050. Electricity generation is the single largest source of energy-related CO2 emissions today, accounting for 36% of total energy-related emissions. CO2 emissions from electricity generation worldwide totalled 12.3 Gt in 2020, of which 9.1 Gt was from coal-fired generation, 2.7 Gt from 9 gas-fired plants and 0.6 Gt from oil-fired plants. In the NZE<sup>106</sup>, CO2 emissions from electricity generation fall to zero in aggregate in advanced economies in the 2030s."*
133. The IEA also estimates under the 2050 net zero pathway that by 2030, the amount of methane emitted from fossil fuel use would need to fall by 75% under the 2050 net zero pathway: see p.47. Given the very significant emissions of methane arising from the use of fossil gas, this necessarily implies a steep reduction in the use of fossil gas.
134. The European Commission has modelled the use of fossil gas in its November 2018 Communication: 'A Clean Planet for all - A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy' (COM(2018) 773 final). In the energy sector, the Communication envisages net-zero emissions (Section 3, p.6):

*"The transition towards a net-zero greenhouse gas economy gives energy a central role as it is today responsible for more than 75% of the EU's greenhouse gas emissions. In all options analysed, the energy system moves towards net-zero greenhouse gas emissions. It relies on a secure and sustainable energy supply underpinned by a market-based and pan-European approach."*

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<sup>104</sup> IEA Report "Net Zero by 2050: A Roadmap for the Global Energy Sector", May 2021, accessible at: <https://www.iea.org/reports/net-zero-by-2050>.

<sup>105</sup> See figure 2.18 of the IEA Report "Net Zero by 2050: A Roadmap for the Global Energy Sector", *ibid*.

<sup>106</sup> NZE: Net-Zero Emissions Scenario



135. As regards fossil gas in the energy mix, the key points arising from the analysis of future scenarios in 2030 and 2050 are set out in Figure 2 of the Communication:

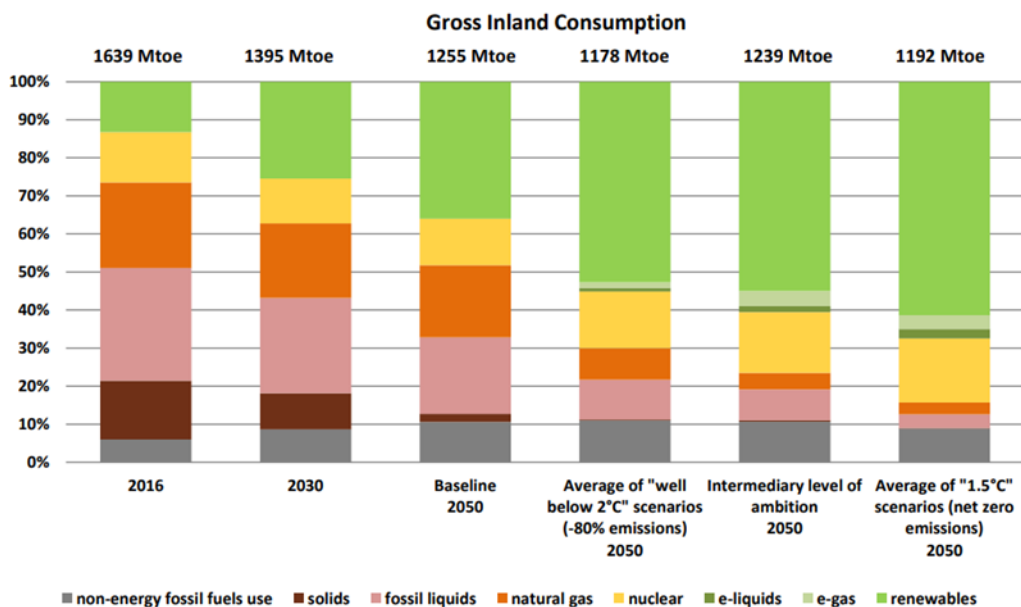


Figure 2. Fuel mix in Gross Inland Consumption

136. This graph shows the different mixes of fuel supporting inland energy consumption in a range of different scenarios analysed as a means of complying with the Paris Agreement (see page 9): a. As at 2016, energy from fossil gas accounted for over 20% of gross energy consumption; b. Projections showed this falling by 2030 to below 20%;<sup>107</sup> c. As of 2050, fossil gas consumption is projected under different scenarios: i. Under the 'baseline' scenario (i.e., without the further climate action required by the Paris Agreement), fossil gas consumption would continue to have a similar share as projected in 2030; ii. Under the scenario of action to meet the 'well below 2C' scenario, involving overall emissions reductions in the order of 80%, the share of fossil gas falls below 10% of the total; iii. At an 'intermediary level ambition', the share of fossil gas is projected to be lower still, at around 4% of the total; iv. Across an average of scenarios to meet the target for 1,5°C, the share of fossil gas is projected to account for 3% of the total.

<sup>107</sup> And even then, of a lower total volume of energy consumption: 1395 Mtoe, as opposed to 1639 Mtoe in 2016.

137. The Commission Communication “Investing in a climate-neutral future for the benefit of our people”<sup>108</sup> finds that to meet its 55% climate target, the EU must cut its total fossil gas use by more than 25% by 2030<sup>109</sup>. The decreasing share of fossil gas in an energy mix and the need to cut its use has also been demonstrated in the Impact assessment for this Commission Communication.<sup>110</sup>
138. The report “Foot off the Gas – Why Italy should invest in clean energy”<sup>111</sup> by the Carbon Tracker Initiative, indicates that, in the specific case of Italy, choosing clean energy over gas, annual emissions savings are estimated to be 18 million tonnes of CO<sub>2</sub>, equivalent to 6% of 2019 total emissions.
139. Further evidence as to the inconsistency between the TSC set by the Commission and the requirements of the Taxonomy Regulation is set out below under Ground 3, limb 2, in section 5.3.3.1. For the purposes of this Ground 2 alleging an excess of power, the Applicants cross-refer to the evidence set out in that section and to the inconsistencies noted therein. That evidence and those inconsistencies confirm the Commission’s failure to act on the basis of conclusive scientific evidence and having regard to the precautionary principle.
140. In the light of the above scientific analysis and evidence (and the matters developed in section 5.3.3.1 below), it is clear that fossil gas based economic activities are inconsistent with: (i) the 1,5°C goal; (ii) the EU’s climate-neutrality objective (under Article 2 of the European Climate Law) and (iii) the EU’s emissions reduction targets. Alternatively, at the very least, this evidence raises a serious question as to how fossil gas activities could be compatible with those requirements. These studies are reports are persuasive, authoritative and/or endorsed by the Commission.
141. As mentioned above under section 4, the Commission was obliged to base its decision to determine that an activity could be classified as ‘sustainable’ based on “conclusive scientific evidence” and in compliance with the precautionary principle. It plainly did not do so, vitiating the Contested Act.

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<sup>108</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Stepping up Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, Brussels, 17.9.2020 COM(2020) 562 final.

<sup>109</sup> See p. 9.: “Achieving 55% greenhouse gas emissions reductions would result in a new and greener energy mix. By 2030, coal consumption would be reduced by more than 70% compared to 2015, **and oil and gas by more than 30% and 25%, respectively**. Renewable energy instead would see its share increase. By 2030, it would reach 38% to 40% of gross final consumption. Overall, this would lead to a *balanced path towards climate neutrality by 2050*.” (emphasis added)

<sup>110</sup> Commission Staff working document impact assessment accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Stepping up Europe’s 2030 climate ambition - Investing in a climate-neutral future for the benefit of our people”, Brussels, 17.9.2020; SWD(2020) 176 final.

<sup>111</sup> “Foot off the gas - Why Italy should invest in clean energy”; Carbon Tracker Initiative & RMI; Bell Udomchaiporn, Lee Ray, Lily Chau, Catharina Hillenbrand von der Neyen, with support from Alexander Engel, Charles Teplin, Mathias Einberger; March 2021, accessible at: <https://carbontracker.org/reports/foot-off-the-gas-italy/>.

## 5.2.2. The Commission disregarded the essential requirement to establish technical screening criteria by taking into account the life cycle of the activity, in breach of the mandatory requirements set out under Articles 10(2), 17 and 19(1)(g) Taxonomy Regulation

142. Article 19(1)(g) Taxonomy Regulation requires that the technical screening criteria “*shall take into account the life cycle (...) by considering both the environmental impact of the economic activity itself and the environmental impact of the products and services provided by that economic activity (...)*”. The requirement to take into account the life cycle of activities also stems clearly from recitals (34) and (44), as well as from paragraphs 1 and 2 of Article 17 requiring to take into account the life cycle of the activity to establish whether an activity does significant harm to any of the Environmental Objectives. Those reiterations show that it was an essential choice of the legislator framing the Commission’s delegated powers.
143. This life cycle approach is undoubtedly an essential element of the functioning of the taxonomy without which the objectives and safeguards of ‘sustainability’, ‘substantial contribution’ and of ‘significant harm’ would be empty shells. Considering the life cycle of activities is indeed necessary to ensure a holistic and integrated approach to the environmental impacts of products and services in order, according to the Commission, to improve those impacts at the most appropriate stage of its life cycle; provide incentives for the market and ensure policy coherence accordingly.<sup>112</sup>
144. Fossil gas-based activities and facilities produce GHG emissions across a wide life cycle. Beyond the direct emissions involved in the burning of fossil gas at the point of use, these include, without limitation: GHG emissions in the extraction, refining, transportation and storage of fossil gas (including leakages of methane); and emissions from a fossil gas facility even where its use is converted to other fuels, or a blend of fuels. Despite this, the Commission chose to establish technical screening criteria for fossil gas-based activities that do not take into account a life cycle approach:
- In Annex I (for substantial contribution to climate change mitigation), TSC 1(b)(i)<sup>113</sup> only set thresholds for *direct* GHG emissions of the activities. No threshold for life cycle emissions of the activity, as required by Article 19(1)(g), is set;
  - In Annex I, TSC 1(b)(v)<sup>114</sup> requires that an activity using a fossil gas facility switches to full use of renewable and/or low carbon gaseous fuels by 2035. In the absence of any impact assessment for the Contested Act, there is no evidence that this TSC ensures that the activity will substantially contribute to climate change mitigation when adopting a life cycle approach (given the life cycle emissions of certain renewable and low-carbon gaseous fuels);

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<sup>112</sup> See e.g. Commission Communication of 18 June 2003 on Integrated Product Policy Building on Environmental Life-Cycle Thinking, COM(2003) 302 final, pp. 4-5 in particular.

<sup>113</sup> See TSC 1(b)(ii) for activities 4.30 and 4.31.

<sup>114</sup> See TSC 1(b)(vi) for activities 4.30 and 4.31.

- In Annex I, it is not indicated if TSC 1(b)(vi) relates to direct or life cycle emissions reduction of at least 55%.<sup>115</sup> However since TSC 1(b)(vii) for activities 4.30 and 4.31 require a reduction in emissions “of at least 55% per kWh of output energy”, and as this corresponds to the unit used in relation to direct emissions under TSC 1(b)(ii), the Applicants infer that this would be construed by the Commission as referring to a reduction in *direct* emissions, not of life cycle emissions. Life cycle emissions are accordingly left out of account;
- In Annex I, the Commission requires an independent third party to certify, assess and report only the level of *direct* GHG emissions of the facility and not its life cycle emissions;
- In Annex II, the TSC establishing in respect of the DNSH requirement in respect of the Environmental Objective of climate change mitigation are defined in relation to *direct* emissions of the fossil gas based activities; these TSC not contain any threshold in relation to life cycle emissions whereas the Commission considered in previous guidance that DNSH criteria shall be set with regard to the life cycle of the activities.<sup>116</sup>

145. These TSC have thus been adopted in clear disregard of the Commission’s essential obligation to take into account the life cycle of activities 4.29, 4.30 and 4.31, both for determining when an activity substantially contributes to climate change mitigation (in Annex I) and does no significant harm to the same objective (in Annex II). The Commission thus exceeded its competence.

146. The Applicants submit that the omission of a life cycle approach in the TSC listed above is also inconsistent with the approach the Commission has adopted elsewhere.

- a. First, the Commission previously endorsed the life cycle approach for setting DNSH criteria under Article 17 Taxonomy Regulation, in its Technical Guidance for the DNSH principles under the RRF.<sup>117</sup> This guidance was not adopted directly under the Taxonomy Regulation, but the Applicants submit that it is informative by analogy. That Technical Guidance was provided to guide Member States in designing their recovery and resilience measures. It sets out the Commission’s interpretation and recommended application of the DNSH principles under Article 17 Taxonomy Regulation.
- b. Second, the Commission considers that a life cycle assessment of GHG emissions of fossil gas-based activities can be performed for activities 4.29, 4.30 and 4.31 on the basis of various methodologies, as set under TSC 1(a) for those activities. Since those methodologies already exist, there is no reason why they would not be useable for

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<sup>115</sup> The Applicants also find it difficult to understand if the ‘replacement’ related to the replacement of solid or liquid fossil fuel capacity with fossil gas (TSC 1(b)(iii)) or to the replacement of fossil gas with renewable or low carbon fuels (TSC 1(b)(vi)).

<sup>116</sup> Commission Notice Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, C(2021) 1054 final, p. 5.

<sup>117</sup> *Idem*.

facilities granted a construction permit by 31 December 2030; noting that such facilities could also commit to comply with TSC 1(a) instead of TSC 1(b).

- c. Third, by comparison, the TSC for nuclear power based activities in the Contested Act seem to rely on a life cycle approach, at least for the end of life of the products (waste).

147. In the present case, the lack of a life cycle approach makes proper measurement of climate change mitigation impacts of the activities impossible. The life cycle emissions of gas can be very high – for example, scientists have shown that electricity produced from gas extracted through hydraulic fracturing in the United States (from where the EU is increasingly importing its gas) can have higher emissions than electricity from coal.<sup>118</sup> Blending fossil gas with some forms of hydrogen such as low-carbon hydrogen also involves substantial emissions. If these emissions are not taken into account, *“the plant could in fact emit more than a plant running only on natural gas/kWh, because of the inherent inefficiencies.”*<sup>119</sup> In addition, biofuels production for blending “would require a very large percentage of EU arable land.”<sup>120</sup> The emissions and use of arable land caused by this blending causes material harm to the Environmental Objective, and in any case cannot contribute substantially to climate change mitigation nor is consistent with a 1,5° C trajectory.

148. In light of the above, it is clear that the Commission has disregarded its obligation to take into account the life cycle of an activity pursuant to Articles 10(2), 17 and 19(1)(g) Taxonomy Regulation. This obligation is an essential element of the Taxonomy Regulation that the Commission could not disregard. It has accordingly exceeded its powers delegated to it by the co-legislators pursuant to Article 23 and Article 10(3) Taxonomy Regulation.

### 5.2.3. The Commission applied different standards from those set by the legislature to determine if low carbon alternatives exist, in breach of the mandatory requirements set out under Article 10(2) and in excess of its delegated powers under Articles 10(3) and 23 Taxonomy Regulation

149. Article 10(2) Taxonomy Regulation provides that to qualify an activity as transitional, a first condition is that “there is no technically and economically feasible low-carbon alternative” to it. To determine this, the Commission “shall assess the potential contribution and feasibility of all relevant technologies”. Article 10(3) Taxonomy Regulation explicitly empowers the Commission to “supplement”, but not to amend (or otherwise depart from), Article 10(2) by

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118 Robert Howarth, “A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas” (2014) *Energy Science & Engineering* accessible at [http://www.eeb.cornell.edu/howarth/publications/Howarth\\_2014\\_ESE\\_methane\\_emissions.pdf](http://www.eeb.cornell.edu/howarth/publications/Howarth_2014_ESE_methane_emissions.pdf); Oil Change International, “Burning the Gas ‘Bridge Fuel’ Myth: Why Gas is not Clean, Cheap or Necessary” (2019), accessible at: [http://priceofoil.org/2019/05/30/gas-is-not-a-bridge-fuel/page\\_4](http://priceofoil.org/2019/05/30/gas-is-not-a-bridge-fuel/page_4); Ramon Alvarez et al, “Greater focus needed on methane leakage from natural gas infrastructure” (2012) *PNAS*, accessible at <https://www.pnas.org/content/109/17/6435>.

<sup>119</sup> See Platform on Sustainable Finance, Response to the Complementary Delegated Act 21st January 2022, p.28.

<sup>120</sup> *Idem*.

setting TSC in accordance with Article 19. Despite this, the Contested Act relies on different criteria that are inconsistent with the Taxonomy Regulation.

150. In Annex I, TSC 1(b)(ii) for activity 4.29 and 1(b)(iii) for 4.30 and 4.31, states that the power, heating or cooling to be replaced “*cannot be generated from **renewable energy sources, based on a comparative assessment with the most cost-effective and technically feasible renewable alternative for the same capacity identified (...)***” (emphasis added).
151. The Applicants consider that this wording is likely to be construed in a manner that would contradict the Taxonomy Regulation:
- a. On the one hand, the first part of the wording of these TSC suggests that the criteria would be satisfied only where the power, heating or cooling “cannot be replaced” by renewable energy sources. In isolation, this wording (cannot be replaced) is an open-ended and vague standard. However, the TSC then provides that a comparison is to be undertaken between the fossil gas activity, and renewable alternatives: “*a comparative assessment with the most cost-effective and technically feasible renewable alternative for the same capacity*”.
  - b. This wording indicates that the “comparative assessment” would compare the cost and technical feasibility of a renewable source with a gas facility of the same capacity.
  - c. In addition, recital (4) to the Contested Act states that fossil gas based activities may be deemed transitional on the basis that “*technologically and economically feasible low-carbon alternatives may not yet be **commercially available at a sufficient scale to cover the energy demand in a continuous and reliable manner***” (emphasis added). This standard appears for the first time in the Contested Act for the fossil gas based activities and was neither used by the Commission for any other transitional activity in the first Climate Delegated Act, nor apparently for the nuclear-based activities in the Contested Act.
152. The Applicants contend that these standards (as set in recital (4) and Annex I, TSC 1(b)(ii)/(iii) of the Contested Act) are not consistent with the wording of the Taxonomy Regulation nor with the intent of the legislature. Thus, in having set and used it to determine whether activities may be deemed transitional under Article 10(2), the Commission exceeded the competence conferred on it by Articles 10(3) and 23.
153. First, whereas the Taxonomy Regulation requires to verify the existence of feasible *low carbon* alternatives, TSC 1(b)(ii)/(iii) unduly limits this verification to alternatives using *renewable energy sources*. Therefore, that TSC cannot ensure that the potential contribution of all relevant technologies will be assessed to determine if some are feasible pursuant to Article 10(2). The Applicants contend that the Commission did not have the delegated power to reduce the scope of Article 10(2), first and last paragraphs in this manner. Instead, it should have set TSC requiring the fossil gas based activities to determine whether *low carbon* alternatives to them exist.
154. Second, these standards are not consistent with the wording of Article 10(2) Taxonomy Regulation, which requires in clear terms that “no technologically and economically feasible

low-carbon alternative” must exist<sup>121</sup> for relevant activities to qualify as transitional (in addition to the other climate-, performance- and market-related requirements under that provision).

155. The *absence of existence* of an alternative is significantly different from requiring that it is the most cost-effective, technically feasible solution and/or widely available on the market. The requirement under the TSC for the alternative to be of the “same capacity” also does not appear in the Taxonomy Regulation. Likewise, requiring that an alternative is *feasible* (*réalisable* in the French version), even economically, is very different from requiring that the solution is more cost-effective (and/or “commercially available at a sufficient scale”, per recital (4)). TSC 1(b)(ii)/(iii) contemplates a “comparative assessment” that looks at the cost-effectiveness and technological feasibility of fossil gas based and renewables based activities. This may imply that if, in such a comparison, the fossil gas activity is cheaper (even marginally) than the renewable energy sources, the requirement for “no alternative” would be satisfied. This is clearly not what the Taxonomy Regulation contemplated at all and it is not compliant with the requirement of Article 10(2) that no technologically and economically feasible low-carbon alternative exists. It would, however, appear to be what the comparative assessment with renewable energy sources in TSC 1(b)(ii)/(iii) of the Contested Act would entail. As such, it constitutes a new element additional to the EU Taxonomy Regulation requirements. The same reasoning also applies if the commercial scale of low carbon alternatives (as set in recital (4) to the Contested Act), are considered.
156. If the legislature had intended to provide such a standard, it would not have set a standard according to which the alternatives shall simply *exist* and be *feasible*.
157. Recital (4) of the Contested Act reveals that the Commission itself recognizes the distinction between being feasible and widely available on the market, since its suggestion that low carbon alternatives must be commercially available stems from its intent to include fossil gas based activities in the taxonomy as a means to satisfy energy demand and security of supply (which is not the purpose of the Taxonomy Regulation). The Applicants already note that they contend that in pursuing this objective, the Commission actually misused its powers (see below section 5.3.4).
158. The standards set by the Commission also contradict the intent of the legislature. The purpose of the taxonomy is to “*facilitate the shift of investment towards environmentally sustainable economic activities*”.<sup>122</sup> If indeed, as the Commission’s criteria would appear to presume, low-carbon alternatives are not yet ‘*commercially available at a sufficient scale*’, it is even more important to redirect capital flows towards truly sustainable solutions. The purpose of the taxonomy is not to permit/allow activities or to support the development of any activity that has a role to play in decarbonising the economy at a marginal scale; those activities must comply with sustainability requirements to deserve that label. This is why, the Applicants submit, the requirements set in Article 10(2) Taxonomy Regulation are clearly phrased and stringent.

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<sup>121</sup> The French version of Article 10(2) reads: “Aux fins du paragraphe 1, une activité économique pour laquelle **il n’existe pas** de solution de remplacement sobre en carbone réalisable sur le plan technologique et économique est considérée comme apportant une contribution substantielle (...)”. see also the Italian version («*non esistono alternative*») and the Spanish version («*no existe una alternativa*»).

<sup>122</sup> Taxonomy Regulation, recital (16).

159. The requirement that there must not be feasible low carbon alternatives to an activity is actually the first premise under which an activity could be considered transitional: “*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 fulfils other requirements]*”. On the contrary where a feasible low carbon alternative exists, an activity must be excluded outright from the scope of Article 10(2). The obligation on the Commission to “*assess the potential contribution and feasibility of all relevant technologies*”, in the last paragraph of Article 10(2), confirms the importance given by the legislature to assess the current but also the foreseeable existence and the potential of low carbon alternatives. In respect of the latter, the requirement under point (b) of Article 10(2) that transitional activities shall not hamper the development and deployment of low carbon alternatives also evidences that the legislature’s intent is to leave ample room for those alternatives to develop, not lock in the market with (allegedly) transitional technologies and force the Commission to look beyond the current state of the market when setting the TSC.
160. In nonetheless considering that an activity could be deemed transitional until low carbon alternatives become commercially available at scale – i.e. presumably to cover the same amount of capacity as fossil gas since the actual objective of the Commission is to satisfy energy demand and security – and as long as the activity is more “cost-effective” compared to activities using renewable sources of energy, the Commission set a standard that is significantly different from the one set and intended by the legislature, and thereby exceeded the competence conferred on it by Articles 10(3) and 23 Taxonomy Regulation.

#### 5.2.4. The Commission disregarded the essential requirement to establish technical screening criteria to ensure that the activities do no significant harm to any of the environmental objectives, in breach of the mandatory requirements set out under Articles 3(b) and 17(1)(d) Taxonomy Regulation

161. Another criterion under Article 3 Taxonomy Regulation is the requirement that an activity “does not significantly harm any of the environmental objectives”.<sup>123</sup> To that end, the legislator made the political choice to require that such harm cannot occur to “any” of the environmental objectives, rather than to some environmental objectives or any other environmental objectives besides the one mentioned under Article 3(a).<sup>124</sup>

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<sup>123</sup> Article 3(b) Taxonomy Regulation.

<sup>124</sup> The requirement to set technical screening criteria both for the substantial contribution of an activity to an Environmental Objective and for the DNSH of the same activity to the same Environmental Objective, is also supported by a comment made by the Regulatory Scrutiny Board on a draft of the impact assessment for the first Climate Delegated Act: “*The report should show whether there is a difference between the level of ambition of the criterion for do no significant harm for climate adaptation and the (not presented) criterion for substantial contribution to climate adaptation. For that, the report needs to include both criteria.*”. See Regulatory Scrutiny Board Opinion of 2 October 2020 on Commission Delegated Regulation (EU) .../... of XXX 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, SEC(2021) 166, p. 2.



162. In Annexes I and II to the Complementary Delegated Act, the Commission chose not to assess whether the fossil gas based activities can cause significant harm to the circular economy – this DNSH criterion is simply marked as “N/A” (which we presume means ‘not applicable’) without any justification. In its impact assessment on the first Climate Delegated Act, the Commission generically explains that *“For some activities, there was no risk of significant harm to the circular economy objective. Hence, for these activities, no criteria are proposed for DNSH to circular economy”*.<sup>125</sup> No further explanation is provided with regard to the specific activities as to why circular economy criteria are not adopted. In any event, there is no explanation in that impact assessment nor in the Explanatory Memorandum to the Contested Act as to why fossil gas would not cause significant harm to circular economy by nature. By contrast, the technical screening criteria for nuclear power based activities (4.26, 4.27 and 4.28) cover DNSH to circular economy.
163. The Commission’s approach towards the DNSH on circular economy for the activities 4.29, 4.30 and 4.31 is not compatible with the Commission’s position expressed in its Communication “A new Circular Economy Action Plan For a cleaner and more competitive Europe”<sup>126</sup>, which recognises that the circularity is “a prerequisite for climate neutrality”. In particular, the Commission Communication recognises that:

*“In order to achieve climate neutrality, the synergies between circularity and reduction of greenhouse gas emissions need to be stepped up.”*

*“Next to reducing greenhouse gas emissions, achieving climate neutrality will also require that carbon is removed from the atmosphere, used in our economy without being released, and stored for longer periods of time.”*

164. The Applicants therefore contend that by failing to set technical screening criteria for determining when fossil gas based activities do significant harm to the circular economy in Annexes I and II, the Commission disregarded an essential requirement of the Taxonomy Regulation and therefore, exceeded its powers in adopting the Contested Act.

### 5.2.5. The Commission disregarded the essential requirement to establish technical screening criteria to ensure that 100g CO<sub>2</sub>e/kWh activities contribute to the phasing out of greenhouse gas emissions from solid fossil fuels

165. TSC 1(a) permits fossil gas activities involving the emission of 100g CO<sub>2</sub>e/kWh but does not make this conditional on the cessation of an existing and more carbon intensive activity from solid or liquid fossil fuels. This is contrary to the express requirements of Article 10(2) Taxonomy Regulation.<sup>127</sup> As a result, that TSC 1(a) actually incentivises investments into fossil fuels capacity resulting in additional GHG emissions, in total contradiction with the requirement that the activities contribute to their phasing out and support the transition to a

<sup>125</sup> Impact Assessment Report, p. 232.

<sup>126</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “A new Circular Economy Action Plan for a cleaner and more competitive Europe”, Brussels, 11.3.2020, COM(2020) 98 final.

<sup>127</sup> Article 10(2) Taxonomy Regulation requires that to be transitional, an activity shall support “the phasing out [of] greenhouse gas emissions, in particular emissions from solid fossil fuels”.

climate-neutral economy. By doing this, the Commission postpones the transition while it should be doing the contrary. This TSC is thus both: (i) an excess of powers; and (ii) manifestly inappropriate to ensure that the fossil gas based activities are transitional within the meaning of Article 10(2).

### 5.3. Third ground of review: Infringement of the Treaties or of any rule of law relating to their application and misuse of powers

166. Under Article 10(2) Taxonomy Regulation, economic activities can be regarded as “transitional” (and hence sustainable) only if there is no technologically and economically feasible low-carbon alternative to them while, at the same time, they support the transition to a climate-neutral economy consistent with a pathway to limit the temperature increase to 1,5°C above pre-industrial levels (hereafter referred to as ‘the 1,5°C trajectory’) and comply with additional requirements.
167. As stressed by the Platform on Sustainable Finance,<sup>128</sup> the regulation of transitional activities has not been the original focus of the Taxonomy Regulation: “*The EU Sustainable Finance Taxonomy was conceived to describe the environmental performance necessary for economic activities to substantially contribute to meeting Europe’s environmental goals.*” The Platform further stated that “*Transitional activities as defined in the Taxonomy Regulation are activities that must still make **a substantial contribution in their own right** while ensuring no-significant harm **and not merely be part of a bigger system in transition***” (emphasis added).
168. Under this ground of review, the Applicants first recall that all requirements for TSC of Article 19 are mandatory and cumulative (section 5.3.1). We then submit that by failing to conduct an impact assessment for the Contested Act and not having demonstrated elsewhere that it had analysed all the relevant facts, it could not have exercised its discretion at the standard required by the case law (section 5.3.2). Furthermore, the Applicants submit it is implausible, in light of the established environmental impacts of fossil gas-based activities throughout their life cycle and of the state of development of the power and heating and cooling sectors, that the Commission could find that activities 4.29, 4.30 and 4.31 can make a substantial contribution to climate change mitigation in their own right and thus qualify as transitional activities pursuant to Article 10(2) (section 5.3.3). The Applicants further contend that in adopting the Contested Act for pursuing objectives of energy security, the Commission misused its powers (section 5.3.4). Moreover, it is equally implausible that the Commission could find that these activities could do no significant harm to any of the Environmental Objectives pursuant to Article 17 and that the TSC it set were ensuring they do not (section 5.3.5). Lastly, the Applicants contend that the Contested Act was adopted in breach of the principle of energy solidarity (section 5.3.6).

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<sup>128</sup> Response to the Complementary Delegated Act - 21st January 2022”, accessible at: [EU Platform on Sustainable Finance response to complementary Delegated Act \(europa.eu\)](https://europa.eu/european_council/en/eu-platform-on-sustainable-finance-response-to-complementary-delegated-act).

## 5.3.1. Preliminary remarks on the mandatory and cumulative requirements of Article 19 Taxonomy Regulation

169. It is important to recall that in determining the conditions under which an activity qualifies as contributing substantially to climate change mitigation, the Commission is empowered and obliged to set TSC taking into account the requirements of Article 19.<sup>129</sup> The Applicants contend that all requirements under Article 19(1) Taxonomy Regulation are mandatory and that the legislature made a clear political choice to set mandatory limits to the delegation of power to the Commission.
170. The wording of certain of the requirements under Article 19(1)(a)-(k) Taxonomy Regulation demonstrates that the legislature decided to leave no discretion to the Commission as to how they should be implemented. This applies in particular to the requirements for the technical screening criteria to: respect the principle of technological neutrality (Article 19(1)(a)); be based on conclusive scientific evidence and the precautionary principle (Article 19(1)(f)); ensure that all relevant economic activities within a specific sector are treated equally towards the environmental objectives of the Taxonomy Regulation to avoid distorting competition in the market (Article 19(1)(j)); and be easy to use and be set in a manner that facilitates the verification of their compliance (Article 19(1)(k)).
171. Whereas other criteria shall be “taken into account”, they do not have a lesser value and, naturally, cannot be disregarded by the Commission in any circumstance. This is notably the case of the requirements to take into account: any relevant existing Union legislation (Article 19(1)(d)); the potential market impact of the transition to a more sustainable economy, including the risk of certain assets becoming stranded as a result of such transition, as well as the risk of creating inconsistent incentives for investing sustainably (Article 19(1)(i)); and the life-cycle of the activities including production, use and end of life of the products and services provided (Article 19(1)(g)).
172. The criteria of Article 19(1) Taxonomy Regulation must be applied cumulatively. They cannot be considered as a list of requirements that need to be put in balance where the consequence is that some of them would be disregarded, left aside or contradicted. None of the provisions in the Taxonomy Regulation support such approach.

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<sup>129</sup> Article 10(3) and (5) Taxonomy Regulation.

## 5.3.2. First limb: the Commission failed to conduct an impact assessment (or any equivalent assessment) and failed to demonstrate that it took into account all relevant facts and evidence available to it for setting the TSC

173. Although the Commission undoubtedly benefits from a margin of discretion for establishing the TSC, such margin is strictly framed and limited by the powers conferred on the Commission pursuant to Articles 10(3), 19 and 23 of the Taxonomy Regulation, which the Commission exceeded (see section 2 above). That margin of discretion is also limited by the obligation on the institution to base its choice on objective criteria.<sup>130</sup> That was of particular importance in the present case given how controversial the inclusion of fossil gas based activities in the taxonomy has been amongst the scientific community, policy makers, market operators and civil society.
174. The Applicants' position is that the Commission has failed to show that it took account of the facts and evidence relevant to the exercise of its powers. In the absence of an impact assessment, and in view of the absence of any other sufficient assessment (as described below) the Commission cannot show that it was in a position to take account of the relevant facts and evidence (and the Applicants also infer that the Commission did not do so). This is particularly clear in view of the weight of evidence (in the form of scientific analysis and authoritative and/or official reports) that contradict the Commission's assessment that fossil gas activities can be regarded as "transitional" or "sustainable" (as those terms are specified pursuant to the Taxonomy Regulation). The Applicants in this regard cross-refer to the materials referred to in our second ground of review above, and further below under this third ground of review.
175. The Contested Act was not accompanied by an impact assessment because the Commission stated that it was "*not necessary*" to conduct one.<sup>131</sup> This is contrary to the Commission's obligation under Article 23(4) Taxonomy Regulation, "*before adopting a delegated act, [to] act in accordance with the principles and procedures laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law Making.*" This requirement is additional to the Commission's duty to "*gather all necessary expertise (...) including through the consultation of experts (...)*".
176. In accordance with point 13 of the Interinstitutional Agreement of 13 April 2016 on Better Law Making<sup>132</sup> (hereafter the 'Better Law Making Agreement'), "*the Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts.*" One of the purposes of the impact assessments is "*to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission*".<sup>133</sup> This is of particular importance for delegated acts, for which the Council and

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<sup>130</sup> See e.g. Judgement of 3 December 2019 (Grand Chamber), *Czech Republic v. European Parliament and Council of the European Union*, C-482/17, ECLI:EU:C:2019:1035, para. 79.

<sup>131</sup> Explanatory Memorandum to the Contested Act, p. 5.

<sup>132</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

<sup>133</sup> *Ibid*, point 14

the European Parliament can only exercise a right to object but do not participate in the elaboration of the act.

177. The CJEU has confirmed that “*the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have such implications*”<sup>134</sup>, i.e. significant economic, environmental or social impacts. The Commission can be exempted from this obligation only if it “*is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure.*”<sup>135</sup>
178. In the present case, there is no doubt that the Contested Act has significant environmental impacts. As stated in the impact assessment to the first Climate Delegated Act: “*The EU Taxonomy is an important piece of the puzzle to enable and scale up sustainable investment and thus to implement the European Green Deal. The Taxonomy aims to channel capital towards activities that substantially contribute to reaching the objectives of the European Green Deal, such as climate neutrality, zero pollution, preservation of biodiversity, a circular economy and a high degree of energy efficiency*”<sup>136</sup>; and “*The Taxonomy as a whole aims to incentivise the mitigation of GHG emissions and adaptation to climate change compared also in sectors that are not yet recognised as “green” by the market. The Taxonomy is, however, not a mandatory or prescriptive list to invest in.*”<sup>137</sup> The Commission also considers that “*Beyond the EU, the delegated act may also constitute an important reference point for promoting sustainable investments worldwide.*”<sup>138</sup> As for the Contested Act specifically, the inclusion of fossil gas based (and nuclear based) activities by the Commission as ‘transitional activities’ pursuant to Article 10(2) Taxonomy Regulation supposes that those activities comply with the 1,5°C trajectory and, on the DNSH side, do not “*lead to significant greenhouse gas emissions*”.<sup>139</sup> This undoubtedly confirms that the included activities are considered by the Commission to have a significant environmental impact, even if it is a positive one.<sup>140</sup> An impact assessment should therefore have been conducted. In this respect, it is useful to refer to the Regulatory Scrutiny Board’s opinion on the draft impact assessment for the first Climate Delegated Act, criticising the Commission for not having sufficiently “*[justified] the selection of included sectors for climate mitigation and adaptation*”, nor “*why CO2 mitigating activities in*

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<sup>134</sup> Judgement of 3 December 2019 (Grand Chamber), *Czech Republic v. European Parliament and Council of the European Union*, C-482/17, *ibid*, para. 84

<sup>135</sup> *Ibid*, para. 85

<sup>136</sup> Impact Assessment Report of 4 June 2021 accompanying the document Commission Delegated Regulation (EU) .../... 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, SWD(2021) 152 final, p. 1.

<sup>137</sup> *Ibid*, p. 5

<sup>138</sup> Commission Staff Working Document: Executive Summary of the impact assessment report of 4 June 2021 Accompanying the document Commission Delegated Regulation (EU) .../... 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, SWD(2021) 153 final, p. 3.

<sup>139</sup> Article 17(1)(a) Taxonomy Regulation.

<sup>140</sup> This is without prejudice to the Applicants’ analysis that fossil gas based activities do not fulfil the requirements to qualify as ‘transitional activities’ under Article 10(2) Taxonomy Regulation, as demonstrated in this request.

*fossil fuel activities (such as oil refineries) are not covered*".<sup>141</sup> Those comments demonstrate that a comprehensive impact assessment should have justified why and how fossil gas based activities could be included in the Contested Act.

179. On the contrary, the Applicants are not aware of any circumstance dispensing the Commission from this duty, such as urgency to adopt the Contested Act – which the Commission itself never alleged.<sup>142</sup>

180. Rather, the Commission justified the absence of a specific impact assessment, in the Explanatory Memorandum to the Contested Act, by the fact that it had gathered sufficient information from experts and stakeholders in the course of the decision-making process and that the impact assessment conducted for the first Climate Delegated Act covered criteria for “*most activities*” included in the Contested Act.<sup>143</sup> At page 5 of the Explanatory Memorandum to the Contested Act, the Commission explains:

*“As regards the process of adoption of this Delegated Act, it was decided that an impact assessment was not necessary for fossil gas energy activities, given that:*

- *this Delegated Act will implement policy choices already made and will only complement the Taxonomy Climate Delegated Act;*
- *the Taxonomy Climate Delegated Act was based on advice received from the TEG and from the Platform on Sustainable Finance and was accompanied by a proportionate impact assessment;*
- *the criteria for most activities which are planned to be included in this Delegated Act have been already subject to an impact assessment and public consultation as part of the preparation of the Taxonomy Climate Delegated Act.”*

181. The Applicants contend that these circumstances could actually not enable the Commission to exercise its discretion based on all relevant facts, according to the standard set by the case law. In this respect, pursuant to the case law “*even judicial review of limited scope requires that the EU institutions that have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into*

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<sup>141</sup> Regulatory Scrutiny Board Opinion of 2 October 2020 on Commission Delegated Regulation (EU) .../... of XXX 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, SEC(2021) 166, p. 2 of the first opinion (negative) and p. 2 of the second opinion (positive with reservations).

<sup>142</sup> Better Law Making Agreement, point 12. See a *contrario* Advocate General Sharpston’s opinion of 11 April 2019 in *Czech Republic v. European Parliament and Council of the European Union*, C-482/17, ECLI:EU:C:2019:321, paragraph 100: “*The Commission stated expressly in the explanatory memorandum to the proposal for Directive 2017/853 that, ‘due to the urgency of the proposal in the light of recent events, it is submitted without an impact assessment’.* On the basis of the material before the Court, I see no reason to quarrel with that statement.”

<sup>143</sup> Explanatory Memorandum to the Contested Act, p. 5.

*account as the basis of the contested measures of the act and on which the exercise of their discretion depended (judgment of 21 June 2018, Poland v Parliament and Council, C-5/16, EU:C:2018:483, paragraphs 152 and 153 and the case-law cited).<sup>144</sup>*

182. First, given the significant environmental impact of fossil gas-based activities, it is not sufficient to state that “most activities” in the energy sector have already been subject to an impact assessment for the first Climate Delegated Act when fossil gas-based activities were specifically *not* included. This was so because it had been already decided to exclude them from the draft Climate Delegated Act.<sup>145</sup> Thus the “policy choices already made” were *not* to *include* fossil gas based activities in the first Climate Delegated Act<sup>146</sup>. The Commission thus cannot claim that the Contested Act is a mere complement to the first Climate Delegated Act and that one can simply refer to the impact assessment on that delegated act or elsewhere.<sup>147</sup>
183. Second, the impact of technical screening criteria of crucial importance set for fossil gas based activities was not fully assessed by experts and scientists prior to the adoption of the Contested Act. The impact of life cycle GHG emissions lower than 100gCO<sub>2</sub>/kWh was assessed for other electricity generation activities in the impact assessment for the first Climate Delegated Act, and was recommended by the TEG<sup>148</sup> and by the EU Platform on Sustainable Finance for determining when an electricity generation activity could be deemed to substantially contribute to climate change mitigation. However, the other criteria under TSC 1(b) for fossil gas based activities were not fully assessed. The impact assessment for the first Climate Delegated Act and the TEG Technical Recommendations did not cover the specific thresholds of 270gCO<sub>2</sub>e/kWh and 550kgCO<sub>2</sub>e/KW in relation to their substantial contribution to climate change mitigation, neither in isolation nor combined with the other criteria set under TSC 1(b)(ii) to (vii).<sup>149</sup> Those thresholds are significantly different to 100gCO<sub>2</sub>e/kWh (see

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<sup>144</sup> Judgement of 3 December 2019 (Grand Chamber), *Czech Republic v. European Parliament and Council of the European Union*, C-482/17, *ibid*, para. 81.

<sup>145</sup> See impact assessment to the first Climate Delegated Act, point 1.4 (p.8) : “(...) *The changes that have been made to the criteria as part of the stakeholder feedback gathered in this process are not part of the assessment (...)*”; Annex 5 point 5.1.4: “*Activities related to fossil-based gaseous and liquid fuels have been removed from the final draft delegated act. The analysis for the criteria that have been put forward in November 2020 does not aim to prejudge further analysis and work that will be carried out on these criteria in the future.*”; Annex 9 provides in that electricity generation from natural gas, cogeneration from natural gas and production of heat/cool from natural gas have been removed in the final delegated act.

<sup>146</sup> The November 2020 draft that was subject to the impact assessment only included the threshold of 100gCO<sub>2</sub>e per 1 kWh. However, it looks from the impact assessment for the first Climate Delegated Act that the fossil gas based activities were not included in it.

<sup>147</sup> Whereas other pieces of EU legislation such as the State Aid Guidelines for Climate, Environmental Protection and Energy 2022 (‘CEEAG’) or the Recovery and Resilience Fund (‘RRF’), also contain criteria relating to fossil gas based activities that allegedly aim at ensuring those activities are consistent with a trajectory towards the 2030 and 2050 climate targets and do not result in lock in or stranded assets, the reasons for the choice of such criteria is not explained in the impact assessment on the CEEAG and there was no impact assessment for the RRF. It is thus impossible to understand where the TSC in the Contested Act come from.

<sup>148</sup> The TEG Report was prepared thoroughly and taking into account the scientific and technical knowledge (although might have not only be based on these as integrated input from wide variety of stakeholders): “These recommendations have been developed over 20 months and with substantial consultation and scientific and technical input. The TEG has received input from all parts of the investment chain, industry sector representatives, academia, environmental experts, civil society and public bodies. Combined, these reports contain detailed explanation of the rationale and methodologies behind the TEG’s conclusions.” (p.3, Final TEG Report, March 2020).

<sup>149</sup> TSC 1(b)(i) to (ix) for activities 4.30 and 4.31.

below section 5.3.3.1) and therefore likely to have even more significant environmental impacts. Therefore, one cannot simply extrapolate from positive opinions on the 100gCO<sub>2</sub>e/kWh threshold that they would necessarily apply to other emissions levels.

184. The Platform repetitively stressed that the proposed technical screening criteria were not scientifically grounded, inconsistent with the Taxonomy Regulation and the first Climate Delegated Act, counterproductive and hardly usable and verifiable.<sup>150</sup> In other words, the Platform's assessment was clearly negative.
185. For all these reasons, the Commission cannot purport to simply build on a previous impact assessment (under the Taxonomy Regulation or otherwise) and on the advice received from the TEG, the Platform or any other body to assert having assessed the relevant facts in an objective manner and in their entirety. The Explanatory Memorandum indicates that the Commission received multiple observations from stakeholders before adopting the Contested Act; but one is unable to understand what objective factors and evidence, if any, were eventually deemed sufficiently conclusive by the Commission for elaborating the Contested Act.
186. In light of the above, the Commission failed to demonstrate in the Contested Act and in its explanatory memorandum that it exercised its discretion up to the standard of review set by the case law, which suffices to justify a revision of the Contested Act.
187. Most importantly, as a result of not having conducted an impact assessment, or otherwise demonstrated having taken into account all of the factors and circumstances relevant to the situation being regulated, the Commission was not in a position to weigh all the evidence and to exercise its discretion properly and/or cannot demonstrate that it has done so. Consequently, the Commission made manifest errors regarding a significant number of essential and mandatory requirements under Article 10(2), 17 and 19 Taxonomy Regulation, as demonstrated under the pleas below.

### 5.3.3. Second limb: The Commission manifestly erred in its assessment of Articles 10(2) and 19(1) Taxonomy Regulation and misapplied the requirements of these Articles

188. The Applicants submit that the Commission manifestly erred in considering: that the fossil gas-based activities in the Contested Act could, on the basis of the TSC set in Annex I, support the transition to a climate-neutral economy consistent with the 1,5°C trajectory (section 5.3.3.1); that there is no technologically and economically feasible low-carbon alternative to activities 4.29, 4.30 and 4.31 (section 5.3.3.2); that the activities do not hamper the development and deployment of low-carbon alternatives (section 5.3.3.3); that the TSC prevent the creation of stranded assets and lock in of emissions (section 5.3.3.4); and that the TSC ensure respect of the principle of technology neutrality (section 5.3.3.5).
189. The Commission has accordingly made manifest errors of assessment in adopting the Contested Act resulting in infringements of the Taxonomy Regulation.

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<sup>150</sup> Platform on Sustainable Finance, Response to Complementary Delegated Act, 21 January 2022.



## 5.3.3.1. The Commission manifestly erred in characterising the fossil gas based activities as transitional and in setting TSC that do not ensure that the activities would comply with the requirements of Article 10(2), in breach of Articles 10(2) and 19 in conjunction with Article 10(3) Taxonomy Regulation

190. The requirement in Article 10(2) Taxonomy Regulation that the activities support the transition to a climate-neutral economy consistent with a 1,5°C trajectory, including by phasing out greenhouse gas emissions, directly derives from the Union's commitment to comply with the Paris Agreement, as recently reiterated in the European Climate Law.<sup>151</sup> The Applicants contend that the fossil gas based activities and their TSC set out in the Contested Act, do not comply with this requirement and, on the contrary, put the transition towards climate neutrality and the achievement of the 2030 climate target at risk.
191. Had the Commission complied with the mandatory requirements of Article 19 in light of the requirements of Article 10(2), in particular (i) the obligation to base the criteria on conclusive scientific evidence and the precautionary principle, (ii) to adopt a life cycle approach and (iii) ensure that the TSC are verifiable, it could never have plausibly set the TSC as it did in the Contested Act. As such, it committed manifest errors of assessment.
192. These errors are additional to the excess of powers committed by the Commission. This includes the excess arising from the Commission having disregarded the requirements to: (i) act on the basis of conclusive scientific evidence and having regard to the precautionary principle; and (ii) take a life cycle approach (see above section 5.2). There are in addition further excesses of power, as noted below. In making those arguments as to excess of powers (certain of which are developed under Ground 2 above), the Applicants rely in full on the matters set out under this limb, including each instance of incompatibility between the TSC set by the Commission, and the requirements of the Taxonomy Regulation, and the evidence in that regard.
193. Annex I to the Contested Act contains different TSC relating to the maximum level of emissions the facilities are allowed to emit in order to qualify as substantially contributing to climate change mitigation:

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<sup>151</sup>Recitals (3, (4) and (24) Taxonomy Regulation.

	All facilities	Facilities granted a permit by 31 December 2030	
Activity 4.29 – Electricity generation	100g CO <sub>2</sub> e/KWh over their life cycle	<i>Either:</i> 270g CO <sub>2</sub> e/kWh for direct emissions of output energy (no life cycle approach) + other criteria	<i>Or:</i> 550kg CO <sub>2</sub> e/kW over 20 years + other criteria
Activity 4.30 – Cogeneration of heat and power	100g CO <sub>2</sub> e/KWh over their life cycle	270g CO <sub>2</sub> e/kWh for direct emissions of output energy (no life cycle approach) + other criteria	/
Activity 4.31 – district heating and cooling	100g CO <sub>2</sub> e/KWh over their life cycle	270g CO <sub>2</sub> e/kWh for direct emissions of output energy (no life cycle approach) + other criteria	/

194. It is worth emphasising the following (which are developed further below):

- a. 100g CO<sub>2</sub>e/KWh is also the TSC applicable to other energy activities from non-fossil fuel sources under the first Climate Delegated Act, and for nuclear based activities under the Contested Act. In isolation, that level corresponds to the recommendation of the TEG;<sup>152</sup> but the TEG advised that that emissions level would need to decline over time<sup>153</sup>;
- b. 270g CO<sub>2</sub>e/KWh and 550kg CO<sub>2</sub>e/KW are calculated based on direct emissions of the facility without adopting a life cycle approach;
- c. 270g CO<sub>2</sub>e/KWh of direct emissions (without other criteria) is also the DNSH criteria for climate change mitigation of the fossil gas-based activities under Annex II to the Contested Act;
- d. The 550kg CO<sub>2</sub>e/kW threshold requires account to be taken of the load factor, i.e. the number of hours per year during which the plant is running to calculate annual emissions per kW. By contrast, 100g CO<sub>2</sub>e/kWh and 270g CO<sub>2</sub>e/kWh are calculated based on a maximum carbon intensity metric required at any point in time (kWh). Hence under the 550kg CO<sub>2</sub>e/kW threshold, a facility could emit a very high level of emissions at the peak of its operations, to be averaged over 20 years with the absence of emissions when the plant is not operating at

<sup>152</sup> TEG Report p. 21: “Energy generation from gaseous or liquid fossil fuels should only be considered to make a substantial contribution to climate change mitigation where it meets the technical screening criteria, which we recommend be set at < 100 g CO<sub>2</sub>e/ kWh reducing in five-year increments to 0 g CO<sub>2</sub>e/kWh by 2050. The implications of this are discussed further in the energy sector commentary.”

<sup>153</sup> “Declining threshold: Facilities operating at life cycle emissions lower than 100gCO<sub>2</sub>e/kWh, declining to 0gCO<sub>2</sub>e/kWh by 2050, are eligible.

- This threshold will be reduced every 5 years in line with a net-zero CO<sub>2</sub>e in 2050 trajectory
  - Assets and activities must meet the threshold at the point in time when taxonomy approval is sought
- For activities which go beyond 2050, it must be technically feasible to reach net-zero emissions.”

all; or could emit very high emissions in the first years of its operations, notably until 2035 (when it has to fully switch to low carbon or renewable fuels).

195. None of these thresholds is appropriate to ensure that the fossil gas based activities will be transitional within the requirements of Article 10(2), either in isolation or in combination with other TSC (in particular under TSC 1(b)). In particular, they are not based on conclusive scientific evidence nor on a life cycle approach and are hardly verifiable.

**The Commission breached Article 19(1)(f) by not basing the TSC on conclusive scientific evidence**

196. The Applicants make an over-arching point regarding each of the specific inconsistencies and errors addressed in this section. They observe that whereas there is ample conclusive scientific evidence that fossil gas based activities are unable to substantially contribute to climate change mitigation given that they contribute to aggravate climate change – and therefore do not comply with the EU climate-neutrality objective under Article 2 of the European Climate Law – this evidence appears to have been ignored by the Commission. Further and in the alternative, the Commission’s specification of each TSC is not supported by any such evidence, and/or was adopted contrary to the precautionary principle. The Applicants submitted under section 5.2.1 above that by not basing the inclusion of fossil gas based activities or the TSC in the Contested Act on conclusive scientific evidence and the precautionary principle, despite these being essential requirements of the taxonomy, the Commission exceeded its competence. The Applicants also refer to the scientific evidence developed under that section 5.2.1 for the purpose of the following section where relevant.
197. Should the Commission argue that it did not exceed its competence nonetheless, the Applicants claim that the Commission’s disregarding of the evidence constitutes a manifest error justifying the revision of the Contested Act in relation to the inclusion of fossil gas based activities. Apart from this general manifest error, the TSC set in Annex I are also manifestly inappropriate to ensure that the activities could be considered transitional pursuant to Article 10(2) Taxonomy Regulation.

**The 100 g CO<sub>2</sub>e/kWh level in TSC 1(a) is inappropriate to ensure that fossil gas based activities are transitional**

198. TSC1(a) sets a maximum level of emissions for fossil gas activities of 100g CO<sub>2</sub>e/kWh. This is manifestly inappropriate to qualify the activities as transitional under Article 10(2) Taxonomy Regulation. The Applicants refer to three factors.
199. First, the TEG recommended that if this level of emissions was to be adopted, it would also need to decline over time to be truly compliant with a 1,5°C trajectory, taking into account GHG emissions from other activities and sectors. By contrast, the Commission has fixed that TSC in isolation and has not provided that this level of GHG emissions shall decline over time. The TEG’s recommendation confirms that the Commission could not have acted on the basis of “conclusive scientific evidence”.

200. Second, TSC 1(a) requires that any abatement equipment comply with the TSC that are set in the first Climate Delegated Act where applicable. However, this statement simply acknowledges that abatement will be required to reach the 100g CO<sub>2</sub>e/kWh threshold in the first place. As demonstrated below under paragraphs 262 ff., CCS remains uncertain due to technical, environmental and economic obstacles and the renewable and low-carbon gases are not defined yet. Relying on these uncertain technologies when calculating the activity's life-cycle impact creates a risk of qualifying as 'transitional' activities that in the end may not achieve expectations.
201. Third, as mentioned above under section 5.2.5, TSC 1(a) recognises fossil gas activities involving the emission of 100 g CO<sub>2</sub>e/kWh as transitional and sustainable but does not make this conditional on the cessation of an existing and more carbon intensive activity from solid or liquid fossil fuels. This is contrary to the express requirements of Article 10(2) Taxonomy Regulation.<sup>154</sup> As a result, that TSC 1 actually incentivises investments into new fossil fuels capacity resulting in additional GHG emissions, in total contradiction with the requirement that the activities contribute to their phasing out and support the transition to a climate-neutral economy. By doing this, the Commission postpones the transition while it should be doing the contrary. This TSC is thus both: (i) an excess of powers; and (ii) manifestly inappropriate to ensure that the fossil gas based activities are transitional within the meaning of Article 10(2).
202. In light of the above, it is implausible that the Commission could consider that the TSC 1(a) it set would be consistent with the objectives and requirements of Article 10(2) Taxonomy Regulation. This TSC is therefore vitiated with manifest errors and must be reviewed.

**The thresholds of 270g CO<sub>2</sub>e/kWh for direct emissions of output energy and 550 Kg CO<sub>2</sub>e/kW over 20 years in TSC1(b), and related criteria in TSC 1(b), are inappropriate to ensure that fossil gas based activities are transitional**

203. As set out in the table under paragraph 193 above, in Annex I to the Contested Act, the Commission allows facilities for which a permit is granted by 31 December 2030 to be considered sustainable according to emissions thresholds permitting up to 270g CO<sub>2</sub>e/kWh for direct emissions of output energy for electricity generation, cogeneration of heat/cool, and efficient district heating; and in the case of electricity generation, an alternative threshold of up to 550 kg CO<sub>2</sub>e/kW over a 20 year period is permitted. These criteria are inconsistent with the legal framework for the delegated act, because (as developed below) they are inconsistent with the requirements of Article 10(2) and other rules of EU law. This is because they are incompatible with: (i) the 1,5 degree temperature goal enacted under EU law and the Taxonomy Regulation; and (ii) the emissions reduction targets under EU law. The Applicants note that the criteria permitted by the Contested Act for these activities are very different than those specified for other facilities (noting that the former may also choose to comply with TSC 1(a)). The Applicants submit that it is implausible, based on conclusive scientific evidence and the precautionary principle, that the Commission could find that those TSC 1(b), in isolation or combined with each other, could correspond to the requirements under Article 19 and 10(2).

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<sup>154</sup> Article 10(2) Taxonomy Regulation requires that to be transitional, an activity shall support "the phasing out [of] greenhouse gas emissions, in particular emissions from solid fossil fuels".

204. A range of evidence shows the emissions levels specified in TSC 1(b) to be inconsistent with these requirements (such that the Commission acted contrary to the requirement for conclusive scientific evidence and the precautionary principle, and also made manifest errors of assessment).
205. It should first be recalled that the TEG and the Platform considered that only a (declining) limit of 100g CO<sub>2</sub>e/kWh of output energy over a facility's lifecycle could support the qualification of fossil gas based activities as contributing substantially to climate change mitigation. These expert bodies never supported derogations for certain facilities such as those granted a permit by a certain date.<sup>155</sup> On the contrary, the Platform stated that the 270g CO<sub>2</sub>e/kWh and 550kg CO<sub>2</sub>e/kWh thresholds "*are assessed to be largely incompatible with existing decarbonisation projections for 1.5 degree scenarios or EU decarbonisation targets (-55% by 2030) according to IEA and PRIMES modelling*".<sup>156</sup>
206. Two additional arguments against the 270g CO<sub>2</sub>e/kWh and 550 kg CO<sub>2</sub>e/kWh thresholds were expressed by the Platform on Sustainable Finance:
- A gas power plant would need to blend fossil gas with hydrogen or biofuels to meet the 270g CO<sub>2</sub>e/kWh threshold. But the production of low-carbon hydrogen involves substantial emissions. If these emissions are not taken account of "*the plant could in fact emit more than a plant running only on natural gas/kWh, because of the inherent inefficiencies*."<sup>157</sup> Besides, blending with biofuels "would require a very large percentage of EU arable land."<sup>158</sup> The emissions and use of arable land caused by this blending causes harm, and in any case cannot contribute substantially to climate change mitigation nor is consistent with a 1.5° C trajectory. The TSC make no reference to those emissions in production.
  - A gas-fired power plant operating at 270g CO<sub>2</sub>e/kWh threshold would be "effectively worsening the grid average" CO<sub>2</sub> intensity.<sup>159</sup> The Platform further explains in its January 2022 report that "*performance above the mean emissions levels needed to meet 2030 climate targets do not constitute a substantial contribution to climate change mitigation goals, they actually make it harder to meet them*."<sup>160</sup> As Peter Sweatman from Climate & Energy Partners puts it: "*Clearly the addition of power generation with a carbon intensity of this limit [of at least the 235 gCO<sub>2</sub>/kWh base of 2019] is going in*

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<sup>155</sup> The TEG never gave an opinion on those TSC since the additional criteria for facilities for which the construction permit is granted by 31 December 2030, using the 270 g CO<sub>2</sub>e/kWh and 550 kg CO<sub>2</sub>e/kWh thresholds to qualify the activities as contributing substantially to climate change mitigation, were presented for the first time in the draft of the Contested Act sent for the consultation to the EU Member States and the Platform on Sustainable Finance on the 31 December 2021.

<sup>156</sup> See: Platform on Sustainable Finance, Response to the Complementary Delegated Act 21st January 2022, p.30.

<sup>157</sup> See: Platform on Sustainable Finance, Response to the Complementary Delegated Act 21st January 2022, p.28.

<sup>158</sup> *Idem*.

<sup>159</sup> *Idem*.

<sup>160</sup> *Ibid.*, p.30

*the wrong direction, and will harm the EU's decarbonisation trajectory, and therefore its ability to deliver its net zero 2050 objectives.*"<sup>161</sup>

207. The Commission would also need to be satisfied that the 270g CO<sub>2</sub>e/kWh corresponds with the "best performance in the sector or industry" (per Article 10(2)(a) of the Taxonomy Regulation). There is no clear evidence as to the basis on which the Commission considered that this level meets that requirement. But the Applicants note that the Commission had endorsed a lower GHG emissions limit of 250g CO<sub>2</sub>e/kWh in the Technical Guidance on DNSH under the Recovery and Resilience Facility Regulation (see also section 5.3.4.9). In addition, the Applicants note that the limit of 250g CO<sub>2</sub>e/kWh is also applied by the European Investment Bank under its Energy Lending Policy<sup>162</sup> as a minimum requirement for power generation technologies.
208. The points noted above indicate also that the Commission omitted to take a life cycle approach for these TSC, ignoring a large share of their GHG emissions. This is contrary to the express requirements of the Taxonomy Regulation and also creates a severe risk that the pathway to the 1,5°C target will be undermined (still less that any material contribution will be made to that target).
209. The Commission ignored recommendations of the TEG and the Platform and has not demonstrated that it duly took into account other conclusive scientific evidence or objective relevant facts that would support the TSC it set in Annex I to the Contested Act. In fact, the Applicants are not aware of any such studies supporting the contested TSC.
210. This conclusion is not affected by the additional criterion<sup>163</sup> for the facility to switch to full use of renewable and/or low-carbon gaseous fuels by 31 December 2035, with a commitment and verifiable plan approved by the management body of the undertaking. It is unclear how the Commission could consider that reducing emissions by 2035 would ensure consistency with the 2030 climate target. The Applicants add that in the absence of TSC for low-carbon hydrogen in the first Climate Delegated Act or in the Contested Act and a lack of definitions in EU law of renewable and/or low-carbon gaseous fuels, there is no criteria to ensure that blending would substantially contribute to climate change mitigation. Therefore TSC 1(b)(i), in isolation or in combination with TSC 1(b)(v), is inappropriate.<sup>164</sup> Furthermore as will be discussed below, there is a risk that the commitments do not materialise, whereas the damage of having let GHG emissions increase would have been done, in breach of the precautionary principle.
211. Further errors are evident in the additional criteria specifying that the activities replace an existing high emitting activity (in case of activities 4.29 and 4.31 the replaced activity should be using solid or liquid fossil fuels); and not exceed the capacity of the replaced facility (for activities 4.30 and 4.31), or not to exceed it by more than 15% (for the activity 4.29). These criteria are also manifestly inappropriate to ensure compliance with the 1,5°C trajectory and

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<sup>161</sup> P. Sweatman, "A credible and robust EU Taxonomy must be based on science", Climate & Strategy Partners, 7<sup>th</sup> December 2020, accessible at: <https://www.climatestrategy.es/press/FINAL%20DRAFT%20deisgn%20version%20v3%20071202020.pdf>.

<sup>162</sup> "The EIB Energy Lending Policy – final version adopted by the EIB's Board of Directors on 14 November 2014."

<sup>163</sup> Included in: for activity 4.29 in 1(b)(v), for activities 4.30 and 4.31 in 1.(b)(vi).

<sup>164</sup> Respectively: TSC 1(b)(ii) and (vi) for activities 4.30 and 4.31.

to meet the requirement under Article 10(2) that the transitional activities support “phasing out of greenhouse gas emissions, in particular emissions from solid fossil fuels”. The TSC refer to a fossil gas activity that “replaces” a “high emitting” activity, and permit the new fossil gas activity to exceed the capacity of the previous activity by 15%. This involves several errors:

- a. The requirement that a fossil gas activity “replaces” the previous activity departs from the requirement under Article 10(2) that the new activity supports the phasing out of greenhouse gas emissions. Article 10(2) requires that the new activity supports the phasing out of the previous activity (particularly activities involving solid fossil fuels); implying that the availability of the new activity is a material cause of the cessation of the former activity (such as where a coal power plant is closed earlier than it would otherwise have been). But the TSC does not require any causal connection between the phasing out of the former activity, and the new fossil gas activity.
  - b. The Commission does not define “high emitting” activities, which raises concerns that new gas activities, only marginally less GHG intensive than an existing facility, could be classed as environmentally sustainable.
  - c. It is also not logical to permit electricity generation activities (activity 4.29) to produce up to 15% more than the previous “high emitting” installation – particularly if their emissions are only marginally lower than the activities they replace; by contrast, activities 4.30 and 4.31 cannot exceed the capacity of the activities they replace.
212. Finally, there is a specific risk related to the threshold of the 550kgCO<sub>2</sub>e/kW average emission per year over 20 years established for the activity 4.29 (electricity generation from fossil gas) allows facilities that emit more than 270gCO<sub>2</sub>/kWh to be classified as making a substantial contribution. The 550kgCO<sub>2</sub>/kW average emission per year over 20 years allows facilities that emit more than 270gCO<sub>2</sub>/kWh a year to be classified as making a substantial contribution to climate change mitigation, which breaches the requirement of the best performance in the sector or industry.<sup>165</sup>
213. In light of the above, it is implausible that the Commission could consider that the TSC 1(b) it set would be consistent with the objectives and requirements of Article 10(2) Taxonomy Regulation. This TSC is therefore vitiated with manifest errors and shall be reviewed.

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<sup>165</sup> 550kg CO<sub>2</sub>e/kW per year over 20 years means that the facility can emit up to 11,000 kg of CO<sub>2</sub> per kW (calculated by multiplying 550kgx20years). Taking into account that facilities are required to switch to low-carbon gases by the end of 2035, that means that a facility can emit 11,000 kg CO<sub>2</sub> per kW between 2023, when the Contested Act comes into force, and 2035 (i.e. over the period of 13 years). Given that most plants in Europe run for about 2,000 hours per year, plants will run for 26,000 hours (2,000 hours multiplied by 13 years) over this period. If they have an emissions threshold of 11,000 kg, or 11,000,000 grammes over 26,000 hours, this gives us an emissions intensity of up to 423gCO<sub>2</sub>/kWh (divide 11,000,000 grammes by 26,000 hours). That means that a facility can emit for 13 years with emissions far above the EU average emissions intensity - which had declined to 229g CO<sub>2</sub>/kWh by the year 2020.

**The Commission breached Article 19(1)(g) – in conjunction with Article 10(2) – by not taking into account the life cycle of fossil gas based activities for setting the TSC**

214. For the three activities, the TSC<sup>166</sup> set a maximum level of emissions at 270g CO<sub>2</sub>e/kWh or 550kg CO<sub>2</sub>e/kW<sup>167</sup> of direct emissions of the facilities. The independent third party in charge of verifying compliance with this criteria is only required to assess, certify and report on the level of direct emissions of the facilities. This entails two distinct (albeit related) errors.
215. First, this TSC is manifestly non-compliant with the mandatory requirement of Article 19(1)(g) to take into account the life cycle of the activity as well as with Article 10(2), which adopts a holistic approach to greenhouse gas emissions, with the objective of phasing them out in order to meet the 1,5°C trajectory. The Applicants already demonstrated under section 5.2.2 above that this violation amounts to an excess of competence given the essential character of this requirement for the legislature, from which the Commission could not depart. In the alternative, it constitutes a manifest error vitiating the TSC established by the Commission.
216. Second, even leaving aside the express requirement for a life cycle approach to be taken, setting those TSC without taking into account the life cycle emissions of the facility is also a manifest error with respect to the requirement that the activities shall substantially contribute to climate change mitigation, including by phasing out greenhouse gas emissions.<sup>168</sup>
217. Whereas the emissions levels are set in CO<sub>2</sub> equivalent, and thus do not only account for CO<sub>2</sub> emissions, the absence of any life cycle calculation implies that methane emissions with a direct causal connection to the fossils gas based activities are insufficiently accounted for. This is a highly material, and very harmful, omission.
218. Fossil gas has a particularly heavy, well-recognised indirect greenhouse gas impact through fugitive emissions (methane leaks) along the supply chain. Methane is mainly released upstream when gas is extracted and transported, before it is used to produce electricity, district heating or cooling. Fossil gas-fired power is one of the two largest sectors in Europe (with agriculture) contributing to methane emissions - which the EU committed in the EU- and US-led Global Methane Pledge<sup>169</sup>, launched at the COP26, to cut by 30% at least by 2030. It is estimated that around 2,3% of the gas produced leaks into the atmosphere in the gas supply chain (see Alvarez et al 2018). A CSIRO Energy analysis<sup>170</sup> finds that where methane leakage represents 2-3% of the gas produced, electricity production from gas or coal roughly have the same GHG intensity in lifecycle emissions.

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<sup>166</sup> TSC 1(b)(i) for activity 4.29 and TSC 1(b)(ii) for activities 4.30 and 4.31.

<sup>167</sup> For activity 4.29 only.

<sup>168</sup> Article 10(2) Taxonomy Regulation.

<sup>169</sup> [Launch by US, EU and Partners of the Global Methane Pledge \(europa.eu\)](https://europa.eu)

<sup>170</sup> "Whole of Life Greenhouse Gas Emissions Assessment of a Coal Seam Gas to Liquefied Natural Gas Project in the Surat Basin, Queensland, Australia - Final Report for GISERA Project G2"; Heinz Schandl, Tim Baynes, Nawshad Haque, Damian Barrett and Arne Geschke; July 2019. ([CSIRO report template](#)).



219. Methane notably has a detrimental impact on air quality and ecosystems as it is a precursor to the formation of tropospheric ozone (O<sub>3</sub>), a short-lived yet powerful greenhouse gas as well as an air pollutant.<sup>171</sup> The connection between methane emissions and O<sub>3</sub> formation, as well as the impact of O<sub>3</sub> on respiratory and cardiovascular diseases, are well-established in science.<sup>172</sup> The UNEP's Global Methane Assessment found that respiratory or cardiovascular problems cause "1,430 premature deaths due to ozone in response to each million tonne of methane emitted, a value considerably higher than prior estimates."<sup>173</sup> The assessment further states that "methane also plays a significant role in reducing crop yields and the quality of vegetation" due to the increased ozone exposure and temperatures resulting from high emissions.<sup>174</sup>
220. The problem of the methane emissions from the fossil gas activities has been wrongly assessed and under-estimated. According to the 2021 study "The Hidden Emissions from Gas-Fired Power"<sup>175</sup> : "Expected GHG emissions savings from using natural gas instead of coal have been exaggerated. Such claims have been based solely on a plant-by-plant comparison between coal and gas-fired power; they do not include the gas supply chain, which is a significant omission. Gas is lost at the wellhead and through equipment along the transportation route. While the percentage is a small number, because gas is mostly methane, even tiny amounts have a significant impact on climate."
221. After having been seriously underestimated for a long time, the seriousness of the methane problem for climate change has been recently accepted by the European Commission in the 2020 Communication "Stepping up Europe's 2030 climate ambition - Investing in a climate-neutral future for the benefit of our people"<sup>176</sup>: 'Non-CO<sub>2</sub>-emission of methane, nitrous oxide and so-called F-gases represent almost 20% of EU's green-house gas emissions which can be reduced effectively by 2030 effectively up to 35% compared to 2015. The energy sector shows the largest potential in low-cost additional reductions beyond existing policies, notably avoiding fugitive methane emissions from oil, gas and coal production and transport. (...).'
222. The Commission's decision to set TSC 1(b) for the three fossil gas based activities on the basis of direct levels of GHG emissions without adopting a life cycle approach is thus manifestly inconsistent with the conclusive scientific evidence that fossil gas is a high emitter

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<sup>171</sup> CCAC & UNAP, *op.cit.*, p.18, available at <https://www.ccacoalition.org/en/resources/global-methane-assessment-full-report>. See also Kathleen A. Mar, Charlotte Unger, Ludmila Walderdorff, Tim Butler, "Beyond CO<sub>2</sub> equivalence: The impacts of methane on climate, ecosystems, and health" in *Environmental Science & Policy*, Volume 134, 2022, available at: <https://doi.org/10.1016/j.envsci.2022.03.027>; Van Dingenen, R. et al., Global trends of methane emissions and their impacts on ozone concentrations, EUR 29394 EN, Publications Office of the European Union, Luxembourg, 2018, JRC113210.

<sup>172</sup> UNEP & CCAC, *op.cit.*, pp.51ff and quoted literature. See also e.g. Shindell, D. and Smith, C.J., "Climate and air-quality benefits of a realistic phase-out of fossil fuels", in *Nature*, 2019, n. 573; Turner, Michelle .C. et.al., "Long-term ozone exposure and mortality in a large prospective study" in *American Journal of Respiratory and Critical Care Medicine*, 2016, n. 193.

<sup>173</sup> CCAC & UNAP, *op.cit.* 40.

<sup>174</sup> *Ibid.*, pp.60ff and quoted literature.

<sup>175</sup> Climate Bonds Initiative, (2021), *The Hidden Emissions from Gas-Fired Power*; see also the open letter 'Gas Attack in Taxonomy', signed by 225 scientists, referring to Dezem, V., (2021), *European Gas Is a Long Way From Tackling Methane Leaks*; Research by Deutsche Umwelthilfe, Urgewald (2021), *Market survey: methane emissions from natural gas companies*.

<sup>176</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Stepping up Europe's 2030 climate ambition - Investing in a climate-neutral future for the benefit of our people"; COM(2020) 562 final; Brussels, 17.9.2020.

of methane along its supply chain, that methane is particularly potent and that modelling endorsed by the Commission calls for a drastic reduction of methane emissions, including from fossil fuels, as soon as possible.

223. In the absence of an impact assessment for the Contested Act, one cannot understand why the Commission considered that a life cycle approach was irrelevant and could be disregarded for TSC 1(b). Nevertheless, the Applicants submit that this violation of the Taxonomy Regulation could have been avoided had the Commission duly taken into account experts' opinions and recommendations, as required under Articles 10(4) and 23(4) Taxonomy Regulation. Commenting on the draft Complementary Delegated Act in January 2022,<sup>177</sup> the Platform on Sustainable Finance – the Commission's own multi-stakeholder expert group - had already warned the Commission about the fact that technical screening criteria based on direct levels of greenhouse gas emissions (i) do not take into account a life cycle approach and thereby ignore methane emissions<sup>178</sup> (ii) breach Article 19(1) Taxonomy Regulation.<sup>179</sup>and (iii) may directly affect the compliance of the activities with the technical screening criteria set for the activities to substantially contribute to climate change mitigation and qualify as 'transitional activities' under Article 10(2) Taxonomy Regulation.
224. The Platform also stressed that this “*mixture of direct/lifecycle emissions*” in the technical screening criteria for fossil gas based activities inevitably creates confusion for modelling the emissions performance of the activities.<sup>180</sup> Furthermore, this omission may have concrete direct implications on the possibility for an activity to fulfil the technical screening criteria applicable to it for substantially contributing and not significantly harming an Environmental Objective such as climate change mitigation. For instance, the Platform highlights that “*The blending option with low carbon or renewable gases, **will in reality depend in terms of GHG impact on the lifecycle of these gases and yet this is not defined.** If such a plant was to run on gas blended with blue hydrogen (assuming no CCS) to meet the direct emissions proposed criteria of 270gCO<sub>2</sub>e/kWh, then should the substantial direct emissions of making the blue hydrogen not be taken account of, **the plant could in fact emit more than a plant running only on natural gas/kWh**, because of the inherent inefficiencies. (...) Sources of hydrogen vary and the lifecycle emissions when burning the hydrogen can be enormously different. As per TEG Final Report, March 2021, **this is why both the SC and DNSH thresholds proposed were lifecycle. The proposed 270g SC threshold without any lifecycle considerations is against the Taxonomy lifecycle requirements and in practical terms when considering the overall picture of the different fuel supplies in EU, might in a large number of cases, result in higher emissions than conventional unabated gas fired power.** Even when delivering a reduction in GHG emissions, the cumulative impact of making and burning the different fuel sources to reach the 270g CO<sub>2</sub>e/kWh level is unknown”<sup>181</sup> (emphasis added)*

<sup>177</sup> Platform on Sustainable Finance, Response to Complementary Delegated Act, 21 January 2022.

<sup>178</sup> *Ibid*, pp. 7, 19 and 29.

<sup>179</sup> *Ibid*, p. 13; see also pp. 5, 23, 24 (point 2.2) and p. 33 (points 8 and 9).

<sup>180</sup> *Ibid*, p. 25.

<sup>181</sup> *Ibid*, pp. 28-29.

225. The Applicants further contend that TSC 2, according to which all facilities shall monitor their physical emissions and repair leaks, is manifestly insufficient to address the releases of methane on a life cycle basis and therefore, to ensure that the activities comply with the requirement to support the transition including by phasing out greenhouse gas emissions. First, it is unclear for activity 4.29 is methane must necessarily be monitored and leaks repaired under TSC 2(a) and (b), since methane leakage is not clearly included (“*physical emissions such as those from methane leakage*”).<sup>182</sup> Second, monitoring and repairing will only partially remedy the issue whereas prevention at source, in accordance with the precautionary principle, should be prioritised. Third, this criterion only targets methane emissions from the facilities and not upstream emissions along the whole supply chain, which are the most significant ones, therefore also in breach of the precautionary principle.
226. In light of the above, the manifest error of the Commission in setting TSC that do not rely on a life cycle approach and do not ensure that the activity substantially contributes to climate change mitigation constitutes a breach of Article 19(1)(g) in conjunction with Article 10(2) Taxonomy Regulation.

**The TSC set by the Commission relating to verification of the TSC do not ensure that the activities will comply with either the TSC nor Article 10(2)**

227. Article 19(1)(k) requires that the TSC are “*set in a manner that facilitate the verification of their compliance*”. In all logic, this requirement ultimately aims at ensuring that the activities comply with the TSC set pursuant to Article 19 and their substantive obligation to contribute substantially to an Environmental Objective and DNSH to any of them; not only that verification operations should not be burdensome.<sup>183</sup>
228. The Applicants contend that several of the TSC set under TSC 1(b) in Annex I are not easily verifiable. As such, there is insufficient assurance (particularly in view of the precautionary principle that the activities will comply at all times with the TSC themselves, nor with the substantive requirements in Article 10(2) applicable to transitional activities.
- a. The inconsistent use of GHG emissions thresholds depending on the activities or the date of their permit, and of life cycle *versus* direct emissions approaches is rather complex. The TEG, for instance, had recommended on the contrary that the criteria be aligned for all energy production activities, also so that they can be easy to use and technology neutral, in accordance with Article 19(1)(j) and (k).<sup>184</sup> The Commission followed this recommendation in the first Climate Delegated Act but suddenly deviated from it in the Contested Act, without justification;

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<sup>182</sup> By comparison, TSC 2 for activities 4.30 and 4.31 explicitly include methane.

<sup>183</sup> See recital (47) Taxonomy Regulation.

<sup>184</sup> “Taxonomy Report: Technical Annex”, EU Technical Expert Group on Sustainable Finance, March 2020, p. 206: “*An overarching, technology-agnostic emissions intensity threshold of 100g CO<sub>2</sub>e / kWh is proposed for electricity generation, heat production and the co-generation of heat and electricity.*” “*The calculation of the 100g CO<sub>2</sub>e / kWh threshold is based on the political targets for future allowed emissions from the power sector, divided by the expected evolution of electricity demand. The threshold will be set at a single value for all new investments in electricity generation, until it is revised in future. It applies equally to the production of heating / cooling and co-generation of heat and electricity.*”

- b. The requirement that “annual direct GHG emissions of the activity do not exceed an average of 550kg CO<sub>2</sub>e/kW over 20 years” is not verifiable *ex ante*. To evaluate Taxonomy alignment in year one, the verifier would need detailed information about emissions and operating hours in years 2 to 20.<sup>185</sup> In reality, no operator is able to plan so far ahead, e.g. because future availability and prices of low-carbon gases like hydrogen cannot be guaranteed. Thus, for auditors and investors verification is practically impossible.<sup>186</sup> The requirement under item (b) that the verifier simply assess whether the facility is “on a credible trajectory” to comply, by taking into account planned operating hours and emissions, is too weak due to a lack of effective enforcement requirements: if that planning is not respected and excesses are observed afterwards, the damage of having incentivised investments and therefore, supported an incompliant facility would have been done. As expressed by the Platform: *“For example, if the plant has been financed as taxonomy aligned via sustainable finance instruments but fails to achieve the improvements, it would not be possible re-classify the already invested funds as not taxonomy aligned retrospectively.”*;
- c. TSC 1(b)(v) requires that the activity fully switches to renewable and/or low-carbon gaseous fuels by 31 December 2035. The verifier is in charge of “*assessing whether the activity is on a credible trajectory to comply with point 1(b)(v)*”. “Renewable gaseous fuels” and “low-carbon gaseous fuels” are not defined in the Contested Act, in the first Climate delegated Act nor anywhere in existing Union legislation.<sup>187</sup> It is thus impossible, at present, to ensure that one can verify compliance with this requirement or even that the facility is on the trajectory to fulfil it, until such definition exists. Setting a target date at 2035 without requiring a progressive switch between the start of operations and 2035 also implies that a facility could be labelled as sustainable and be supported by investors while eventually not comply with the requirement to make a full switch in 2035; undermining the protection that the TSC are supposed to guarantee under the taxonomy.

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<sup>185</sup> The TSC require that “the independent third party verifier takes into account in particular the planned annual direct GHG emissions for each year of the trajectory (...)”.

<sup>186</sup> Comments by Austria (to consultation of the draft) Complementary Delegated Act (DDA) amending Delegated Regulations (EU) 2021/2139 and (EU) 2021/2178; January 21, 2022.

<sup>187</sup> To date, the Commission proposal for a Directive on common rules for the internal markets in renewable and natural gases and in hydrogen (COM/2021/803 final, 15.12.2021) proposes definitions of: ‘renewable gas’, ‘low-carbon gas’, ‘low-carbon hydrogen’, ‘low-carbon fuels’. The three latter categories require “the greenhouse gas emission reduction threshold of 70%”. However, although Article 8(5) of the proposed Directive charges the Commission to adopt a delegated act by 31 December 2024 to specify the methodologies for assessing the above GHG emissions savings, the Commission proposal for the Directive is still undergoing a legislative process and is far from being adopted. The relevant delegated act will obviously be adopted only later.

Moreover, the delegated acts under RED II (OJ L 328, 21.12.2018, p. 82) supposed to define renewable hydrogen (the exact term is ‘renewable liquid and gaseous transport fuels of non-biological origin’ (RFNBOs)) and ‘recycled carbon fuels’ have not been adopted yet.

- d. It is unclear whether TSC 2 relating to the installation of monitoring and leak detection equipment, or to their actual use during operations, shall be verified by an independent third party. If not, that TSC was obviously set in disregard of Article 19(1)(k) and cannot ensure that the activities substantially contribute to climate change mitigation in a manner consistent with Article 10(2).

229. The Applicants also contend that the governance mechanism itself is too weak to ensure proper verification of compliance, or to provide a sufficient assurance (in view of the precautionary principle in particular) that an activity that is non-compliant will not be classified as sustainable:

- The appointment system of an “independent third party” is not indicated in the Contested Act;
- While the independent third party verifier shall not have a conflict of interest with the owner or the funder, there is no obligation that the verifier has no such a conflict with an operator and developer;
- The annual reports by the independent verifier are published and transmitted to the Commission; on the basis of these reports, the Commission may address the opinion to the relevant operators. However, these communications would not have any direct impact or consequences on the initial financing decision: the Commission in fact has no power of enforcement in that respect in relation to particular facilities and the Contested Act does not provide for any mechanisms or consequences in case reporting shows that the threshold has not been met.

### 5.3.3.2. The Commission breached Article 10(2) Taxonomy Regulation by qualifying the fossil gas based activities as having no technologically and economically feasible low-carbon alternative

230. An activity can qualify as transitional under Article 10(2) Taxonomy Regulation on the condition that “*there is no technologically and economically feasible low-carbon alternative*”. This is additional to the requirement that the activity must support the transition towards a climate neutral economy consistent with a 1,5°C trajectory, and to the other requirements under points (a) to (c) of that provision.

231. It is worth noting that none of the terms “technologically”, “economically”, “feasible” and “low-carbon alternative” are defined in the Taxonomy Regulation. The Commission itself has used different terminology, creating the risk that different standards are applied to the activities, including standards different to those intended by the legislature. In particular, as provided in section 5.2.3, in establishing TSC the Commission established a criterion requiring a comparison of cost-effectiveness and feasibility between the fossil gas activity and that the renewable energy source (which would include reference to whether the renewable source is

commercially availability at a sufficient scale).<sup>188</sup>. As further discussed in this section, the Commission clearly narrowed the scope of “low-carbon alternatives” by referring in the TSC 1(b) only to renewable energy sources and not addressing other low-carbon alternatives. As mentioned above under section 5.3.2, in the absence of an impact assessment or other explanation by the Commission of the evidence for its approach, one cannot ensure that the Commission has exercised its discretion adequately when determining that there are no technologically and economically feasible low-carbon alternatives to fossil gas based activities 4.29, 4.30 and 4.31.

232. In any case, the Applicants contend that the standard the Commission applied in the Contested Act does not comply with the Taxonomy Regulation and that such alternatives exist. Therefore, the Commission manifestly erred in considering that the fossil gas based activities could qualify as transitional pursuant to Article 10(2) Taxonomy Regulation. The Applicants contend in particular that:

- a. The Commission erred in considering that technologically and economically feasible low-carbon alternatives to the fossil gas based activities do not exist;
- b. The Commission erred in setting TSC that do not give effect to the requirement under the Taxonomy Regulation that there must be an absence of low-carbon alternatives.

**The Commission erred in considering that low-carbon alternatives to the fossil fuel based activities do not exist (at sufficient scale)**

233. The premise of the Commission’s TSC is that there is a reasonable likelihood that “low carbon alternatives” do not exist to fossil gas projects. For the reasons developed below the Applicants contend that this premise is flawed.

234. At the outset, given the various standards expressed by the Commission in the Contested Act (in the recitals and the TSC), and previously in the first Climate Delegated Act and its impact assessment, it is unclear whether the Commission actually assessed the existence and feasibility of *renewable* alternatives or of *low-carbon* alternatives to activities 4.29, 4.30 and 4.32. Even though those are different groups presenting different GHG emissions profiles, and even though the notion of “low-carbon” is not (yet) defined in the Taxonomy Regulation or in other pieces of Union legislation, the Applicants contend that in this case, the legislator must have considered renewable alternatives as part of the low-carbon alternatives. The terminology of “low-carbon” would on its face also include “renewable” sources. Taking into account the language of these terms and, as demonstrated below, the existence and wide availability of renewable alternatives, which has a direct impact on fossil gas needs, it can be inferred that low-carbon alternatives include renewable alternatives.

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<sup>188</sup> See also in recital 13 of the first Climate Taxonomy Delegated Act, where this additional criterion has been expressed by the Commission slightly differently as: “...near-zero carbon solutions are not yet viable or where near-zero carbon activities exist, but are not yet practicable at scale”.

235. Either way, it is clear that, had the Commission “assess[ed] the potential contribution and feasibility of **all relevant existing technologies**”<sup>189</sup> for determining whether fossil gas based activities could be deemed transitional, it would have found that such alternatives exist either in isolation or in combination with each other. This is the case both under the standard set by the Taxonomy Regulation (no feasible low carbon alternatives exist) and under the standard created by the Commission (the alternatives must be commercially available at sufficient scale).
236. This is notably the case of renewable energy sources (incl. in combination with storage and smart grids). The growing availability of renewable energy sources has been evidenced in many studies, including:
- The report “Renewables 2021 – Analysis and forecast 2026” of the International Energy Agency 190, which forecasts:
    - the deployment of renewable energy technologies in electricity, transport and heat to 2026 while also exploring key challenges to the industry and identifying barriers to faster growth;
    - the continued increase of renewable power capacity and stated “almost 290 gigawatts (GW) of new renewable power will be commissioned this year, which is 3% higher than 2020’s already exceptional growth.”
    - the further growth of renewable capacity, “accounting for almost 95% of the increase in global power capacity through 2026.”
  - The “World energy Transitions Outlook” by the International Renewable Energy Agency<sup>191</sup> that indicates a growing trend of renewables and “a record level of 260 gigawatts (GW) of renewables-based generation capacity (...) added globally in 2020”.
  - A more recent IEA report “Renewable Energy Market Update – May 2022”<sup>192</sup> that confirms further expansion trend of renewable technologies in 2021 and demonstrates that “annual renewable capacity additions broke a new record in 2021, increasing 6% to almost 295 GW (...).”

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<sup>189</sup> Article 10(2) last paragraph of Taxonomy Regulation.

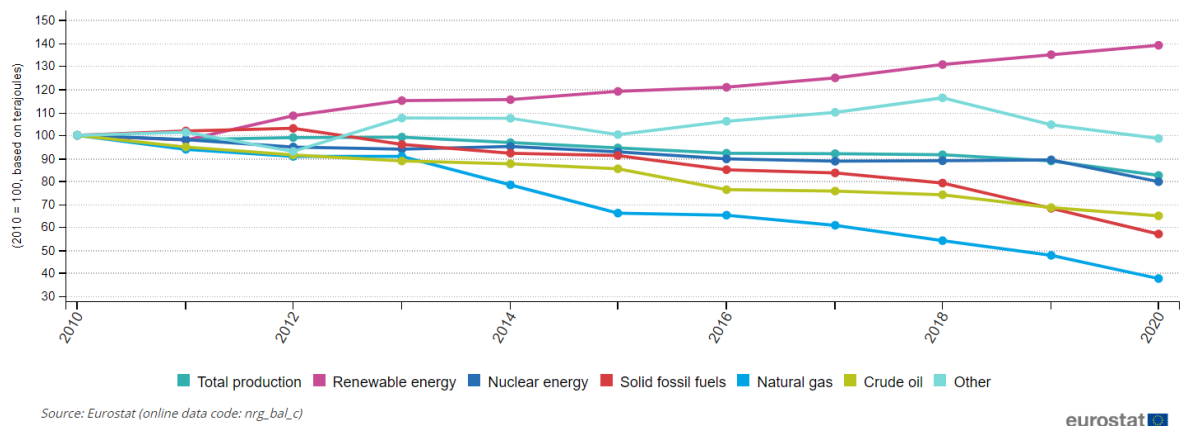
<sup>190</sup> See also for 2021: “Renewables 2021 – Analysis and forecast 2026”, IEA, December 2021 (<https://iea.blob.core.windows.net/assets/5ae32253-7409-4f9a-a91d-1493ffb9777a/Renewables2021-Analysisandforecastto2026.pdf>); [https://www.theguardian.com/environment/2021/dec/01/renewable-energy-has-another-record-year-of-growth-says-iaea?utm\\_campaign=5%20things%20from%20the%20week&utm\\_medium=email&\\_hsmt=199330880&\\_hscnc=p2ANqtz-8iNfz5BQbtn0a2CFOIqHH7WqhHltZw46h56DKxr2RQxVHXTOGXyzXob8wPvvtVivlytbXwy8zQnLIEzTYUe sH95GjxWg&utm\\_content=199330879&utm\\_source=hs\\_email](https://www.theguardian.com/environment/2021/dec/01/renewable-energy-has-another-record-year-of-growth-says-iaea?utm_campaign=5%20things%20from%20the%20week&utm_medium=email&_hsmt=199330880&_hscnc=p2ANqtz-8iNfz5BQbtn0a2CFOIqHH7WqhHltZw46h56DKxr2RQxVHXTOGXyzXob8wPvvtVivlytbXwy8zQnLIEzTYUe sH95GjxWg&utm_content=199330879&utm_source=hs_email).

<sup>191</sup> <https://www.irena.org/newsroom/pressreleases/2021/Apr/World-Adds-Record-New-Renewable-Energy-Capacity-in-2020>.

<sup>192</sup> <https://www.iea.org/reports/renewable-energy-market-update-may-2022>.

- A InStrat’s study “The missing element – energy security considerations”<sup>193</sup> that demonstrates that it is possible in Poland, the heavy coal reliant country, to shift from coal to renewable energy sources without requiring to construct more gas plants than the two plants that are already in progress and which have already signed capacity contracts.
- The Eurostat statistics that demonstrate increased use of renewable energy and decrease of fossil gas for primary energy production <sup>194</sup>

Production of primary energy by fuel type, EU, 2010-2020



237. The analysis of trends in the EU power market conducted annually by Ember, an independent climate and energy think tank demonstrate that in 2020.<sup>195</sup>

- Coal generation fell 20% in 2020, and has halved since 2015
- Gas generation fell 4% in 2020
- Nuclear generation fell by 10% in 2020 (which is probably the largest fall ever)
- Wind and solar generation grew by 10%.
- Since 2015, wind and solar have supplied all of Europe’s growth in renewables, as bioenergy growth has stalled, and hydro generation remains unchanged.

<sup>193</sup> “The missing element – energy security considerations” InStrat Policy Paper 09/21, Paweł Czyżak Adrianna Wrona Michał Borkowski (<https://instrat.pl/en/energy-security/>).

<sup>194</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy\\_production\\_and\\_imports](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy_production_and_imports).

<sup>195</sup> “The European Power Sector in 2020: Up to Date Analysis on the Electricity Transition”; Agora Energiewende, Ember; Christian Redl, Fabian Hein, Matthias Buck, Dr. Patrick Graichen, Dave Jones; <https://ember-climate.org/app/uploads/2022/01/European-Power-Sector-in-2020.pdf>; <https://ember-climate.org/insights/research/eu-power-sector-2020/>.



238. Similarly, for 2019, Ember analysis of the EU power market in 2019<sup>196</sup> found that:

- Electricity generation from coal collapsed and for the first time, wind and solar provided more electricity than coal;
- Europe's transition avoided a bridge into gas: despite the uptick in gas generation in 2019, gas' share is still 1 percentage point lower in 2019 than in 2010.

239. Moreover, it has been widely documented that the use of other low-carbon alternatives have been growing (even though on lower pace) and that this trend is expected to continue due to the recognized necessity to align with the Net Zero Emissions by 2050 Scenario. In that respect, for example:

- the IEA *Tracking Report on Energy Storage* (Nov. 2021)<sup>197</sup> provides that “battery storage capacity additions in 2020 rose to a record-high 5 GW”,
- the SolarPower Europe's annual '*European Market Outlook for Residential Battery Storage*' report<sup>198</sup>, covering 2021-2025, shows that European residential solar & storage soared by 44% to 140,000 installed units in 2020; it also demonstrates the cost-effectiveness of installing storage to support residential solar.

240. Studies also show that other low carbon alternative, the Demand Side Response (“DSR”), in spite of its huge potential, remains largely unexploited due to regulatory barriers and not because it is no technologically and economically feasible. In the *Tracking Report on Energy Storage* (Nov. 2021)<sup>199</sup>, the IEA noted that positive developments in demand-response regulation and implementation happened in 2020 and 2021 (more countries removed barriers preventing demand-response from providing more services to the grid, and some also increased the amount of capacity awarded in electricity markets) but even faster progress is needed. The feasibility of this technology is demonstrated in Germany and Spain, where DSR schemes already exist, and in the United States, where interruptibility services (a form of DSR) has existed since the early 1970s.<sup>200</sup> Similar DSR support scheme for the flexibility and interruptibility mechanisms was approved by the Commission for the Greek energy market.

241. The availability and development of renewable energy sources, growth of certain other low carbon alternatives and the fact that the development of certain other low-carbon technologies is slowed down by the regulatory and not economic and financial barriers, clearly demonstrates that low-carbon alternatives to the fossil fuel based activities do exist and are feasible technologically and economically. The Commission could not have considered the

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<sup>196</sup> “The European Power Sector in 2019 Up to Date Analysis on the Electricity Transition”; Ember, Agora Energiewende, Sandbag; Christian Redl, Fabian Hein, Matthias Buck, Dr. Patrick Graichen, Dave Jones (Sandbag) <https://ember-climate.org/app/uploads/2022/02/Ember-European-Power-Sector-Review-2019.pdf>; <https://ember-climate.org/insights/research/eu-power-sector-2019/>.

<sup>197</sup> <https://www.iea.org/reports/energy-storage>.

<sup>198</sup> <https://www.solarpowereurope.org/press-releases/european-energy-security-needs-energy-storage>.

<sup>199</sup> <https://www.iea.org/reports/demand-response>.

<sup>200</sup> IRENA, Demand-side flexibility for power sector transformation p. 11, accessible at: [https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Dec/IRENA\\_Demand-side\\_flexibility\\_2019.pdf](https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Dec/IRENA_Demand-side_flexibility_2019.pdf).

contrary and should not have considered these activities as “transitional” under Article 10(2) of the Taxonomy Regulation.

**The Commission manifestly erred in setting TSC that do not give effect to the requirement that there must be an absence of low-carbon alternatives**

242. The TSC set in the Contested Act are manifestly inadequate to supplement the requirement under Article 10(2) Taxonomy Regulation that there is no technologically and economically feasible low carbon alternative to the activities.
243. First, TSC 1(b)(ii)<sup>201</sup> merely requires that the facility shall assess that “the power to be replaced cannot be generated from renewable energy sources”. The Commission manifestly breached Article 10(2) and 10(3) in conjunction with Article 19(1)(j) by not setting any TSC requiring to assess whether low carbon alternatives exist.
244. Second, the Commission erred in setting TSC 1(b)(ii)/(iii). These criteria require a static assessment of the alternative activities, presumably at the point in time at which the facility pretends to be labelled sustainable (although it is not clear when that assessment and the public consultation shall be conducted). Indeed the TSC requiring that the assessment is published and subject to stakeholder consultation suggests that this shall be done only once. The Applicants contend that, in order to ensure that the facilities remain ‘transitional’ and continue meeting the TSC, such assessment must be dynamic and capable of taking into account the evolution of the market and of the expected and actual deployment of low-carbon alternatives, both technologically and economically, as well as relevant existing legislation and foreseeable developments. This is valid under both the rule set by the Taxonomy Regulation (no feasible low carbon alternatives exist) and under the standard created by the Commission (alternatives are not commercially available at scale), given how dynamic the energy market is.
245. Third, the Applicants claim that the Commission failed to set criteria that could ensure that TSC 1(b) has a “dynamic” character allowing for an assessment to be re-appraised or periodically reviewed in light of changing circumstances, such as the recent gas supply problems and drastic price increase, to ensure that the activities remain fully transitional in light of the requirement under Article 10(2) that there is no technologically and economically feasible alternative to fossil gas. Based on the above arguments and available evidence, the Applicants contend that TSC are inadequate to ensure that the fossil gas based economic activities have no technologically and economically feasible low-carbon alternative. In consequence, fossil gas based activities will be wrongly classified as ‘sustainable’. The Commission accordingly committed manifest errors of assessment.

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<sup>201</sup> That is TSC 1(b)(iii) for activities 4.30 and 4.31.

### 5.3.3.3. The TSC do not ensure that the activities will not hamper the development and deployment of low-carbon alternatives

246. Article 10(2)(b) Taxonomy Regulation requires that a transitional activity “*does not hamper the development and deployment of low-carbon alternatives*”. Article 10(2) last paragraph adds that “*for the purpose of this paragraph and the establishment of the technical screening criteria pursuant to Article 19, the Commission shall assess the potential contribution and feasibility of all relevant existing technologies*”. This requirement under (b) goes hand in hand with the need to establish that there is no technologically and economically feasible low carbon alternative to the activities at stake (here activities 4.29, 4.30 and 4.31). Not only is the current existence of low carbon alternatives relevant, but their foreseeable deployment and potential need to be assessed when setting the TSC for an activity to be transitional.
247. The Applicants submit that the TSC set in Annex I to the Contested Act are manifestly inappropriate to avoid hampering the deployment of low carbon alternatives on the energy market as a whole, but also for the gas market itself:
- First, the mere classification of fossil gas based activities as transitional will hamper the deployment of low carbon alternatives. By incentivising investments in the activities that create a risk of stranded assets and lock-in into carbon intensive assets, the Commission in fact decided to create favourable conditions for financing technologies that should not be considered as contributing substantially to climate change mitigation. As described in other parts of this document, funds being limited, this means that money will be directed to activities other than low-carbon alternatives and in fact may hamper the development and deployment of low-carbon alternatives.
  - It is expected that fossil gas based activities, due to their recognition as sustainable activities under the EU Taxonomy, will have easier and cheaper access to finance. This would put them in an advantageous situation and allow offering lower prices than could potentially be offered by activities that do not have access to similarly competitive financing conditions. That would be particularly relevant for access to capacity markets by low carbon alternatives with higher costs (incl. due to not being regulated as sustainable under the EU Taxonomy).
  - In addition, that consequence is emphasised by the absence of a TSC limiting the capacity of new fossil gas based activities, so that the TSC do not guarantee that fossil gas based activities will be limited to a smaller share of the market. In fact, TSC 1(b)(iv) for activity 4.29 allows for an increase in fossil fuels capacity (by replacing coal or oil by gas) of 15%.<sup>202</sup> The TSC set by the Commission are therefore manifestly inappropriate to ensure that investments into new fossil gas

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<sup>202</sup> The Applicants submit that limiting capacity of new gas based activities as part of the TSC would not have been inconsistent with Article 19(1)(a) according to which the principle of technology neutrality shall be assessed in light of the potential contribution of the solutions to the given environmental objective (climate change mitigation), considering both the short term and long term impact of the activity (knowing that unabated fossil gas has both a short term and a long term negative contribution to climate change mitigation).

capacity will not hamper the development and deployment of low carbon alternatives;

- TSC 1(b) providing for more flexible criteria for facilities that are granted a permit by 31 December 2030 will already dis-incentivise fossil gas based activities from being limited to the lower level of 100g CO<sub>2</sub>e/kWh on a life cycle basis, established under TSC 1(a), for the next 10 years. Indeed, TSC 1(b) notably allows those facilities to emit more GHG emissions than facilities complying with TSC 1(a) – and therefore, by definition, to contribute much less substantially to climate change mitigation (or indeed, to harm the objective of mitigation even further). It means that even within the fossil gas sector itself, TSC 1(b) will hamper the development and deployment of low carbon, or less emissive-intensive alternatives;
- TSC 1(b)(i) for activity 4.29 leaves the choice to the facilities to either emit up to 270g CO<sub>2</sub>e/kWh of the output of energy, or average their emissions over 20 years up to 550kg CO<sub>2</sub>e/kW. As explained above, that 550kg CO<sub>2</sub>e/kW criteria is manifestly wrong to ensure that the facilities contribute substantially (or at all) to climate change mitigation, given that it allows the facilities to emit high levels of GHG emissions periodically, or in the first years, and average them over a very long period. That possibility actually also risks hampering the development and deployment of less emissions-intensive fossil gas based activities. As established by the Platform on Sustainable Finance and mentioned above under paragraph 206, a gas plant cannot reach 270g without blending. Blending with hydrogen or other renewable or low carbon gases is an emerging technology, that may be hampered in coming years (at least until 2035) should the gas facilities have the choice not to blend and to simply reduce their operating hours instead;
- TSC 1(b)(i), (v) and (vi) do not in fact require that the facilities fully use low carbon technologies before 2035. The consequence is that market opportunities for those low carbon solutions are uncertain, which will be reflected in their development and deployment projections. Furthermore, given the absence of strong verification criteria or sanction in case of breach, the TSC do not incentivise the facilities to decarbonise effectively and rapidly, also preventing low carbon solutions from entering the market at full speed.
- Finally, the risk of hampering the development and deployment of low-carbon alternatives by TSC 1(b) is amplified by a too static character of this TSC that does not address possible future developments and changing circumstances that influence availability and accessibility of different energy sources. This risk has become apparent recently due to gas drastic price increases and supply problems.

248. The Applicants thus contend that the Contested Act breaches Article 10(2)(b) of the Taxonomy Regulation as all the above arguments clearly demonstrate that TSC do not ensure that the fossil gas based activities will not hamper the development and deployment of low-carbon alternatives.

## 5.3.3.4. The TSC add to the risk that fossil gas based activities will become stranded assets and that GHG emissions and carbon intensive assets will be locked in

249. The Applicants contend that the consequences of including fossil gas based activities in the list of sustainable economic activities subject to certain TSC, despite the impossibility for the TSC set in the Contested Act to ensure that the activities comply with Articles 10(2) and 19(1), are as follows:
- a. The TSC give a false signal to the market that those activities can be labelled sustainable, when all evidence points to the fact that they cannot substantially contribute to climate change mitigation;
  - b. The incentive given to the market to finance those carbon-intensive assets will lock in harmful technologies. This cannot be avoided through the abatement solutions provided in the Contested Act given uncertainties around their nature, characteristics, technological and economic feasibility at the scale that would be required;
  - c. These signals and incentives would eventually create stranded assets since the fossil gas based activities would become unlawful and/or uneconomic before the end of their expected lifetime, by reason of the evolution of climate and environmental policies and legislation, as well as the fast deployment of cleaner, more sustainable and more economic solutions on the market.
250. By reason of this 'overinclusion' of activities in the Contested Act, the Commission manifestly erred and therefore breached some of the key requirements of Article 10(2) and 19(1) related to the not leading to a lock in and avoiding creating stranded assets.

### **The TSC create a risk that the fossil gas based activities will lead to stranded assets**

251. Article 19(1)(i) Taxonomy Regulation requires that technical screening criteria take into account the potential market impact of the transition to a more sustainable economy, including, i.a. the risk of certain assets becoming stranded as a result of such a transition. The Applicants contend that the Contested Act does not respect or give effect to these requirements in relation to the fossil gas based activities included there.
252. The fact that the business model of fossil gas fired power plants is unattractive and risky is demonstrated by various studies, e.g.:
- The report "Put Gas on Standby"<sup>203</sup> from Carbon Tracker Initiative provides that more than a fifth of European gas-fired power plants and nearly a third of US units are already loss-making, and surging fuel prices may cause that many more get into this situation; close to \$16 billion could be stranded if gas-fired assets are closed in line with the timeframe required to deliver net zero emissions by 2050; the decline of gas power sector role is already underway as the economics of gas-fired power generation in Europe and the US are growing in fragility; existing gas

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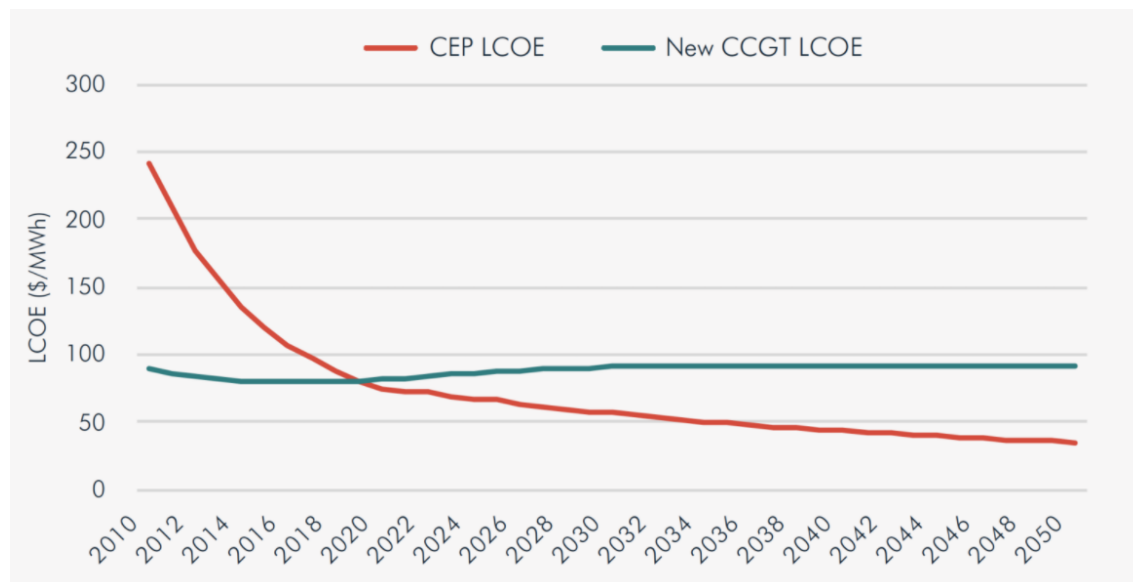
<sup>203</sup> <https://carbontracker.org/reports/put-gas-on-standby/>.

capacity modelled is already more expensive to operate than new renewables and most new built gas capacity planned will be unable to recover initial investment.

- The report “Foot off the Gas – Why Italy should invest in clean energy”<sup>204</sup> from Carbon Tracker Initiative finds that by investing in new gas in Italy, investors are exposing themselves to stranded asset risk of €11 billion; investment in new Combined Cycle Gas Turbines would lead to comparatively higher electricity prices; newly built gas plants in Italy are no longer cost competitive when compared to clean energy sources, owing to the rapid cost reductions in renewables; and that investment in Italy’s pipeline of combined cycle gas plants planned for this decade would be misconceived.

**Figure 2. Clean Energy Portfolio LCOE vs proposed CCGT gas plant LCOE**

(LCOE: Levelized Cost of Energy) (CCGT: Combined Cycle Gas Turbine)



253. The above analysis clearly demonstrates the declining economic interest for fossil gas infrastructure and long-term unattractiveness of relevant investments. Facilitating investments into technologies that will have to be phased out in a near future exposes investors and the market to a future stranded assets problem. This risk became very apparent very recently due to a sudden and unprecedented gas price increase and huge supply problems.

254. The Applicants contend that the Commission erred in the way it set TSC 1(b). TSC 1(b) encourages investments in the capacity that may well be too big in future. In

<sup>204</sup> “Foot off the gas - Why Italy should invest in clean energy”; Carbon Tracker Initiative & RMI; Bell Udomchaiporn, Lee Ray, Lily Chau, Catharina Hillenbrand von der Neyen, with support from Alexander Engel, Charles Teplin, Mathias Einberger; March 2021, <https://carbontracker.org/reports/foot-off-the-gas-italy/>.

consequence it adds to the risk that the relevant activities will become stranded assets. Criteria 1(b)(iv) for the activity 4.29 and 1(b)(v) for the activities 4.30 and 4.31 are designed in a way that encourage maintenance or increase of the existing capacity. Criteria (ii) for activity 4.29 and (iii) for activities 4.30 and 4.31, risk to lead to over-estimation of the power needs as they assess the power that cannot be generated from renewable sources in a static way at the moment when a financing decision is taken and not addressing the future development of renewable technologies and relevant market changes. The TSC do not include criteria to avoid these risks. In particular, the TSC do not address the impact of deployment of other low carbon alternatives, which has the consequence that capacity needs would be over-estimated.

255. Based on the above assessments and studies, in view of the EU's climate objectives and commitments and taking into account the risk that future power needs would be over-estimated due to the way the TSC 1(b) is designed, the Applicants contend that investments in the fossil gas based activities included in the Contested Act create a serious risk of assets being stranded in breach of Article 19(1)(i) of the Taxonomy Regulation.

**The fossil gas based activities risk to lead to a lock-in in GHG emissions and carbon intensive assets**

256. Pursuant to Article 10(2)(c) Taxonomy Regulation a “transitional activity” should “not lead to a lock-in of carbon intensive assets, considering the economic lifetime of those “assets”. According to Recital 41 Taxonomy Regulation, the aim of Article 10(2)(c) Taxonomy Regulation is to ensure that transitional activities “do not lead to a lock-in of assets incompatible with the objective of climate neutrality”. As demonstrated below, two particular lock-in risks may be distinguished in relation to activities 4.29, 4.30 and 4.31 of the Contested Act: locking into GHG emissions (especially with the TSC 1(b)) and locking in fossil fuels due to the promise of uncertain technologies, and in particular CCS.

***Locking into GHG emissions***

257. As displayed in section 5.2.1 above, various assessments, reports and studies demonstrate that the use of fossil gas will have to decline to achieve the EU and global climate objectives. Studies analysing the risk of stranded assets (in this section above) show future financial risks related to investments in the fossil gas based activities included in the Contested Act.

258. The particular risk of lock-in in highly emitting technologies related to investments in fossil gas based facilities has also been analysed separately. For example, the study “Assessing carbon lock-in” (Peter Erickson et al 2015 Environ. Res. Lett.)<sup>205</sup> provides that globally gas-fired plants present the second largest lock-in risk amounting to 25 GtCO<sub>2</sub> for gas plants alone, as evidenced by the chart below:

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<sup>205</sup> “Assessing carbon lock-in”, Environmental Research Letters, Volume 10, Number 8, Peter Erickson, Sivan Kartha, Michael Lazarus and Kevin Tempest, 25 August 2015, accessible at: <https://iopscience.iop.org/article/10.1088/1748-9326/10/8/084023/meta>.

## Global assessment of carbon lock-in risks by fuel and sector

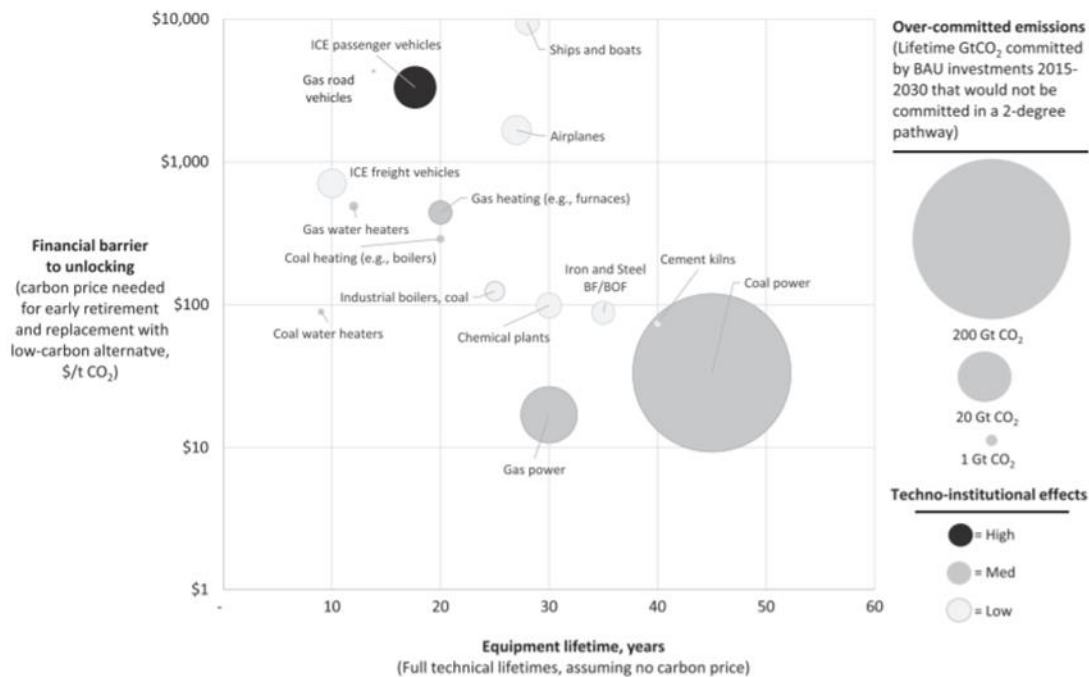


Figure 1. Global assessment of carbon lock-in risks by fuel and sector.

259. In light of the above studies, facilitating investments into fossil gas based activities will incontestably lead to a lock-in into infrastructure that has no place in the future energy structure and will be a source of GHG emissions non-compliant with the EU climate goals and commitments.
260. Another serious risk of a lock-in into high GHG emissions is related to the fact that the Contested Act does not limit the use of fossil gas overtime. TSC 1(b)(ii) for activity 4.29 and TSC 1(b)(iii) for the activities 4.30 and 4.31 merely requires that “the power to be replaced cannot be generated from renewable energy sources, based on a comparative assessment with the most-effective and technically feasible renewable alternative for the same capacity identified”.
261. The requirement of the TSC 1(b) ((v) for activity 4.29, (vi) for activities 4.30 and 4.31) that the facilities permitted by 2030 will have to switch to full use of renewable and/or low carbon gases by 31 December 2035 is insufficient to ensure that the lock-if effect will be avoided. This is because of the fact that the facility may choose to switch to low-carbon



and not to renewable gases<sup>206</sup>; the absence of definition in legislation on what these fuels are; and the lack of a solid verification and sanction mechanism should the facilities do not switch do not prevent the risk of lock in.

### *Locking in fossil fuels technologies due to uncertain promises*

262. In order to reach the GHG emissions thresholds set in the Contested Act for the fossil gas based activities, it will be necessary to have recourse to technologies, the efficiency of which is uncertain due to technical, environmental and economic obstacles. For example, Carbon Capture and Storage (“CCS”) may be necessary to achieve the threshold of life-cycle GHG emissions lower than 100g CO<sub>2</sub>e/kWh. However, the CCS installations which are in operation now do not achieve their target capture rates.

263. There is a real risk of lock-in arising from the (at best) highly uncertain premise that CCS may provide a means of meeting the thresholds set out in the TSC. This risk has been acknowledged by the IPCC in its most recent Working Group III contribution to the IPPC Sixth Assessment Report (“WGIII AR6 report”) that references scholars which “have noted the potential lock-in of existing energy structures due to CCS” (for scholar literature see: Shinichiro Asayama<sup>207</sup>, Markusson and Haszeldine (2010)<sup>208</sup>, and Shackley and Thompson (2012)<sup>209</sup>, Vergragt, “Carbon capture and storage, bio-energy with carbon capture and storage, and the escape from the fossil-fuel lock-in”<sup>210</sup>)

264. The literature in particular states that “it is largely believed that adding CCS on fossil-fuel power plants would risk deepening or reinforcing carbon lock-in—known as reinforced carbon lock-in.”<sup>211</sup> This is because “adding CCS” means the building of an entirely new infrastructure for capturing, transporting and storing CO<sub>2</sub> underground as an integrated socio-technical system. Building new CCS infrastructures (capture facility, pipeline, and geological storage) requires large capital investments with long lead-times. This substantially increases the infrastructural inertia of fossil fuel energy system, keeping it in place for several decades. CCS would likely reinforce the lock-in of—and make it difficult to transition away from—fossil fuel systems.<sup>212</sup>

265. In the light of the EU climate commitments and goals, the above arguments and as largely demonstrated in relevant literature, the Applicants contend that the fossil gas based activities in the Contested Act cannot be qualified as activities that do “not lead to a lock-in of carbon intensive assets, considering the economic lifetime of those assets” and that

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<sup>206</sup> These two types of gases do not have the same environmental impact. Using an example of hydrogen: First, the climate impact of the energy sources to produce low-carbon and renewable hydrogen obviously differs greatly, making the former clearly less suitable for decarbonisation. Second, this equal treatment contradicts the EU’s Hydrogen Strategy<sup>206</sup> and the Energy System Integration Strateg that clearly indicate that the EU’s priority is to develop renewable hydrogen.

<sup>207</sup> Shinichiro Asayama, “The Oxymoron of Carbon Dioxide Removal: Escaping Carbon Lock-In and yet Perpetuating the Fossil Status Quo?”, *Frontiers in Climate* (2021).

<sup>208</sup> Markusson & Haszeldine, “‘Capture ready’ regulation of fossil fuel power plants – Betting the UK’s carbon emissions on promises of future technology”, *Energy Policy* (2010).

<sup>209</sup> Markusson and Haszeldine, 2010; Shackley and Thompson, 2012.

<sup>210</sup> In *Global Env’tl. Change* (2011).

<sup>211</sup> Shinichiro Asayama, “The Oxymoron of Carbon Dioxide Removal: Escaping Carbon Lock-In and yet Perpetuating the Fossil Status Quo?”, *Frontiers in Climate* (2021).

<sup>212</sup> *Idem*.

certain criteria of the Contested Act do not take into account the risk of certain assets becoming stranded as a result of such a transition to a more sustainable economy.

266. The Applicants contend also that risks of stranded assets and lock in are particularly apparent recently in the case of TSC 1(b) due to the gas drastic price increase and supply problems because this TSC does not address possible future developments and changing circumstances that influence availability and accessibility of different energy sources.

### 5.3.3.5. The Commission breached Article 19(1)(a) Taxonomy Regulation by establishing TSC that do not respect the principle of technological neutrality

267. Article 19(1)(a) of the Taxonomy Regulation requires that the technical screening criteria *“identify the most relevant potential contributions to the given environmental objective while respecting the principle of technological neutrality, considering both the short- and long-term impact of a given economic activity.”*
268. The Applicants contend that the criteria applied in the Contested Act to the fossil gas based activities do not respect the principle of technological neutrality.<sup>213</sup>
269. In particular, the Applicants point to the fact that the Commission decided to set in TSC 1(b) more favourable conditions (potentially applicable during a period of around 10 years) for facilities permitted by the end of 2030 than to other fossil-gas based facilities regulated under TSC 1(a). Applying two different TSC with a different ambition level to the same activity practically forces stakeholders into less ambitious solutions, while these less ambitious solutions have a long life-time, include forward looking conditions that may only be realised in future and lack enforcement requirements in case of future problems with implementation.
270. The Applicants contend also that the differences between thresholds applicable to fossil gas activities under TSC 1(b) and the taxonomy thresholds applicable to other activities in the energy sector clearly favour recourse to the use of fossil gas based technologies and, in fact, create equally favourable financing conditions for them, while requiring less performance.
271. It also potentially diverts investors from having recourse to low-carbon alternative solutions not regulated under the taxonomy by setting sustainability requirements on fossil gas at a low level.
272. The Applicants accordingly contend that the use in the Contested Act of the TSC 1(b) breaches Article 19(1)(a) of the Taxonomy Regulation as this TSC does not respect the principle of technological neutrality.

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<sup>213</sup> Technology neutrality may be defined as: “The freedom of individuals and organizations to choose the most appropriate technology adequate to their needs and requirements for development, acquisition, use or commercialization, without knowledge dependencies involved as information or data” ([“What is technological neutrality?” • Viafirma's Blog](#))

## 5.3.4. Third limb: Misuse of powers

273. The Applicants contend that the Commission misused its powers by classifying the fossil gas based activities in the Contested Act as transitional for the actual purpose of incentivising, or maintaining incentives for investments into fossil gas capacity to fulfil energy demand and ensure energy security, instead of pursuing the objective of mitigating climate change – which is the only relevant objective under Article 10(2).
274. The Commission’s actual intention to include fossil gas based activities in the Contested Act for purposes other than mitigating climate change is expressed in recital (4) to the Contested Act, in which the Commission explains that it assessed whether low carbon alternatives are commercially available at scale in order to “*cover the energy demand in a continuous and reliable manner*”.<sup>214</sup> The Commission also revealed that its decision was not only driven by environmental, but by energy security considerations in various instances: “(...) Russia’s unprovoked military aggression of Ukraine adds to the urgency in accelerating our clean transition. The REPowerEU Plan and the Complementary Delegated Act both reflect this reality and help reduce our dependency on Russian gas.(..)”<sup>215</sup>
275. The Applicants do not deny that the Commission has considered, in various legislation and policies, that fossil gas supply could have a role to play to satisfy energy demand and security of supply. However, the purpose of the taxonomy is to orientate and incentivise investments into solutions that are deemed sustainable from an environmental perspective, not a social or economic one. Satisfying energy demand or contributing to security of supply are economic and social considerations that, even though legitimate in other contexts, are irrelevant and exceed the scope of the Taxonomy Regulation.
276. In considering nonetheless that transitional fossil gas based activities should serve the purpose of satisfying energy demand and energy security and not necessarily or not only the one of mitigating climate change, the Commission misapplied the Taxonomy Regulation and exercised its delegated powers for a different purpose than the one conferred by the legislature, thereby misusing its powers.

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<sup>214</sup> In respect of this standard of commercial availability, see section 5.2.3 of this request.

<sup>215</sup> Commission press release of 6 July 2022, IP/22/4349.

## 5.3.5. Fourth limb: The Commission manifestly erred in its assessment and misused the powers delegated to it under Article 10(3) thereof by misapplying the requirements set out under Article 19 with regard to the DNSH requirement under Article 17 Taxonomy Regulation

272. The Taxonomy Regulation obliges the Commission to establish criteria according to which an economic activity does not significantly harm any Environmental Objective. At the outset, it must be recalled that “*the technical screening criteria should identify the **minimum requirements** necessary to avoid significant harm to other objectives, including by building on any minimum requirements laid down pursuant to Union law*” (emphasis added).<sup>216</sup>
273. The Applicants submit that in establishing (or failing to establish) DNSH criteria for several Environmental Objectives in Annexes I and II to the Contested Act, the Commission exceeded its competence (see section 5.2). In the alternative, it manifestly erred in its assessment and misused its powers thus infringing Articles 3, 10(3), 17 and 19 Taxonomy Regulation, including by failing to “*take into account existing relevant Union legislation*” and to base those criteria on “*conclusive scientific evidence and the precautionary principle*”.
274. This section is divided according to the different Environmental Objectives listed under Articles 9 and 17 Taxonomy Regulation concerned: section 5.3.5.1 on climate change mitigation (Articles 9(a) and 17(a)); section 5.3.5.2 on water and marine resources (Articles 9(c) and 17(1)(c)); and section 5.3.5.3. on pollution prevention and control (Articles 9(e) and 17(1)(e)).
275. It is worth noting that the Commission already issued, in February 2021, a Technical Guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation.<sup>217</sup> As mentioned above, the Applicants submit that this Technical Guidance is relevant by analogy to show how the Commission has interpreted Article 17 in the recent past. As detailed further below, there are clear inconsistencies between the Commission’s previous interpretation and recommended application of DNSH in that Technical Guidance and the criteria set (or not set) in the Contested Act.

### 5.3.5.1. Climate change mitigation

276. First, the Applicants submit that, in light of its obligation to set criteria for ensuring that activities DNSH to any Environmental Objective, the Commission exceeded its competence (see above section 5.2) and in any case, manifestly erred by not adopting any criteria for DNSH to climate change mitigation in Annex I to the Contested Act.
277. Second, there is ample conclusive scientific evidence (see section 5.3.3.1) that combustion of fossil gas, throughout its life cycle and in particular upstream, leads to significant GHG emissions. It is thus implausible that the Commission could have considered, based on conclusive scientific evidence and by adopting a life cycle approach as required pursuant to

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<sup>216</sup> Recital (40) Taxonomy Regulation.

<sup>217</sup> Commission Notice Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01).

Articles 17 and 19 Taxonomy Regulation, that fossil gas based activities could ever DNSH to climate change mitigation. As expressed by the Commission in its Technical Guidance on DNSH under the RRF, relevant by analogy, “*For example, an EIA is required for the construction of crude-oil refineries, coal-fired thermal power stations and projects involving the extraction of petroleum or natural gas. However, these types of measures would not be compliant with DNSH to climate change mitigation of Article 17 (‘Significant harm to environmental objectives’) of the Taxonomy Regulation, which state that significant harm is done if an activity ‘leads to significant GHG emissions’*” (emphasis added).<sup>218</sup>

278. If the Commission had any doubt as to the extent or weight of the scientific evidence available, it was required not to reach the conclusion that such activities would DNSH. This is because, as set out in section 4 above, the Commission is: (i) required to set TSC only where there is conclusive scientific evidence; and (ii) otherwise act in accordance with the precautionary principle. This is particularly so where fossil gas activities would emit more than 100gCO<sub>2</sub>e/kWh on a life cycle basis.
279. Third in the alternative, if the Commission would now nonetheless consider that some fossil gas based activities can do no significant harm to climate change mitigation in certain circumstances, the Applicants further contend that the Commission manifestly erred by adopting insufficient TSC in Annex II to the Contested Act.
280. In Annex II, the Commission simply set the DNSH maximum level of direct GHG emissions of fossil gas based activities at 270 gCO<sub>2</sub>e/kWh. In the absence of an impact assessment, it is unclear why whereas in a comparable context, the Commission had endorsed a limit of 250 gCO<sub>2</sub>e/kWh in the Technical Guidance on DNSH under the RRF<sup>219</sup>, presumably on the basis of a life cycle approach.<sup>220</sup> In any case, the absence of life cycle approach to set that DNSH criterion contravenes Article 17 and Article 19(1)(g) Taxonomy Regulation.
281. The Commission therefore infringed Articles 3, 10(3), 17 and 19 Taxonomy Regulation by committing a manifest error of assessment and misusing its powers when it considered that not setting DNSH criteria in Annex I, and setting a threshold of direct emissions up to 270 gCO<sub>2</sub>e/kWh in Annex II, would ensure that the activities do no significant harm to climate change mitigation in the absence of conclusive scientific evidence supporting such TSC.

### 5.3.5.2. Sustainable use and protection of water and marine resources

282. Article 17(1)(c) establishes that an activity significantly harms the sustainable use and protection of water resources, where it is “*detrimental: (i) to the good status or the good ecological potential of bodies of water, including surface water and groundwater [...]*”. Recital (26) Taxonomy Regulation indicates that this Environmental Objective must be interpreted in accordance with relevant Union law including that cited in that recital.
283. It is particularly important to provide for strong DNSH criteria in relation to water and marine protection for fossil gas based activities given the contamination risks those activities pose.

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<sup>218</sup> *Ibid*, fn. 20.

<sup>219</sup> Commission Notice Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01), Annex III.

<sup>220</sup> *Ibid*, p. 5. The limit of 250g CO<sub>2</sub>e/kWh is also applied by the European Investment Bank under its Energy Lending Policy as a minimum requirement for power generation technologies.

Some EU Member States have extensive offshore gas production facilities, and some Member States, including Germany, the Netherlands and Romania, plan to open up new sites.<sup>221</sup> These sites are at significant water depths, which makes proper baseline data collection and environmental management difficult.<sup>222</sup> Gas extraction can lead to accidental releases of hydrocarbons, and the likelihood of an accidental spill or blowout increases with the depth of the operations.<sup>223</sup> Risk modeling indicates that an incident the size of Deepwater Horizon can broadly be expected to occur globally around once every 17 years.<sup>224</sup> Several major oil and gas extraction blowouts have occurred, including the Ekofisk blowout in Norwegian waters where 200,000 barrels (32 million liters) of oil were released at a depth of 70m.<sup>225</sup> The damage to wildlife and marine-based commerce that such releases can cause have been extensively documented.<sup>226</sup> Terrestrial gas extraction also presents the risk of groundwater contamination. For example, the use of hydraulic fracturing, which is not currently used in the EU but could resume if countries seek to expand domestic gas extraction, uses to extract gas can lead to the release of injection or flowback fluids which can contain toxic chemicals, and a risk of polluting surface water or soil from storage of these fluids above ground.<sup>227</sup> In Annexes I and II to the Contested Act, the DNSH technical screening criteria for ‘sustainable use and protection of water and marine resources’ simply provide, for the three activities 4.29, 4.30 and 4.31: “*The activity complies with the criteria set out in Appendix B to this Annex.*” Appendix B to Annex I sets out “Generic Criteria for DNSH to Sustainable Use and Protection of Water and Marine Resources”:

*“Environmental degradation risks related to preserving water quality and avoiding water stress are identified and addressed with the aim of achieving good water status and good ecological potential as defined in Article 2, points (22) and (23), of Regulation (EU) 2020/852, in accordance with Directive 2000/60/EC of the European Parliament and of the Council (1) and a water use and protection management plan, developed thereunder for the potentially affected water body or bodies, in consultation with relevant stakeholders.*

*Where an Environmental Impact Assessment is carried out in accordance with Directive 2011/92/EU of the European Parliament and of the Council (2) and includes an assessment of the impact on water in accordance with Directive 2000/60/EC, no additional assessment of impact on water is required, provided the risks identified have been addressed”.*

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<sup>221</sup> <https://www.euractiv.com/section/energy-environment/news/gas-drilling-projects-resurrected-around-europe/>.

<sup>222</sup> <https://www.oedigital.com/news/469675-deepwater-in-the-north-sea>.

<sup>223</sup> Muehlenbachs, L., Cohen, M. A., and Gerarden, T. (2013). The impact of water depth on safety and environmental performance in offshore oil and gas production. *Energy Policy* 55, 699–705. doi: 10.1016/j.enpol.2012.12.074.

<sup>224</sup> Eckle, P., Burgherr, P., and Michaux, E. (2012). Risk of large oil spills: a statistical analysis in the aftermath of Deepwater Horizon. *Environ. Sci. Technol.* 46, 13002–13008. doi: 10.1016/j.marpol.2013.12.002.

<sup>225</sup> Law, R. J. (1978). Determination of petroleum hydrocarbons in water, fish and sediments following the Ekofisk blow-out. *Mar. Pollut. Bull.* 9, 321–324. doi: 10.1016/0025-326X(78)90241-2.

<sup>226</sup> <https://www.frontiersin.org/articles/10.3389/fenvs.2016.00058/full#T1>

<sup>227</sup> [What went wrong? Fracking in Eastern Europe | SpringerLink](#); [House of Commons - Environmental risks of fracking - Environmental Audit \(parliament.uk\)](#).

284. These Generic Criteria are limited to considering that mere compliance with Union legislation is sufficient for the purpose of DNSH to this Environmental Objective. This approach is inconsistent with:

- recital (40) Taxonomy Regulation according to which minimum requirements for DNSH should build on minimum requirements of Union law (and not necessarily merely comply with them);
- Article 19 Taxonomy Regulation per which “taking into account relevant existing Union legislation” is only one of the requirements to be fulfilled;
- the previous interpretation of Article 17 Taxonomy Regulation in the Technical Guidance on DNSH under the RRF, in which the Commission stated that: “***Complying with the applicable EU and national environmental law is a separate obligation and does not waive the need for a DNSH assessment. All measures proposed in the RRP must comply with the relevant EU legislation, including the relevant EU environmental legislation. Although compliance with the existing EU legislation provides a strong indication that the measure does not entail environmental harm, it does not automatically imply that a measure complies with DNSH, in particular as some of the objectives covered by Article 17 are not yet fully reflected in the EU environmental legislation.***”<sup>228</sup>

285. In any case, the Generic Criteria do not even comply with existing Union legislation when they state that environmental degradation risks are identified and addressed by way of a “*water use and protection management plan*” developed under Directive 2000/60/EC. Directive 2000/60/EC does not require the preparation of such a plan. In fact, this term does not appear in the Directive, nor otherwise in EU law. It thus appears that this DNSH criterion was not set taking into account relevant existing Union legislation as required under Article 19(1)(d) Taxonomy Regulation.

286. Furthermore, relating to the second DNSH criterion in the Contested Act according to which risks identified in an EIA, where any, must be addressed, it is worth referring by analogy to the Technical Guidance on DNSH under the RRF in which the Commission stated that this is not sufficient in all circumstances:

*“depending on the exact design of a measure, carrying out an EIA and implementing the required mitigation steps for protecting the environment can **in some cases**, and in particular when it comes to investments in infrastructure, **be sufficient for a Member State to demonstrate compliance with DNSH for some of the relevant environmental objectives (notably, the sustainable use and protection of marine and water resources, as well as protection and restoration of biodiversity and ecosystems).** However, **this does not exempt the Member State from carrying out the DNSH assessment for that measure since an EIA, SEA or proofing might not cover all aspects that are required as part of the DNSH assessment.** This is because **neither the legal obligations contained in the EIA and SEA Directives, nor the approach set out in the relevant Commission guidelines on proofing, are the same as***

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<sup>228</sup> Commission Notice Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01), p. 4, section 2.3.

***those set out in Article 17 ('Significant harm to environmental objectives') of the Taxonomy Regulation.***<sup>229</sup> (emphasis added)

287. Lastly, Directive 2000/60/EC does not address marine protection. It is therefore a manifestly
288. insufficient TSC for ensuring protection of marine waters which are affected by gas extraction in particular.

The Commission therefore infringed Articles 3, 10(3), 17 and 19 Taxonomy Regulation by committing a manifest error of assessment and misusing its powers when it considered that such a “water use and protection management plan” and merely addressing the risks identified in an EIA would prevent significant harm being caused to water resources by the fossil gas based activities.

### 5.3.5.3. Pollution prevention and control

289. In accordance with Article 17(1)(e) Taxonomy Regulation, “*For the purposes of point (b) of Article 3, **taking into account the life cycle** of the products and services provided by an economic activity, including evidence from existing life-cycle assessments, that economic activity shall be considered to significantly harm: (...) (e) pollution prevention and control, where that activity **leads to a significant increase in the emissions of pollutants into air, water or land, as compared with the situation before the activity started**’.* (emphasis added)
290. Recital (29) Taxonomy Regulation provides that “*The environmental objective of pollution prevention and control should be interpreted in accordance with relevant Union law, including Directives 2000/60/EC, 2004/35/EC, 2004/107/EC, 2006/118/EC, **2008/50/EC**, 2008/105/EC, 2010/75/EU, (EU) 2016/802 and (EU) **2016/2284** of the European Parliament and of the Council.*” (emphasis added). Consistency between the DNSH criteria set under Articles 17 and 19(1)(b) Taxonomy Regulation and the NEC Directive (EU 2016/2284) and Air Quality Directive (2008/50/EC), as a minimum requirement<sup>230</sup>, must thus be ensured.
291. It is crucial to set strong DNSH criteria for preventing and controlling air pollution caused by fossil gas-based activities. In the Commission’s own words, “*methane contributes to ozone formation, which is **a potent air pollutant that causes serious health problems**.*”<sup>231</sup> (emphasis added). Indeed as mentioned above under paragraph 218, methane has a detrimental impact on air quality and ecosystems as it is a precursor to the formation of tropospheric (ground-level) ozone (O<sub>3</sub>), a short-lived yet powerful greenhouse gas as well as

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<sup>229</sup> Commission Notice Technical guidance on the application of ‘do no significant harm’ under the Recovery and Resilience Facility Regulation (2021/C 58/01), p. 4.

<sup>230</sup> Recital (40) Taxonomy Regulation.

<sup>231</sup> Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942, COM(2021) 805 final, p. 1. See also recital (2) of the proposal.



an air pollutant.<sup>232</sup> The IPCC<sup>233</sup>, the World Health Organization (WHO)<sup>234</sup> and the European Environmental Agency (EEA)<sup>235</sup> all recognise the harmful contribution of methane released throughout the life cycle of fossil fuels combustion for worsening the levels of O<sub>3</sub>. In EU law, methane is already recognised in the NEC Directive as a precursor for O<sub>3</sub><sup>236</sup>, for which air quality standards are set in the Air Quality Directive.<sup>237</sup> O<sub>3</sub> standards are also set in the WHO Global Air Quality Guidelines.<sup>238</sup> The health impacts of ozone pollution are particularly concerning: according to the EEA 16,800 premature deaths were attributed to exposure to O<sub>3</sub> in 2019 in the EU.<sup>239</sup> Moreover, O<sub>3</sub> is harmful not only to human health, but also to ecosystems. Article 17 and Annex VII, Section B of the Air Quality Directive set a target value to limit concentrations of O<sub>3</sub> in order to protect vegetation. Annex V to the NEC Directive also recommends to assess ozone damage to vegetation growth and biodiversity in order to monitor the impacts of air pollution on terrestrial ecosystems.

292. In light of the established impact of methane on the levels of air pollution, the WHO has been stressing the need to carefully design energy transition policies so that they do not further harm air quality: “Another issue of great interest to decision-makers is [...] that the co-benefits of policies aimed at reducing greenhouse gases may also have adverse direct or indirect health effects (e.g. methane, a powerful greenhouse gas and an ozone precursor)”.<sup>240</sup> In this respect and long before the adoption of the Contested Act, the Commission acknowledged the need to reduce methane emissions to tackle air pollution. In its Declaration on the Review of Methane Emissions contained in the revised NEC Directive in 2016, the Commission declared:

***“The Commission considers that there is a strong air quality case for keeping the development of methane emissions in the Member States under review in order to reduce ozone concentrations in the EU and to promote methane reductions internationally.”***

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<sup>232</sup> CCAC & UNAP, *op.cit.*, p.18, available at <https://www.ccacoalition.org/en/resources/global-methane-assessment-full-report>. See also Kathleen A. Mar, Charlotte Unger, Ludmila Walderdorff, Tim Butler, “Beyond CO<sub>2</sub> equivalence: The impacts of methane on climate, ecosystems, and health” in *Environmental Science & Policy*, Volume 134, 2022, available at: <https://doi.org/10.1016/j.envsci.2022.03.027>; Van Dingenen, R. et al., Global trends of methane emissions and their impacts on ozone concentrations, EUR 29394 EN, Publications Office of the European Union, Luxembourg, 2018, JRC113210.

<sup>233</sup> IPCC Report (2021), Technical Summary p. 103, at: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_TS.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_TS.pdf) : “This additional [global mean] warming is stable after 2040 in SSPs [Shared Socio-economic Pathways] associated with lower global air pollution as long as CH<sub>4</sub> emissions are also mitigated, but the overall warming induced by SLCF changes is higher in scenarios in which air quality continues to deteriorate (induced by growing fossil fuel use and limited air pollution control) (high confidence). Sustained CH<sub>4</sub> mitigation reduces global surface ozone, contributing to air quality improvements, and also reduces surface temperature in the longer term, but only sustained CO<sub>2</sub> emissions reductions allow long-term climate stabilization (high confidence). Future changes in air quality (near-surface ozone and particulate matter, or PM) at global and local scales are predominantly driven by changes in ozone and aerosol precursor emissions rather than climate (high confidence).”

<sup>234</sup> WHO Global Air Quality Guidelines (September 2021), at: <https://apps.who.int/iris/bitstream/handle/10665/345329/9789240034228-eng.pdf>

<sup>235</sup> EEA report No 12/2018, “Air Quality in Europe – 2018 Report”, from p. 29.

<sup>236</sup> Article 3(3) Directive 2016/2284.

<sup>237</sup> Article 17 and Annex VII Directive 2008/50/EC.

<sup>238</sup> WHO Global Air Quality Guidelines (September 2021), p. 102.

<sup>239</sup> EEA, Air Quality in Europe 2021, Health impacts of air pollution in Europe, 2021, accessible at: <https://www.eea.europa.eu/publications/air-quality-in-europe-2021/health-impacts-of-air-pollution>.

<sup>240</sup> WHO Global Air Quality Guidelines (September 2021), p. 16.

*The Commission confirms that on the basis of the reported national emissions, it intends to further assess the impact of methane emissions on achieving the objectives set out in Art. 1 paragraph 2 of the NEC Directive and will consider measures for reducing those emissions, and where appropriate, submit a legislative proposal to that purpose. In its assessment, the Commission will take into account a number of ongoing studies in this field, due to be finalised in 2017, as well as further international developments in this area.” (emphasis added)*

293. In its Methane Regulation proposal of December 2021, the Commission stated that:

*“(…) **There is thus a need for a sharp, rapid and sustained reduction in methane emissions to slow down global warming and improve air quality.** It is important to note that the report concludes that the increase of methane in the atmosphere is the result of human activity and that **fossil fuels have been a large contributor** to the growth in methane emissions at least since 2007, alongside agriculture (mainly livestock) and wastewater.”<sup>241</sup> (emphasis added).*

294. Therefore, conclusive scientific evidence, EU legislation and international guidelines all consistently recognise that methane is a precursor for air pollution (O<sub>3</sub>) and that the EU needs to reduce methane emissions beyond what existing legislation provides. In this respect, the Applicants stress again that the Commission is required to set DNSH criteria by *“building on any minimum requirements laid down pursuant to Union law”*<sup>242</sup> – not simply to consider that mere compliance with existing Union law is appropriate, in particular when it is recognised by the Commission itself that current rules are insufficient to tackle a well-recognised pollution issue and that new legislation is already being proposed to this effect.<sup>243</sup> It bears emphasis that the effect of classification of a fossil gas activity as “sustainable” is to provide incentives and advantages to those activities, thus leading to an increase in their prevalence and to the associated pollution.

295. Despite the above, no reference is made to air quality legislation and standards in the DNSH criteria for the three activities 4.29, 4.30 and 4.31 in Annexes I and II to the Contested Act. For those activities, the DNSH technical screening criteria for ‘pollution prevention and control’ provide:

*“The activity complies with the criteria set out in Appendix C to this Annex.  
Emissions are within or lower than the emission levels associated with the best available techniques (BAT-AEL) ranges set out in the latest relevant best available techniques (BAT) conclusions, including the best available techniques (BAT) conclusions for large combustion plants.  
No significant cross-media effects occur.*

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<sup>241</sup> Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942, COM(2021) 805 final, p. 1.

<sup>242</sup> Recital (40) Taxonomy Regulation.

<sup>243</sup> The EU Commission published a legislative proposal dedicated to methane emissions including the preference to impose leak detection and repair obligations on operators and ban venting and flaring. See Proposal for a Regulation of the European Parliament and of the Council on methane emissions reduction in the energy sector and amending Regulation (EU) 2019/942, COM(2021) 805 final, p. 9.

*For combustion plants with thermal input greater than 1 MW but below the thresholds for the BAT conclusions for large combustion plants to apply, emissions are below the emission limit values set out in Annex II, part 2, to Directive (EU) 2015/2193.”*

296. The Applicants contend that those criteria do not ensure that the fossil gas based activities do not lead to a significant increase in the emissions and concentrations of pollutants into air. In particular, they do not set any appropriate TSC for preventing and controlling the levels of air pollution (notably of O<sub>3</sub>) caused or aggravated by methane emissions, for at least two reasons.
297. First, the absence of DNSH criteria to prevent air pollution is not remedied by a reference to the Best Available Techniques conclusions ('BATc'). Indeed, the mere requirement, in the Contested Act, that the activity complies with the relevant BATc is manifestly inappropriate to prevent a significant increase in the emissions of air pollutants derived from the life cycle of fossil gas combustion as compared to the situation before the activity started. This is because the Industrial Emissions Directive and associated BATc only regulate a minimal share of methane and ozone emissions caused by large combustion plants using fossil gas. As summarised in the Commission's proposal for a Methane Regulation, "*The IED covers the refining of mineral oil and gas but not fossil gas upstream, mid and downstream (LNG, underground gas storage, transmission, distribution) or coal mining*"<sup>244</sup>, whereas most methane emissions associated with fossil gas power plants occur upstream. BAT45 of the BATc on large combustion plants, in particular, only regulates the very specific case of methane emissions to air from the combustion of fossil gas in a spark-ignited lean-burn gas engine (in case of a combustion plant total rated thermal input  $\geq 50$  MW<sub>th</sub>).<sup>245</sup> At least NO<sub>x</sub> emissions are addressed (e.g. BAT44), whereas O<sub>3</sub> is not covered. This would have become evident to the Commission had it adopted a life cycle approach of the fossil gas based activities. In any case, even if best available techniques are used by the activities, the Commission has not justified in the Contested Act how those are sufficient to prevent and control air pollution up to the standard required by Article 17 Taxonomy Regulation.
298. Second, whilst TSC 2 in Annex I (climate change mitigation) for each of the three fossil gas based activities requires the activities to monitor physical emissions and repair leaks, this is not sufficient to constitute appropriate DNSH criteria under Article 17(1)(e) Taxonomy Regulation because:
- These duties do not apply to methane emissions upstream or in other parts of the life cycle (other than in the construction or operation of the specific activity);
  - Methane emissions occur in the normal operation of fossil gas combustion, not only as leaks;

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<sup>244</sup> *Ibid.*, p. 3.

<sup>245</sup> Best Available Techniques (BAT) Reference Document for Large Combustion Plants (2017), p. 786, at : [https://eippcb.jrc.ec.europa.eu/sites/default/files/2019-11/JRC\\_107769\\_LCPBref\\_2017.pdf](https://eippcb.jrc.ec.europa.eu/sites/default/files/2019-11/JRC_107769_LCPBref_2017.pdf) and Commission Implementing Decision (EU) 2021/2326 of 30 November 2021 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (notified under document C (2021) 8580) (Text with EEA relevance), at [EUR-Lex - 32021D2326 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eur-lex.do?uri=CELEX:32021D2326-EN).

- In relation to activity 4.29, TSC 2 seems to leave the monitoring and repair of methane leaks optional (“*such as those of methane emissions*”) whereas methane should be mandatorily included like for activities 4.30 and 4.31, in light of all the above;
- For the three activities to substantially contribute to climate change mitigation, the facility seems to have the choice of installing a leak detection and repair equipment but is not obliged to use it, if it chooses to comply with TSC 2(a) (“*the activity meets either the following criteria: (a) at construction, measurement equipment (...) is **installed** or a leak programme detection is **introduced***”, compared with (b) “*at operation, (...) leak is **eliminated***”). It implies that TSC 2 is manifestly inappropriate to also prevent that significant harm is done to air pollution prevention and control;
- Those criteria are not included as DNSH criteria under Annex II (climate change adaptation) for any of the three activities, neither for the Environmental Objective of climate change mitigation nor for the Objectives of pollution prevention and control, without justification.

299. In light of the above, the Applicants submit that the Commission manifestly erred in setting inappropriate DNSH criteria for air pollution prevention and control, which are not based on conclusive scientific evidence and do not take into account the life cycle of the activities nor existing Union legislation on air quality, nor are consistent with prior commitments and legislative proposals of the Commission – in breach of Article 3, 10(3), 17 and 19 Taxonomy Regulation.

### 5.3.6. Fifth limb: The Contested Act was adopted in breach of Article 194 TFEU (principle of energy solidarity)

300. The principle of solidarity is a general principle of EU law. It can be found across EU primary law, including the preamble to the Treaty on European Union (“TEU”) (“*[Desiring] to deepen the solidarity between their peoples while respecting their history, their culture and their traditions*”); Article 2 TEU, which links it to the values of the EU; and Article 3 TEU, which places it among the aims of the EU (“*[The Union] shall promote economic, social and territorial cohesion, and solidarity among Member States*”). The principle of solidarity is also mentioned in EU primary law in respect to different areas of EU policy.
301. The principle of energy solidarity is the manifestation of the principle of solidarity in energy law. It emanates from Article 194 TFEU, which states that the Union’s policy on energy should pursue its objectives “*in a spirit of solidarity between Member States*”. Under that Article, the Union energy policy objectives include “*[promoting] energy efficiency and energy saving and the development of new and renewable forms of energy*” (emphasis added).
302. The nature, scope and derived obligations of the principle of energy solidarity were clarified in the General Court’s judgment on Case T-883/16 (“OPAL judgment”).<sup>246</sup> The OPAL

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<sup>246</sup>Judgment of 10 September 2019 (OPAL), T-883/16 EU:T:2019:567 (OPAL I).

judgment was confirmed on appeal by the Court sitting in Grand Chamber, in Case C-848/19 P (the “*OPAL II* judgment”).<sup>247</sup> The *OPAL II* judgment confirmed that the principle of energy solidarity is the specific expression in the field of energy of the principle of solidarity, which is itself one of the fundamental principles of EU law.<sup>248</sup> It established that the principle of energy solidarity produces binding legal effects on the Member States and the institutions of the European Union<sup>249</sup> in respect to all the objectives of the Energy Union,<sup>250</sup> including the objective of promoting energy efficiency and the development of renewable sources of energy.<sup>251</sup>

303. As a fundamental principle of EU law with binding legal effects, the principle of energy solidarity creates obligations for the European Union and for the Member States. The CJEU established that this principle “entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interests of the European Union and the policies pursued by it”<sup>252</sup> (emphasis added).
304. In order to comply with the solidarity obligation, the European Union must, in the exercise of its competences in EU energy policy, take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, and do so in order to take account of their interdependence and the fact of solidarity.<sup>253</sup> The *OPAL* judgments clarify that the principle of energy solidarity also requires that the various interests affected must be balanced wherever there is a conflict between them.<sup>254</sup>
305. The *OPAL* case concerned a Commission decision on the review of the conditions for exemption of the *OPAL* pipeline from the requirements on third-party access and tariff regulation under Directive 2003/55. The decision was challenged by the Republic of Poland before the General Court, which annulled the decision based on a breach of the principle of energy solidarity (*OPAL* judgment). The Federal Republic of Germany appealed the General Court’s judgment. In the judgment on the appeal (*OPAL II* judgment), the Court of Justice confirmed that the decision adopted by the Commission was in breach of the principle of energy solidarity, since it failed to identify its potential impact on the interests of Member States, to take such interests into account, and to balance them with the main purpose of the decision. In considering whether the decision infringed the principle of energy solidarity, the General Court noted that the principle of energy solidarity was not only not mentioned in the Commission’s decision, but also that the decision itself did not disclose that an examination of the principle had been carried out.<sup>255</sup> The General Court also took into account in its reasoning that it did not appear that the Commission had assessed the

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<sup>247</sup> Judgment of 15 July 2021 (*OPAL II*), C-848/19 P, ECLI:EU:C:2021:598.

<sup>248</sup> *Ibid.*, para. 38.

<sup>249</sup> *Ibid.*, para. 43.

<sup>250</sup> *Ibid.*, para. 47.

<sup>251</sup> Article 194(1)(c) TFEU.

<sup>252</sup> *OPAL II*, *op.cit.* para. 49.

<sup>253</sup> *Ibid.*, para. 71.

<sup>254</sup> *Ibid.*, para. 73.

<sup>255</sup> *OPAL I*, *op.cit.* para. 79.

consequences of its decision on a particular Member State, nor that it had balanced such consequences against the main purpose of the decision.<sup>256</sup>

306. A breach of the principle of energy solidarity constitutes a ground for annulment of measures of energy policy of the European Union. The Court made it clear that the principle of energy solidarity, “*like general principles of EU law, constitutes a criterion for assessing the legality of measures adopted by the EU institutions*” and that “*acts adopted by the EU institutions, including the Commission under that [energy] policy, must be interpreted, and their legality assessed, in the light of the principle of energy solidarity*”.<sup>257</sup> The adoption of the contested decision in breach of the principle of energy solidarity was the sole plea in law on which the General Court ruled and consequently the only ground for the annulment of the contested decision.<sup>258</sup>
307. The Contested Act is a measure of energy policy of the European Union and therefore an examination of the principle of energy solidarity was required prior to its adoption. Despite all the above, the Contested Act has been adopted without examining the principle of energy solidarity. There is no evidence, neither in the Contested Act itself, nor in the accompanying documents (Explanatory Memorandum to the proposal, Q&A and other content published on the Commission’s website<sup>259</sup>), that an examination of the principle of energy solidarity was conducted with regards to the Contested Act. The Contested Act and its publicly available accompanying documents fail to systematically identify the energy policy interests of Member States and the Union that could be affected, explicitly assess the potential consequences for Member States or the Union, or engage in an exercise of balancing any different conflicting interests in light of the energy solidarity principle as defined in the OPAL judgments.
308. Had the principle of energy solidarity been duly examined, the Contested Act or its accompanying documents should show how the Commission identified the impacts of the Contested Act (notably fossil gas based activities) on energy policy objectives of the Energy Union and of Member States –for example, on the achievement of the binding overall Union target on renewable energy for 2030 and the contributions by Member States to this target (jointly, the “RES targets”),<sup>260</sup>. Subsequently, the Commission should have assessed the potential consequences of the Contested Act on the RES targets and eventually engaged in an exercise of balancing any conflicting interests.
309. The achievement of the RES targets is an interest of energy policy of the EU and Member States, as the RES targets are a mechanism serving one of the objectives of the EU energy policy: “*promote [...] the development of new and renewable forms of energy*”.<sup>261</sup> While the interpretation of the principle of energy solidarity and of its “interest” element is made in the OPAL judgments mainly with regards to security of supply, the Court of Justice clearly

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<sup>256</sup> *Ibid.*, para. 82.

<sup>257</sup> OPAL II, paras. 45 & 44.

<sup>258</sup> OPAL I, paras. 83-86.

[https://finance.ec.europa.eu/publications/eu-taxonomy-complementary-climate-delegated-act-accelerate-decarbonisation\\_en](https://finance.ec.europa.eu/publications/eu-taxonomy-complementary-climate-delegated-act-accelerate-decarbonisation_en).

<sup>260</sup> 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, OJ L 328, 21 December 2018 (“REDII”), Arts. 3(1) & 3(2)

<sup>261</sup> Article 194(1)(c) TFEU.

specifies that the principle of energy solidarity “cannot [...] be regarded as being synonymous with or limited to the requirement to ensure security of supply, referred to in Article 36(1) of Directive 2009/73, which is merely one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out, in points (a) to (d), four different objectives which, in a spirit of solidarity between Member States, EU energy policy aims to achieve [...]”.<sup>262</sup>

310. The inclusion of fossil gas based activities in the Contested Act has the potential to realistically affect the achievement of the RES targets. This is because:

- a. Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (“REDII”)<sup>263</sup> establishes an EU framework for the promotion of energy from renewable sources. To that end, REDII sets the RES targets: a binding overall Union target for 2030, as well as an obligation for Member States to set national contributions to meet, collectively the binding overall Union target. The binding overall Union target is set as a share of energy from renewable sources in the Union’s gross final consumption of energy in 2030 of at least 32%.
- b. The calculation of the RES targets can be more clearly understood from Article 7(5) REDII, which specifies that:

*“The share of energy from renewable sources shall be calculated as the gross final consumption of energy from renewable sources divided by the gross final consumption of energy from all energy sources, expressed as a percentage”.*

Expressed as a formula, this definition would be:

$$RES\ targets = \frac{GFCE(RES)}{GFCE(ALL)} \cdot 100$$

where:

GFCE(RES)= Gross Final Consumption of Energy from renewable energy sources

GFCE(ALL)= Gross Final Consumption of Energy from all energy sources

311. The ‘sustainable’ labelling and facilitation of financing of fossil gas based activities would likely lead to a growth of gas based economic activities in the energy sector. This, in turn, would cause an increase in the volume of fossil gas consumed for energy purposes.

312. Since energy generated from fossil gas is not considered renewable energy under EU law,<sup>264</sup> any increase in the consumption of fossil gas would be accounted for under gross final consumption of energy from all energy sources (GFCE(ALL)), and, all other factors remaining constant, lead to a decrease in the share of renewables, therefore threatening the achievement of the RES targets.

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<sup>262</sup> OPAL II, *op.cit.* para. 47.

<sup>263</sup> REDII, *op.cit.*

<sup>264</sup> Article 2(1) REDII.

313. In view of the above, the Applicants contend that the Contested Act was adopted in breach of the principle of energy solidarity derived from Article 194(1) TFEU.

## Conclusion

314. In this Request for Internal Review, the Applicants have put forward facts and legal arguments raising serious doubts about the lawfulness of the Contested Act as regards the classification of fossil gas based activities as 'transitional activities' under Article 10(2) Taxonomy Regulation and the technical screening criteria supporting this classification, for the following activities:

4.29. Electricity generation from fossil gaseous fuels

4.30. High-efficiency co-generation of heat/cool and power from fossil gaseous fuels

4.31. Production of heat/cool from fossil gaseous fuels in an efficient district heating and cooling system

315. We hereby ask the Commission to review the Contested Act in accordance with the Aarhus Regulation.



## Schedule of Annexes

- Annex 1. ClientEarth AISBL - Statutes dated November 2020
- Annex 2. ClientEarth AISBL – Statutes (updated Object) dated March 2022
- Annex 3. ClientEarth AISBL - Extract of Belgian companies register (*BCE*) dated 10 January 2022
- Annex 4. Transport & Environment AISBL – Statutes dated January 2011
- Annex 5. WWF EPO AISBL – Statutes dated February 2006
- Annex 6. BUND e.V. - Statutes dated November 2021
- Annex 7. BUND e.V. - Extract of Associations Register dated 31 March 2022