4. The different forms and content of 'Do No Significant Harm' in EU law: in search of legal certainty

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1. INTRODUCTION

References to the 'do no significant harm' (DNSH) principle increasingly appear within EU legal documents. The first mention of DNSH can be found in Regulation 2019/2088 (the so-called Sustainable Finance Disclosure Regulation (SFDR)), laying down transparency requirements for financial market participants, and qualifying a sustainable investment as an investment ensuring the principle of 'do no significant harm'.[1] Under the SFDR, the DNSH is linked to both environmental and social objectives, so that neither is significantly harmed.[2] Shortly after, with the Communication launching the European Green Deal (EGD)[3] – a comprehensive and ambitious strategy for ecological transition[4] – the goal that all EU policies shall 'do no harm' to any EGD objectives was set forth.

The DNSH is a central and crucial element within two further legal frameworks. Regulation (EU) 2020/852 (the so-called Taxonomy Regulation)

[1] Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1 (so-called Sustainable Finance Disclosure Regulation, 'SFDR Regulation').

[2] SFDR Regulation, recital 17 and art 2(17).

[3] European Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

[4] On the EGD, see Edoardo Chiti, 'Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process' (2022) 19 Common Market Law Review 59; Edoardo Chiti and Dario Bevilacqua, *Green Deal. Come costruire una nuova Europa* (Il Mulino 2024); Dario Bevilacqua, *Il Green New Deal* (Giuffrè Francis Lefebvre 2024). For a discussion of the EGD objectives, see Section 2.

– adopted with the aim of channelling private investments towards 'sustainable' investments[5] – stipulates that, to be qualified as 'environmentally sustainable', an economic activity not only shall contribute substantially to one of six environmental objectives identified by Article 9, but also shall not significantly harm any of such objectives.[6] Furthermore, the key act of the EU's response to the Covid-19 pandemic – that is, the Regulation establishing the Recovery and Resilience Facility (RRF Regulation)[7] – mandates that each policy included in a National Recovery and Resilience Plan (NRRP) conform to the environmental test of DNSH set forth in the Taxonomy Regulation.[8]

Within these various legal frameworks, the content and the function of the DNSH principle seem to change, leading to considerable uncertainty as to what obligations stem from it. While several notions of 'rule of law' exist,[9] a broad consensus can be traced on the essential elements of this concept. According to the Venice Commission's rule of law checklist, legal certainty is one of the core elements of the concept.[10] In addition to requiring that legal rules be *clear and precise*, legal certainty implies that rules can be implemented in practice.[11] With this understanding of the rule of law in mind, this chapter will, first, aim at identifying the content of the DNSH principle, and, second, reflect on whether it can be effectively applied.

The chapter proceeds as follows. First, the analysis will clarify the role the 'do no harm' principle plays in the EGD Communication (Section 2). Second, the chapter will move to the legal framework for sustainable finance, focusing on the very detailed rules for DNSH in the Taxonomy Regulation (Section 3).

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5 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13 ('Taxonomy Regulation').

6 Ibid art 3 (b).

7 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17 ('RRF Regulation').

8 On the features of the NGEU, see Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 Legal Issues of Economic Integration 337, 355; Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 55 Common Market Law Review 635.

9 Martin Loughlin, *Foundations of Public Law* (OUP 2010) 312–41, distinguishing the rule of law from 'Rechtsstaat' or 'Etat de droit'.

10 Council of Europe, European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law' (2011) CDL-AD(2011)003rev.

11 Ibid para 51.

Third, the analysis will explore the DNSH criterion in the RRF Regulation (Section 4). Section 5 will summarize the different contents and impact of the DNSH principle and how these differences might potentially threaten the rule of law in the EU.

2. THE 'DO NO HARM' AS A GREEN OATH AS PROPOSED IN THE EGD COMMUNICATION

The EGD Communication set forth several objectives, so that its fundamental rationale remains elusive and unspecified.[12] While a core goal is achieving climate neutrality at the latest by 2050, it also aims 'to protect, conserve and enhance the EU's natural capital' and to ensure that the ecological transition is 'just and inclusive'.[13] In particular, sustainability is often referred to in the EGD Communication. However, it seems to remain conceptualized within the theoretical framework of sustainable development,[14] as codified within the Treaty framework[15] (even though in some of the legislation stemming from the Green Deal an ecological understanding of sustainability can be traced).[16]

Within the EGD Communication the 'do no harm' principle is set forth briefly and in a very generic way, as one of the instruments to mainstream sustainability in EU policies. Rather pompously, the Communication affirms that all EU actions and policies shall 'live up to a green oath to "do no harm"'.[17] However, the objectives that shall not be harmed are not specifically identified in the Communication, aside from the generic reference to the objectives of the Green Deal.

For EU policies to 'do no harm' to any objective of the EGD, the Commission plans to make use of better regulation tools, such as public consultations and

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[12] Edoardo Chiti, 'Ecosystem Restoration and EU Law: An Introduction to the Symposium' (2024) 3 European Law Open 175.

[13] COM (2019) 640 final (n 3) 1.

[14] Ibid 1, mentioning specifically the United Nation's 2030 Agenda and the sustainable development goals.

[15] See the Preamble and art 2 of the Treaty on the European Union (TEU). See also art 37 of the Charter of Fundamental Rights. For a discussion, Gyula Bándi, 'Principles of EU Environmental Law Including the (Objective) of Sustainable Development' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 36.

[16] Edoardo Chiti, 'Legal Changes: Ecosystem Health and the Redefinition of Sustainability in the Green Deal' (2024) 3 European Law Open 190, 192–3.

[17] COM (2019) 640 final (n 3) 19.

impact assessments.[18] In addition, it specifies that all legislative proposals shall include, within their explanatory memorandum, a specific section explaining how each initiative upholds the 'do not harm' imperative.

Reference to 'do no harm' as a principle to be respected within all EU public policies can also be found in the eighth EU Environmental Action Plan (EAP), adopted through the ordinary legislative procedure based on Article 192(3) TFEU and setting forth EU environmental priorities up to 2030.[19] In the EAP, the priority objectives that shall not be harmed are specifically listed under art. 2, and refer to GHG reduction, enhancing adaptive capacity, circular economy, zero pollution, biodiversity and sustainability. Moreover, not only EU policies but also policies at national, regional and local levels shall not harm environmental objectives, and this shall apply to legislative and non-legislative initiatives as well as to programmes, investments and projects.[20] Which instruments should be used to guarantee such compliance, though, is not clarified. As a result, even though the principle is similar to the one in the EGD Communication – not referring to a 'significant' harm but to any harm, and applying to any public policy – it does not entail any type of procedural obligations, such as the use of better regulation tools. In the EAP, the 'do no harm' principle remains a vague exhortation to EU institutions, as well as to Member States and to regional and local levels, without introducing specific obligations.

References in the EGD Communication and in the EAP contribute to increasing the variety of the 'do no harm' principle, and, within these legal frameworks, apply to public policies. However, the actual content of the principle – which does not refer to the need for 'harm' to be significant – does not overlap with the expression used in other contexts. Moreover, the obligations stemming from it are not coherently identified. In this sense, on the one hand, such references show the tendency of the principle to expand its scope; on the other hand, by multiplying the labels, these references enhance confusion around this newly introduced principle. Within the Taxonomy and the RRF Regulation, the content of the principle is more detailed – even if the degree

[18] On the rise of better regulation tools in the EU, see Anne Meuwese, *Impact Assessment in EU Lawmaking* (Kluwer 2008).

[19] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 [2022] OJ L114/22 ('8th EAP'). Environment action programmes have provided the framework for EU action in the field of the environment and climate since 1973: see Elizabeth Fischer, 'EU Environmental Law and Legal Imagination' in Paul Craig and Grainne de Burca, *The Evolution of EU Law* (OUP 2021) 847, 849.

[20] 8th EAP, art 3 (d) (i).

of detail does not solve the problem of legal certainty, as will be shown in the following sections.

3. THE DNSH CRITERIA IN THE TAXONOMY REGULATION

3.1 The Taxonomy Regulation: A 'Nudge' Mechanism to Facilitate Sustainable Investments

As mentioned at the outset, the DNSH concept was briefly introduced in 2019 in one of the first pieces of EU sustainable finance legislation, the SFDR Regulation, detailing the transparency requirements for investors meant to clarify how they integrate sustainability risks.[21] The goal of the SFDR is to require financial players to formally declare their degree of compliance with ESG (Environmental, Social, Governance) requirements through disclosure and reporting obligations, and, in so doing, to prevent greenwashing.[22] In such a context, a sustainable investment is defined as an investment contributing to an environmental or a social objective, and not doing significant harm to either the environment or the social objective.[23]

The EU's initiatives on sustainable finance, aimed both at combating greenwashing and at increasingly channelling private investments towards sustainable activities,[24] have intensified. Most notably, the Taxonomy Regulation (TR) establishes a unified classification system for sustainable *activities*,[25] pursuing the immediate goal of providing guidance to investors willing to fund sustainable economic activities.[26]

In addition to setting out the criteria for determining whether an economic activity qualifies as environmentally sustainable, the TR set forth a disclosure framework, which supplements the disclosure requirements laid down in the SFDR: according to the TR, if a company voluntarily chooses to make an

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21 SFDR Regulation, recital 8.

22 Chiara Cremasco and Leonardo Boni, 'Is the European Union (EU) Sustainable Finance Disclosure Regulation (SFDR) Effective in Shaping Sustainability Objectives? An Analysis of Investment Funds' Behaviour' (2024) 14 Journal of Sustainable Finance & Investment 1018.

23 SFDR Regulation, recital 17 and art 2(17).

24 Taxonomy Regulation, recitals 6 and 11.

25 Technical Expert Group on Sustainable Finance, 'Taxonomy Pack for Feedback and Workshops Invitations' 7.

26 Luna Aristei, 'EU Sustainable Finance Taxonomy and the Use of Platforms. A Helpful Mixture for Sustainable Finance' (2022) 3 Rivista Quadrimestrale Di Diritto Dell'ambiente 226, 241 and 244.

environmentally sustainable investment it has to comply with specific disclosure requirements additional to those of the SFDR.[27] The two acts are, therefore, complementary.[28] The DNSH criterion, however, is clarified in detail under the TR, as one of the conditions to be met for an activity to be qualified as environmentally sustainable.

Before turning to examination of the actual content of the DNSH under the TR, the legal impact of the latter needs to be further clarified. As disclosure requirements aim to provide an incentive for companies to take environmental objectives seriously into account in making their managerial decisions – since they know that these decisions could be rewarded by the market – the TR can be seen as a 'nudging' instrument.[29] In addition to its intended impact on private companies, the TR applies to Member States and to the EU if they issue environmentally sustainable financial products: for example, in order to use the designation 'European Green Bond', bonds should be allocated to economic activities that are aligned with the TR requirements.[30]

For an economic activity to be qualified as environmentally sustainable, four conditions need to be met: (a) that the activity contributes substantially to one of six core environmental objectives; (b) that the activity does not significantly harm any of such objectives; (c) that it is carried out according to minimum human and labour rights safeguards; (d) that it complies with the technical screening criteria to be adopted by the Commission.[31]

The six environmental objectives are: climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the circular economy; pollution prevention and control; the

[27] Commission, 'EU Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing Finance towards the European Green Deal' (Communication) COM (2021) 188 final, 4. The TR also introduces some target amendments to the SFDR: Taxonomy Regulation, recitals 35–6 and art 6, 18 (2) and (25).

[28] Christos V Gortsos and Dimitrios Kyriazis, 'The Taxonomy Regulation and Its Implementation' (2023) European Banking Institute Working Paper Series 136/2023, 30–31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381950> accessed 17 February 2025.

[29] Richard H Thaler and Cass R Sunstein, *Nudge. Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008). See also the Taxonomy Regulation, recital 6.

[30] Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds [2023] OJ L2631/1 ('EU Green Bond Regulation') recitals 11–12 and art 4.

[31] Taxonomy Regulation, art 3; Article 9 lists the 6 environmental objectives.

protection and restoration of biodiversity and ecosystems.[32] As for the minimum safeguards for human and labour rights, they are identified through reference to international guidelines.[33]

Within the TR, the DNSH aims at avoiding any situation in which an economic activity can be qualified as environmentally sustainable 'if it causes more harm to the environment than the benefits it brings'.[34] The DNSH logic is to ensure 'that progress against one objective is not made at the expense of others and recognises the reinforcing relationships between different environmental objectives'.[35] As such, the DNSH criteria play an essential role in 'ensuring the environmental integrity' of the EU Taxonomy.[36]

Even if an initial specification of the DNSH principle is provided within the Taxonomy Regulation,[37] the latter delegates the Commission to establish the technical screening criteria (TSC) for determining both whether an economic activity contributes substantially to one of the environmental objectives and the requirements to be met so that such activity does not significant harm to any of such objectives.[38] The analysis will now turn to examine how the delegated acts have specified the content of the DNSH.

3.2 The TSC for the DNSH in the Climate and Environmental Delegated Acts: Substantial and Procedural Content

Before examining the TSC, three features of the process of approval of such criteria are worth recalling. First, the TSC shall avoid unnecessary

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[32] Taxonomy Regulation, art 9.

[33] Taxonomy Regulation, art 18; OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights. On the various mechanisms through which EU law incorporates soft law, see Mariolina Eliantonio and Annalisa Volpato (eds), *Global Standards and EU Law* (Edward Elgar Publishing, forthcoming).

[34] Taxonomy Regulation, recital 40.

[35] Commission, 'Impact Assessment Report' (Commission Staff Working Document) SWD (2021) 152 final, 38.

[36] Ibid.

[37] Taxonomy Regulation, art 17: for example, an activity is considered to significantly harm the circular economy when it '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'.

[38] Taxonomy Regulation, art 19(1)(b).

administrative burdens and guarantee coordination with the existing EU legal framework which could overlap with such requirements.[39] Second, the TSC shall be based on conclusive scientific evidence and the precautionary principle.[40] For this purpose, input from experts and from the relevant stakeholders is a distinctive feature of the drafting of the delegated acts (the Sustainable Investment Platform, bringing together experts from the public and the private sector as well as representatives of the EU agencies for the environment, financial markets and fundamental rights, is set up for this purpose).[41] Third, both the Taxonomy Regulation and the TSC are to be reviewed and updated regularly, and at least every three years, to take the progress and the effectiveness of the classification mechanism into account and ensure it is in line with scientific and technological developments.[42]

The TSC for determining the conditions under which an economic activity qualifies as making a substantial contribution to the first two of the six objectives identified in the EU Taxonomy – that is, to *mitigation* or *adaptation* – and for determining whether that economic activity causes no significant harm to any of the other objectives have been identified with the so-called Climate Delegated Act,[43] while the TSC to determine a substantial contribution to the

[39] Taxonomy Regulation, recital 47 and arts 19(1) (d) and 20(2) (g).

[40] Taxonomy Regulation, art 19(1)(f).

[41] Taxonomy Regulation, recitals 50–4 and arts 20 and 23(4). On the actual scope of participation in the drafting of the Taxonomy Delegated Acts, Dorien Coppens, 'Harnessing Public Participation in the EU Taxonomy Regulation Delegated Acts: Mobilising Sustainable Investments and Mobilising People' in Ivano Alogna (ed), *Climate Litigation in Europe* (Intersentia 2023) 267.

[42] Taxonomy Regulation, recital 59 and arts 19(5) and 26.

[43] 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 [2021] OJ L442/1 ('Climate Delegated Act'). The Climate Delegated Act has been amended to take into account economic activities in the fossil gas and nuclear energy sectors: 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 [2022] OJ L188/1; and Commission Delegated Regulation (EU) 2023/2485 of 27 June 2023 amending Delegated Regulation (EU) 2021/2139 establishing additional technical screening criteria for determining the conditions under which certain economic activities qualify as contributing substantially to climate change

four environmental objectives (marine resources, circular economy, pollution control and the protection of biodiversity) and not causing significant harm to any other objectives have been identified with the so-called Environmental Delegated Act.[44]

The first methodological choice made in the drafting of the Climate Delegated Act was that of the prioritization, selection and classification of economic activities to be covered. This was done by considering which activities had the greatest potential to make a substantial contribution to climate change mitigation, based on their share of overall emissions and their capacity to reduce emissions. As for adaptation, all sectors and activities were in principle able to make a substantial contribution; however, as it would not be feasible to conduct a DNSH for all sectors of the economy, the same activities as for mitigation were considered.[45] The nine sectors of economic activities, listed under annex I of the Climate Delegated Act, are the following: forestry; environmental protection and restoration; manufacturing; energy; water supply and waste management; transport; construction and real estate activity; information and communication (such as data-driven solutions for emissions reductions); professional, scientific and technical activities (such as innovation for direct air capture of carbon dioxide). Each of these activities is further distinguished in sub-sectors: for example, manufacturing of batteries, of cement, of aluminium, and so on. According to the Taxonomy Regulation, the TSC have to be quantitative and contain thresholds to the extent that this is possible – presumably as this would guarantee certainty in their application – and otherwise be qualitative.[46] Within the impact assessment accompanying the Climate Delegated Act, it is clarified that the qualitative criteria for measuring DNSH are often

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mitigation or climate change adaptation and for determining whether those activities cause no significant harm to any of the other environmental objectives [2023] OJ L2485/1.

[44] Commission Delegated Regulation (EU) 2023/2486 of 27 June 2023 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 the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives and amending Commission Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2023] OJ L2486/1 ('Environmental Delegated Act').

[45] Commission Impact Assessment Report (n 35) 15.

[46] Taxonomy Regulation, art 19(1)(c).

process-based, that is, 'define a number of process-based steps that the activity has to follow to be deemed not causing significant harm'.[47]

In the Climate Delegated Act, a quantitative approach appears to be the preferential approach to DNSH in the TSC identified for each economy activity and sub-activity in the Regulation, which runs to more than 400 pages.[48] However, a qualitative, process-based approach can be found in particular in the appendices to the Climate Delegated Act, where, instead of criteria for measuring DNSH tailored on one specific activity, criteria for DNSH common to several economic activities for one specific objective are set forth. The Environmental Delegated Act follows the same type of two-fold approach.

As for climate adaptation, the different potential risks are identified (as temperature-related, such as a heat wave; or wind-related, such as a hurricane; or water-related, such as droughts) and it is requested that a robust climate risk and vulnerability assessment be conducted to check whether one specific economic activity is at risk from one or more of such climate risks and which adaptation solutions can be adopted.[49] Hence, for adaptation the DNSH is a process-based requirement.[50]

The generic criteria for DNSH for the two objectives of the protection of water resources and of biodiversity also have a procedural dimension; however, this does not entail a new and specific assessment procedure. For these two objectives, the Climate Delegated Act, following the principle of avoiding unnecessary administrative burdens, clarifies that, if an EIA has been conducted, no other assessment is requested.[51] These criteria appear to be both procedural and substantive: on the one hand, they are process-based, in that DNSH is complied with through specific procedural steps to be fulfilled; on the other hand, they are also substantive as, for water resources, the risks

47 Commission Impact Assessment Report (n 35) 19 and 38.

48 For example, that the construction of a new building does not cause significant harm to water resources is identified in the following way: 'Where installed, except for installations in residential building units, the specified water use for the following water appliances are attested by product datasheets, a building certification or an existing product label in the Union, in accordance with the technical specifications laid down in Appendix E to this Annex: (a) wash hand basin taps and kitchen taps have a maximum water flow of 6 litres/min; (b) showers have a maximum water flow of 8 litres/min; (c) WCs, including suites, bowls and flushing cisterns, have a full flush volume of a maximum of 6 litres and a maximum average flush volume of 3,5 litres; (d) urinals use a maximum of 2 litres/bowl/hour. Flushing urinals have a maximum full flush volume of 1 litre' (Climate Delegated Act, 7.1).

49 Climate Delegated Act, Appendix A, I (a).

50 Commission Impact Assessment Report (n 35) 40.

51 Climate Delegated Act, Appendix B and D.

identified through EIA need to have been addressed,[52] and for biodiversity, the required mitigation and compensation measures need to have been implemented.[53] These last requirements, though, are not easy to implement effectively, as discussed in the following section.

3.3 Implementation and Enforcement

Despite the DNSH being specified in detailed rules under the Taxonomy Regulation, the implementation and the judicial enforcement of such rules can face obstacles.

Monitoring financial market participants' compliance with the disclosure requirements set in the TR is the task of national competent authorities (NCAs), such as financial markets authorities.[54] Member States shall ensure that their NCAs have all the necessary supervisory and investigatory powers for the exercise of this function, and shall lay down rules so that sanctions are effective, proportionate and dissuasive.[55] However, how compliance with the DNSH criterion shall be controlled is not regulated, which creates uncertainty regarding how to do so. For instance, a NCA could sanction the lack of a specific climate risk and vulnerability assessment, a procedural requirement necessary for an activity not to cause significant harm to adaptation. However, as recalled above, for an activity not to harm the protection of water resources, not only should an EIA have been conducted, but also the risks identified through the EIA must have been addressed.[56] The technical criteria, however, do not explain at which stage such risk should have been addressed; neither do they specify when the implementation of compensation measures identified during an EIA should be implemented for such activity to be considered not to cause significant harm to biodiversity.[57]

A different set of issues emerges from the point of view of judicial enforcement of the Taxonomy Regulation and Delegated Acts. Challenges to the classification and the methodologies used in the taxonomy delegated acts to assess that the economic activity does not harm any environmental objective could face several limitations.

Article 263(4) TFEU allows natural and legal persons to challenge acts of EU bodies and institutions addressed to that person, or of 'direct and individual concern' to them. Since the *Plaumann* judgment the Court has interpreted

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52 Climate Delegated Act, Appendix B.
53 Climate Delegated Act, Appendix D.
54 Taxonomy Regulation, art 21.
55 Taxonomy Regulation, art 21–22.
56 Climate Delegated Act, Appendix B.
57 Climate Delegated Act, Appendix D.

the standing requirement of 'individual concern' very narrowly, requiring that the applicants be affected by reason of certain attributes or circumstances that are peculiar to them, so that by virtue of these factors they are differentiated individually from all other legal persons.[58] Under this approach acts that cannot be challenged directly shall be reviewed through a preliminary reference, as they would be implemented at the national level, notably by taking enforcement measures. Due to several criticisms that emerged over time,[59] with the Treaty of Lisbon the fourth paragraph of Article 263 TFEU was revised, now including a new category of acts that can trigger direct judicial review from the Court of Justice: that of a '*regulatory* act which is of *direct* concern to [an applicant] and *does not entail implementing measures*' (italics added).[60]

As the Taxonomy Delegated Acts are regulatory acts (that is, non-legislative acts of general application, according to the *Inuit* case law)[61] that do not entail implementing measures, they could be successfully challenged by plaintiffs having *direct* concern. 'Direct concern' requires a direct causal link between the contested measure and the impact on the applicant's *legal* situation.[62] While the application of the CJEU's line of reasoning on *individual concern* has traditionally limited access to court for environmental NGOs,[63] the new fourth paragraph of Article 263 TFEU broadens standing insofar as regulatory acts not entailing implementing measures are concerned, which is the case for the Taxonomy Delegated Acts. However, in some recent interpretations the Court has appeared to apply a stringent standard also when assessing the *direct* concern requirement.[64] As a result, challenges to the Taxonomy Delegated Acts based on Article 263(4) TFEU could be declared inadmissible for lack of

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58 Case 25/62 *Plaumann & Co v Commission* ECLI:EU:C:1963:17.

59 Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197 (Opinion) and ECLI:EU:C:2002:462 (Judgment); Case T-177/01 *Jégo-Quéré et Cie SA v Commission* ECLI:EU:T:2002:112, on appeal, Case C-263/02 P *Commission v Jégo-Quéré et Cie SA* ECLI:EU:C:2004:210.

60 Kieran Bradley, 'Judicial Review of EU Administrative Rules, to Lisbon and Beyond' in Carol Harlow et al (eds), *Research Handbook on EU Administrative Law* (Edward Elgar Publishing 2017) 423.

61 Case C-583/11 *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, paras 59–61.

62 Joined Cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori v Commission* ECLI:EU:C:2018:873, para 42.

63 Ioanna Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' (2021) 58 Common Market Law Review 777.

64 Roberto Caranta, 'Knock, and It Shall be Opened Unto You: Standing for Non-Privileged Applicants after *Montessori*' (2021) 58 Common Market Law Review 163, 174–178.

direct concern. In the case *Association Trinationale de Protection Nucléaire (ATPN)*, the Court did indeed declare inadmissible for lack of direct concern the action that an association for protection against nuclear risk had brought against the inclusion of this technology in the Climate Delegated Act.[65] The Court based its reasoning on the argument that the addressees of the act are exclusively the financial market participants, having to comply with disclosure requirements.[66] Applying this approach to the case of the Taxonomy Delegated Acts, a 'double standard' of judicial protection emerges, as only financial market participants, being considered 'directly concerned', could bring an action against the Taxonomy Delegated Acts under Article 263(4) TFEU, while environmental NGOs are precluded from directly accessing the CJEU.

Environmental NGOs, however, can challenge the Taxonomy Delegated Acts through the internal review procedure under article 10 of Regulation no. 1367/2006 (the so-called Aarhus Regulation).[67] After the 2021 revision, the provisions concerning who can have access to the internal review procedure and identifying the acts that can be subject to review have been broadened, no longer being limited to acts of individual scope.[68] As a result, the Taxonomy Delegated Acts could be subject to an internal review. However, the limitations of the internal review system still stand, in terms of its lack of impartiality (given that the decision is taken by the same institution or body that issued the contested act).[69]

According to article 12 of the Aarhus Regulation, after a decision is taken within such internal review, the NGO that made the request can institute judicial proceedings before the Court of Justice. In such proceedings, however, the NGO can only challenge the decision rejecting the request for internal review,

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[65] Case T-567/22 *Association Trinationale de Protection Nucléaire (ATPN) v Commission* ECLI:EU:T:2023:189; Case C-340/23 P *Association Trinationale de Protection Nucléaire (ATPN) v European Commission* ECLI:EU:C:2024:806.

[66] Case C-340/23 P *ATPN v European Commission* (n 65) paras 57–64.

[67] Regulation (EC) 1367/2006 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 [2006] OJ L264/13.

[68] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 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 [2021] OJ L356/1.

[69] Luca de Lucia, 'The New Aarhus Regulation and the Defensive Behaviour of the European Legislator' (2022) 16 Review of European Administrative Law 7, 26–7.

and not the substance of the original act.[70] As a result, the judicial proceeding can be based only on the grounds and on the evidence that were raised in the context of internal review.[71]

Three requests for internal review were filed on the basis of Article 10 of the Aarhus Regulation, contesting several aspects of the Climate Delegated Act.[72] The Commission, examining them jointly, found the requests admissible but unfounded. Some environmental NGOs challenged these rejection decisions, and the cases are currently pending.[73] Among other claims, they allege that the contested Delegated Act breached the 'DNSH requirement'.[74] As the grounds of review appear to be the same ones first advanced within the internal review, they should all be examined on the merits. A decision on the merits, moreover, is expected to be reached in the case of a challenge brought on the same issue by Austria, a privileged applicant.[75] What standard of review the CJEU will apply remains to be seen. In the few cases that reached a decision on the merit on the basis of article 12 of the Aarhus Regulation, the CJEU has never shown any willingness to depart from its well-established deferential position in the cases of complex scientific assessment, according to which it should restrict itself to examining the accuracy of the findings of fact and law and to verifying that the action is not vitiated by a manifest error or a misuse of powers, and that the public authority did not clearly exceed the bounds of its discretion.[76]

Having examined the venues and limitations for access to justice in the case of the Taxonomy Delegated Acts, the analysis will now turn to examining the content and justiciability of the DNSH in a different legal framework, the RRF Regulation.

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[70] Case C-82/17 P *TestBioTech and Others v Commission* ECLI:EU:C:2019:719, para 38.

[71] Ibid para 39; T-108/17 *ClientEarth v Commission* ECLI:EU:T:2019:215, para 55.

[72] Commission, 'Requests for Internal Review' <https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en> accessed 9 December 2024.

[73] Case T-214/23 *Greenpeace and Others v Commission* (Action brought on 18 April 2023); Case T-215/23 *ClientEarth and Others v Commission* (Action brought on 18 April 2023).

[74] Case T-214/23 *Greenpeace* (n 73) paras 5 and 11; Case T-215/23 *ClientEarth* (n 73) para 4.

[75] Case T-625/22 *Austria v Commission* (Action brought on 7 October 2022).

[76] Opinion of AG Szpunar in Case C-82/17 P *TestBioTech and Others v Commission* ECLI:EU:C:2018:837, paras 55–6. In critical terms, see Giulia Claudia Leonelli, 'Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending' (2021) 40 Yearbook of European Law 230, 262–3.

4. THE TRANSPOSITION OF THE DNSH PRINCIPLE IN THE RRF REGULATION

As will now be shown, within the NGEU the features of the DNSH – its content, function and enforcement – are very distant from those examined in the Taxonomy Regulation.

4.1 Green Conditionality in the RRF and its Exception

Within the Next Generation EU (NGEU) plan, the Commission was authorized to borrow funds on capital markets, to be distributed to Member States in the form of loans or grants, following the procedure set forth in the RRF Regulation. To access RRF funds, Member States submitted their national recovery and resilience plans (NRRPs), which were assessed by the Commission and then approved by an implementing decision of the Council (CID).[77]

According to the RRF Regulation, in order to be eligible for financing, the measures envisaged in the NRRPs have to contribute to six pillars, one of them being the 'green transition'.[78] For the green and digital transformations (the latter also being a pillar), the RRF identifies the minimum threshold to be met (respectively, at least 37 per cent and at least 20 per cent of the NRRP's total allocation).[79] To contribute to the green transition, measures shall contribute to climate targets, and in particular to climate neutrality by 2050;[80] to environmental objectives, such as biodiversity and the circular economy; and to sustainable growth, energy efficiency and building renovation.[81]

In addition to demanding that a specific share of the funds should be allocated to the green transition, the RRF prescribes that only measures respecting the principle of DNSH shall be supported, thereby referring to Article 17 of the Taxonomy Regulation.[82] Within the RRF context, the DNSH works as a sort of '*environmental conditionality mechanism*' with which – in the original formulation of the RRF – any national policy has to comply in order to be financed through the RRF. A limited exception to the DNSH principle was introduced through an amendment of the RRF Regulation[83] adopted with

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77 RRF Regulation, art 20(1).
78 RRF Regulation, art 3.
79 RRF Regulation, art 19(3), e) and f).
80 RRF Regulation, art 4.
81 RRF Regulation, recital 11 and art 18(4) b).
82 RRF Regulation, arts 5(2) and 19(3) d).
83 European Parliament and Council Regulation (EU) 2023/435 of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No. 1303/2013,

the REPowerEU Plan, the EU's response to the energy crisis that spread after Russia's invasion of Ukraine.[84] In order to end dependency on Russian fossil fuels, investments in liquefied natural gas and oil infrastructures – inherently in conflict with the green transition – can be included in the REPowerEU chapters added in the NRRPs.

According to the revised RRF Regulation, the Commission can exempt such investments from the DNSH clause if they are *necessary* and *proportionate* to meet immediate security of supply needs, taking into account cleaner feasible alternatives and the risk of lock-in effects.[85] Moreover, the Commission shall verify whether the Member State concerned has undertaken satisfactory efforts to limit and mitigate the potential harm to environmental objectives, without jeopardizing the achievement of the climate targets and the objective of climate neutrality by 2050. Quantitative and time limits are also set forth.[86]

The REPowerEU revision of the RRF, introducing an exception to the DNSH principle, reduces its capacity to work as a general green conditionality mechanism for all investments funded through the RRF. According to the data provided by the Commission, 2 per cent of the measures included in REPowerEU chapters have been allocated to financing gas infrastructures, with Croatia, Italy and Poland being the main actors directing their financing towards this goal.[87] In all three cases, the Commission assessed that the DNSH exception was justified.[88] Compliance with the conditions justifying such exception, however, is affirmed very briefly in the documents accompanying the amendments to the CIDs, so that it cannot be inferred whether the Commission conducted a full assessment of the proportionality of such exception.[89]

(EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC [2023] OJ L63/1 ('Revised RRF Regulation').

84 Commission, 'REPowerEU Plan' (Communication) COM (2022) 230 final.

85 Revised RRF Regulation, art 21c (6).

86 The measures exempted from the DNSH shall be planned to be in operation by 31 December 2026 and their estimated costs shall not exceed 30 % of the total estimated costs of the measures included in the REPowerEU chapter: Revised RRF Regulation, art 21c (9).

87 Commission, 'REPowerEU Chapters in the RRPs' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/rePowerEu.html?lang=en> accessed 9 December 2024.

88 Council Interinstitutional File 2023/0442 (NLE) doc no 16051/23, 40–4; Council Interinstitutional File 2023/0425 (NLE) doc no 15834/23, 47–54; Council Interinstitutional File 2023/0426, doc no 15835/23, 40–7.

89 Ibid.

But how does the DNSH clause work in practice? How was compliance with DNSH controlled by the Commission? The analysis will now examine in greater depth the content and functioning of the clause.

4.2 Implementation and Enforcement of the DNSH Clause in the NRRPs

The RRF delegated the Commission to provide technical guidance to Member States to ensure that measures included in their NRRPs comply with the DNSH principle.[90] The Commission's technical guidance on the application of DNSH under the RRF was adopted in 2021 and revised in 2023.[91] The following aspects need to be stressed.

First, as for the content of the clause, the technical guidance explains that the TSC defined in the Taxonomy delegated acts do not have any direct binding implication for the implementation of the RRF.[92] Member States, however, have the option of relying upon such criteria. Moreover, as for the interaction between the DNSH requirement and compliance with other EU environmental rules, the Commission clarifies that the DNSH assessment is an entirely 'separate obligation' and that compliance with other applicable EU environmental law and impact assessment related to the environmental dimensions of a measure, albeit having to be taken into account for the DNSH assessment, does not waive such requirement.[93] From this affirmation, the DNSH assessment would appear to be a separate and additional requirement, unrelated both to the TSC and to other environmental rules.

Second, as for how DNSH compliance is to be proved, Member States have to provide an individual DNSH assessment for each measure within each component of the plan,[94] achieved by compiling checklists based on a template provided by the Commission. Furthermore, for certain measures the DNSH assessment could be carried out in a simplified form (for example, reforms concerning areas such as labour or energy efficiency measures), while the simplified form was excluded for investments in areas such as waste management, given the higher risk of environmental harm in these latter activities.

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90 RRF Regulation, recital 25.

91 Commission, 'Commission Notice – Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation' [2021] OJ C58/1; Commission, 'Commission Notice – Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation' C(2023) 6454 final.

92 COM (2021) 188 final (n 27) 5.

93 C(2023) 6454 final (n 91) 4–5.

94 Ibid 3.

According to the European Court of Auditors (ECA), though, not all Member States performed a substantive DNSH assessment and some of them opted for the simplified approach even for measures with higher risks.[95]

Third, as for the stage in which DNSH compliance was controlled, the Commission made such assessment, first of all, in the phase of approval of the plans (on the basis of Member States' checklists). During the implementation of the plans, control on DNSH compliance follows the general rules set forth in the RRF. The Commission assesses whether milestones and targets – respectively, the qualitative and quantitative achievements to be reached according to a specific timeline[96] – have been satisfactorily fulfilled and authorizes the disbursement of the financial instalments;[97] in the case of a negative assessment, the payment of all or part of the financial contribution shall be suspended.[98] This means that, insofar that DNSH is integrated in the milestones and targets as described in the Council implementing decision approving the NRRP, the Commission has to verify compliance with DNSH in the implementation phase.[99]

As for the enforcement of the clause, the interpretation of DNSH could theoretically be the object of indirect review, in the case of a preliminary reference. To the best of our knowledge, national courts deciding on cases concerning projects funded under the RRF, and in which lack of compliance with DNSH was argued, have never activated this tool. Time constraints (the timeframe of the RRF ending in 2026) might militate against this perspective.

An initial examination of the Italian case-law, however, shows that in practice uncertainties still arise regarding the actual content of the DNSH under the RRF. In a case concerning the funding of a railway modernization project under the NRRP, initiated by the town of Serra San Quirico (in the Marche Region), within whose territory the project was going to be developed, it was argued that the project was not eligible under the RRF, as it would cause significant harm to biodiversity and to natural water resources present in the area of construction.[100] The tribunal dismissed the claim, arguing that, at the moment of the presentation of the project, the national railway company had duly demonstrated compliance with the TSC laid down under the Taxonomy Delegated Act to exclude such harm.[101] This case demonstrates that, even if not binding

95 ECA, 'Green Transition – Unclear Contribution from the Recovery and Resilience Facility' (Special report 14/2024) para 41.
96 RRF Regulation, art 20(5) a).
97 RRF Regulation, art 24(2–5).
98 RRF Regulation, art 24(6–9).
99 C(2023) 6454 final (n 91) 8; Thaler (n 29); ECA Special report (n 95) para 40.
100 T.A.R. Lazio sez. III – Roma, n. 18141/2023.
101 Ibid paras 17.1–17.2.

for DNSH in the RRF, TSC have been relied upon by economic operators that participated in the procurement procedures through which the projects were funded, in order to demonstrate their compliance with DNSH. Additionally, courts may rely on these rules in assessing such compliance. However, further research is needed in order to verify whether courts will engage with a more substantial assessment of such compliance.

5. THE LEGAL UNCERTAINTY OF DNSH

Within EU law, several versions of the 'do no harm' principle can be identified.

The DNSH concept was introduced in the SFDR Regulation, one of the first pieces of EU sustainable finance legislation, according to which a sustainable investment shall not significantly harm either the environment or any social objective.[102] As such, the specific concept of DNSH introduced in the SFDR clearly aligns with the traditional theoretical framework of sustainable development. Within the EGD Communication and the eighth EAP, the 'do no harm' principle is situated in the broader EU green transition strategy, as all policies shall do no harm to any EGD objective. Moreover, there is no reference to such harm being 'significant' and the addressees of such rule (as part of the eighth EAP) are EU institutions as well as national, regional and local administrations. What this principle entails in term of procedural obligations, however, is clarified in the EGD Communication in terms that are not recalled in the eighth EAP, that is, through better regulation tools. Being set forth in a Communication and in an EAP, though, this principle lacks specific enforcement mechanisms. Hence, from a legal perspective, this form of the 'do no harm' approach is very weak; although as a communication tool, particularly as a starter for introducing the 'do no harm' approach in subsequent binding secondary law, its value should not be underestimated.

Within the Taxonomy and the RRF Regulations, the DNSH is codified in more specific terms. As opposed to the EGD and the eighth EAP, it is connected to a higher threshold, as the harm to be assessed has to be 'significant', which is a less ambitious aim compared to 'do no harm'.

The function of the DNSH in the Taxonomy Regulation is clear: ensuring that progress in terms of one environmental objective is not made at the expense of other environmental values.[103] In this sense, the DNSH criterion provides a new approach in EU environmental law that can potentially ensure more coherence among different environmental requirements: it aims to play an essential role in addressing both the climate-related goals of mitigation

102 SFDR Regulation, recital 17 and art 2(17).
103 Commission Impact Assessment Report (n 35) 38.

and adaptation – the first two objectives of the EU Taxonomy – and the other four environmental objectives, centred on the protection of biodiversity, water resources, pollution prevention and circular economy.[104]

While the inherent logic of the DNSH principle can be broadly shared, the analysis has shown several problematic aspects from the point of view of legal certainty. The Technical Screening Criteria (TSC) set forth in the Taxonomy delegated acts are very detailed rules, aimed at providing clarity. When they follow a quantitative approach, the TSC specify the DNSH principle in an extremely granular and precise way. However, when a procedural approach is adopted in the TSC, several uncertainties arise. For example, for an activity not to significantly harm the protection of water resources and biodiversity, not only should an EIA have been conducted, but also the risks identified through the EIA must have been addressed and the mitigating measures must have been implemented. However, the TSC do not clarify how and when the actual implementation of the mitigation measures should be checked, nor how it should be controlled that the risks eventually identified through the EIA have been addressed, for the DNSH to be complied with.

Uncertainties concerning the actual content of the DNSH also emerge within the RRF. According to the Commission's notice, the TSC set forth in the Taxonomy delegated acts do not have any direct binding implications within the RRF. This appears to be a remarkable distinction: the TSC are binding for private actors in order to be able to qualify a certain investment as environmentally sustainable according to the Taxonomy Regulation, but they are at the same time not binding for Member States in the course of acquiring funding from the EU according to the RFF. However, Member States have the option of relying upon the TSC; moreover, the analysis of the Italian case law demonstrates that both courts and the economic actor receiving the funds have referred to the TSC when adjudicating on the lawfulness of certain projects. Lastly, the Commission's notice is only intended to assist Member States, leaving open a different interpretation from that of the Court of Justice.

The high level of uncertainty surrounding the DNSH has been criticized both by the administrations receiving the RRF funds and by the companies participating in the related procurement procedures.[105] The analysis conducted in this chapter confirms that such uncertainty is not a mere perception of the public and private actors involved; on the contrary, it stems from the choices made in the EU legal texts (which refer to the DNSH alternatively as a principle or as a criterion). This lack of clarity creates a tension with the need for

104 Ibid.

105 ECA Special report (n 95) para 41.

legal rules to respect legal certainty, one of the fundamental principles of the rule of law.

Given the uncertainty in the actual content of the DNSH, it is unsurprising that the implementation of this criterion also presents significant challenges. Within the RRF framework, in the approval phase of the plans, compliance with the DNSH criterion was assessed by the Commission on the basis of a checklist compiled by Member States, in a rather formalistic way. Even stronger challenges, however, emerge during the implementation phase, as control over DNSH compliance will depend on whether and how DNSH compliance has been incorporated into the targets and milestone related to measures included in a NRRP, an aspect that can vary both among different measures within the same NRRP and across national plans.

The doubts concerning the capacity of the DNSH to effectively protect the environmental objectives for which it has been put in place are further magnified because of the limitations of judicial enforcement. The DNSH could be subject to indirect review, in the event of a preliminary reference arising from national cases concerning projects funded under the RRF. However, no such case has yet occurred in practice. On the contrary, several requests for internal review were brought on the basis of the Aarhus Regulation, contesting several aspects of the TSC for DNSH set forth in the Climate Delegated Act. After the requests were considered unfounded by the Commission, several actions were brought before the Court of Justice and are currently pending. It remains to be seen whether the Court will be willing to go beyond the deferential approach it frequently adopts for complex economic assessments.

In conclusion, while the codification of the DNSH has the potential of ensuring more coherence in the environmental domain – thereby avoiding that certain projects lead to significant harm to defined environmental values – it is uncertain whether this will be effectively reached in practice, because of inconsistencies in its formulation, combined with limited access to justice.[106]

[106] The chapter was completed in February 2025 so some of the latest developments, such as the Omnibus package, are not covered in the chapter.