THE EU TAXONOMY CDA: BREACH OF LEGALITY AND THE DEMOCRATIC PROCESS?

The EU Taxonomy Complementary Delegated Act (CDA) establishes that both unabated fossil gas and nuclear are sustainable economic activities. Following its publication at the start of February, criticism of the lack of a public democratic process, breach of mandate and circumvention of co-legislators as well as the outright breach of the EU Taxonomy Regulation, has hailed against the European Commission. With the start of the scrutiny period on the 11th of March, the co-legislators now have 4 months to ensure that a veto of absolute majority is raised against the CDA.

// BREACH OF TAXONOMY REGULATION

The European Commission’s own expert adviser, the Platform on Sustainable Finance (PSF), provided a scathing feedback; identifying clear breaches in the CDA of the Taxonomy Regulation, as well as the democratic process.

The PSF establishes that the draft CDA “takes a materially different approach to implementing the Taxonomy Regulation” that stands in opposition to the DA on climate change mitigation. This is particularly clear for fossil gas, where the starting point for the CDA is a shift away from solid fossil-fired energy – whereas in the CDA, fossil gas is viewed as a tool to transition from coal. This is in stark contrast with the original intention and makes assumptions on the capacity of fossil gas to contribute substantially to sustainability and emission reductions that are not shared by the scientific community. The PSF concluded in its report that the “draft CDA activities are not in line with the Taxonomy Regulation1”.

In addition to changing the focus of the Taxonomy away from sustainability contributions, breaches of Article 10.2 and 19 were identified. Specifically, Article 19 set out important requirements for the criteria included in the DAs, and as evident by the illustration below, the CDA’s in breach on multiple points.

BREACHED REQUIREMENTS TAXONOMY REGULATION ARTICLE 19

- **Technology neutrality principle**: By providing fossil gas a unique exemption to the set emission threshold of 100g CO₂e/kWh for generation of electricity, heat and power.
- **Precautionary principle**: The PSF finds that the precautionary principle has not been used as a basis for the criteria.
- **Do no significant harm principle on any relevant environmental objective**: The PSF found that the do no significant harm principle is not ensured for the 4 remaining objectives, and for new nuclear plants the technical screening criteria does not ensure a substantial contribution to 2050 climate neutrality goals. This is also a clear breach of Article 17 going into further detail on the DNSH criteria.
- **Verifiability of compliance**: There are currently no ways to verify or ensure compliance with plans to shift to undefined renewable or low-carbon gases by 2035.
- **Use of full life-cycle assessments**: The CDA only relies on direct emissions criteria on direct emissions criteria without any lifecycle considerations when determining compliance of fossil gas.
- **Contribution to climate change mitigation & competition distortion**: The CDA treats low-carbon solutions and carbon intensive economic activity differently in determining its contribution to sustainability and climate change mitigation – resulting in distorted competition in the market with low-carbon solutions competing for sustainable capital with carbon intensive economic activity.
- **Market impact of transition and risk of stranded assets and inconsistent incentives**: The CDA fails to address the inconsistent incentives of making low-carbon solutions compete with carbon intensive economic activities for sustainable investments.
As noted below, the draft CDA has not been subject to a proper consultation process as outlined in the Better Regulation Guidelines (BRG). The breaches of the Taxonomy Regulation Article 19, 17 and 10.2 clearly show a breach of the mandate given to the European Commission by the European Parliament and the Council. The European Commission does not have the mandate to amend essential elements or the interpretation of the Taxonomy Regulation in Delegated Acts.

The European Commission is now facing accusations of trying to sneak in changes through a “back-door” approach, knowing full well the added difficulty in gathering an absolute majority for a veto. The issue of the Taxonomy Regulation thus relates just as much to the agreed-upon democratic process as it does the role of unabated fossil gas and nuclear – and sets a dangerous precedent.

UNABATED FOSSIL GAS AS TRANSITIONAL: BREACH OF TAXONOMY REGULATION ARTICLE 10.2

- Has no technologically and economically feasible low-carbon alternative
- Offers GHG emission levels that are best sector/industry performance
- Does not hamper development & deployment of low-carbon alternatives
- Does not lead to lock-in of carbon intensive assets
- Does not hamper development & deployment of low-carbon alternatives
- Offers GHG emission levels that are best sector/industry performance

In clear breach. The CDA reinterprets key concepts here listed, such as availability of “technologically and economically feasible low-carbon alternative”. This concept is reinterpreted in the CDA to mean “at sufficient scale”, as confirmed by the PSF.

In clear breach. The CDA reinterprets “best available performance in the sector”, to now be applied to specific technologies where in the previous DAs it was applied to the energy sector as a whole. As highlighted by the PSF, the listed criteria does in fact not identify the best available performance of neither fossil gas nor nuclear.

In clear breach. The CDA does not take into account the potential diversion of capital or green sustainable energy deployment opportunities, as identified by the PSF. It neither addresses the relatively unfavourable competitive position it puts low-carbon solutions in, now having to compete with unabated fossil gas for sustainable capital.

In clear breach. Continued investments into unabated fossil gas infrastructure will delay the tempo of emission reduction, locking us in to 2035 at a minimum. The CDA exacerbates the lock-in further by not having any safeguards to ensure that a shift away from unabated fossil gas to the undefined “renewable” and “low-carbon gases” takes place by 2035.
BREACH OF PUBLIC TRUST AND BETTER REGULATION GUIDELINES

Despite repeated promises to consult and include stakeholders in the process, in particular market participants subject to the reporting requirements resulting from the Taxonomy DAs, the published CDA has only been subjected to a limited consultation with Member States and the European Commission’s own expert group. The European Commission has neither followed the process as outlined in its own BRG despite the politically sensitive nature and importance of the CDA, nor has it chosen to take into account the advice presented by its own expert advisory group.

CIRCUMVENTION OF THE EU DEMOCRATIC PROCESS

EU DEMOCRATIC PROCESS

- OPEN PUBLIC CONSULTATION
  - Possibility to amend
  - Vote by simple majority

BACKDOOR APPROACH

- LIMITED/NO CONSULTATION
  - Backdoor circumvents the ability of the parliament and council to amend text.

ADDITION

- Adoption by default for Parliament which needs absolute majority to reject.

The content and process of the CDA does not live up to the democratic process agreed onto, nor the underlying Taxonomy Regulation supposed to set the requirements for any DA developed by the European Commission. With a scrutiny period of four months starting on the 11th of March, we strongly urge that you join the call for a veto against the Taxonomy CDA.

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