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With the European Commission’s recent draft document¹ that includes, albeit under restrictive conditions, gas and nuclear power generation plants within the taxonomy of eligible investments for the purposes of the green transition, a decisive issue has come to a head, an issue on which the actual achievement of the Green Deal sustainable growth objectives depends: what is really meant by the “do no significant harm” (DNSH) principle.

The Commission's proposals are now trying to overcome some of the rigidities with which that principle was interpreted in the previous application documents of the Taxonomy launched with the Regulation of 18 June 2020,² where it was formulated in a rigid form that actually risks compromising precisely the reduction of emissions by 2030 and their zeroing by 2050.

In this paper I propose an alternative interpretation of the “do no significant harm” principle so that it becomes an effective lever, not an obstacle, for the fundamental investments of a sustainable development strategy.

The DNSH principle in the EU documents

The “do no significant harm” principle was set out as a qualifying element of the eligibility of an investment for the purpose of accessing financial instruments more favorable in terms of conditionality and cost, by Regulation 2020/852 of the European Parliament and of the Council.

In Article 3, the Regulation specifies that “an economic activity shall qualify as environmentally sustainable where that economic activity: (a) contributes substantially to one or more of the environmental objectives” and “(b) does not significantly harm any” of them. The objectives are indicated in the following article 9: “(a) climate change mitigation; (b) climate change adaptation; (c) the

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¹ The draft is dated December 31, 2021

² (EU) Regulation 2020/852

sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems."

The Regulation entrusted the establishment of the criteria for the technical screening of sustainable economic activities pursuant to the Taxonomy to a European Commission act. The Commission thus launched the Delegated Regulation of 4 June 2021 which establishes those criteria in detail.³ For the purposes of this paper, I would like to recall that: in the energy section of the Delegated Regulation there is neither electricity generation from natural gas nor that from nuclear energy, while the natural gas transport and distribution networks are present within the limits in which the investment relates to their conversion or upgrading for the transmission of renewable and low-carbon gases or for the transport of hydrogen;⁴ in the section concerning the management of the waste cycle, the incineration activity is not considered.⁵

In parallel to this taxonomy elaboration, the Recovery and Resilience Facility (RRF) was developed with the Regulation of the European Parliament and of the Council of 12 February 2021,⁶ which specifies in art. 5 that "the Facility shall only support measures respecting the principle 'do no significant harm'."

The RRF Regulation was accompanied by a Communication with which, also on 12 February 2021, the Commission provided the technical guidelines for the application of the DNSH principle in the context of the RRF.⁷ I recall here two particularly significant prescriptions from this Communication. The first indicates that "Member States need to provide an *individual* DNSH assessment (Commission's italics) for each measure" of the National Recovery and Resilience Plan (NRRP), so that "the DNSH assessment is not to be carried out at the level of the Plan or of individual components of the Plan, but at measure level."⁸ The second provides that "the assessment of the negative environmental impact of each measure should be carried out against a 'no intervention' scenario by taking into account the environmental effect of the measure *in absolute terms* (my italics). This approach consists of considering the environmental impact of the measure, compared to a situation with no negative environmental impact," and therefore it "is not assessed in comparison to the impact of another existing or envisaged activity that the measure in question may be replacing."⁹

Here I point out two of the examples that are given in the text and in the annexes: "measures related to power and/or heat generation using fossil fuels (including natural gas, my notation), as well as related transmission and distribution infrastructures as a general rule should not be deemed compliant under DNSH for the purposes of the RRF;"¹⁰ an investment which supports the construction of new waste-to-

³ Commission Delegated Regulation (EU) 2021/2139

⁴ Ibidem., Annex I, par. 4.14.

⁵ Ibidem., par. 5.

⁶ (EU) Regulation 2021/241

⁷ COM (2021) 1054 final.

⁸ Ibidem, pp. 2-3.

⁹ Ibidem, p. 7.

¹⁰ Ibidem, p. 8.

energy plants, “while it aims to divert [...] combustible non-recyclable waste from landfills”, would still violate the DNSH principle as it “leads to a significant increase in incineration of waste.”¹¹

Compared to this very restrictive approach contained in the Guidelines, a partially different perspective is introduced by the late December draft of the Commission's amendment document to the Delegated Regulation of 4 June 2021 on the technical application criteria of the Taxonomy.¹² The new Delegated Act supplements the original one with reference to two activities that were not included in it, namely the production of electricity from natural gas and that through nuclear energy.

For nuclear energy - which is considered capable of giving “a substantial contribution to the climate change mitigation objective”¹³ - the draft provides a series of prescriptions regarding the safety of the plants and their location, the treatment of waste, and the monitoring of activities so that the DNSH criterion can be considered satisfied with reference to the other environmental objectives.¹⁴ For the activity of electricity generation starting from natural gas - which is considered capable of making a substantial contribution to the climate change mitigation objective as a “transitional activity as referred to in Article 10 (2) of Regulation (EU) 2020/852” on Taxonomy¹⁵ - the draft provides for the threshold values for permissible greenhouse gas emissions, the capacity limits related to the capacity of the coal or oil plants that are replaced, compatibility with the use of renewable and low-emission gases, and the existence of an integrated energy-climate plan in which the Member State has committed itself to abandoning coal-fired generation.¹⁶

An evaluation: the need to get out of an impasse

It is clear that with the draft amendment document the European Commission is trying to overcome some of the rigidity with which the “do no significant harm” principle was applied in previous documents.

In particular, the substantial exclusion of natural gas from Delegated Regulation 2021/2139, added to the restrictions in the eligibility criteria of the possible technological transformations in road and sea transport vehicles, seriously risks hindering the achievement of the emission reduction targets that the Union has set for 2030.¹⁷ Indeed, if in order to achieve the 55% reduction in emissions by 2030 it is

¹¹ Ibidem, Annexes 1-4, p. 12.

¹² Draft dated December 31, 2021, already mentioned in footnote 1.

¹³ Ibidem, p. 3.

¹⁴ Ibidem, Annex 1, para. 4.26-4.28.

¹⁵ Ibidem, p. 28.

¹⁶ Ibidem, para 4.29-4.31.

¹⁷ The same Commission forecasts contained in SWD (2020) 176 final, Annexes, p. 50, fig. 36 and p. 61, fig. 49, however, indicate a still significant use of natural gas in 2030; moreover, the forecasts seem to allow - p. 62, fig. 50 and pp. 75-76, figs. 62-63 - processes of replacing oil and coal with gas still limited in sectors, such as heavy transport and some industrial processes, which at the moment also appear not easy to convert to electricity. On a global level, the International Energy Agency estimates that, in the path towards zero emissions by 2050, the very substantial increase in renewables in the mix of sources for electricity production will require to be

absolutely necessary to accelerate the development of renewable sources and progress in energy efficiency - as well as the development of biofuels and hydrogen research and experimentation - it also appears necessary to safeguard the possibilities of replacing oil and coal with gas in all uses where this can lead to the reduction of emissions more rapidly. Failure to achieve the 55% target by 2030 would have not only effects on the current level of emissions but also significant carry-over effects on achieving the goal of their zeroing in 2050, making it much more difficult and expensive. Faced with the evidence - supported by the working materials and the conclusions of COP26 in Glasgow - that the current trajectory in the world (but also in Europe) in greenhouse emissions is incompatible with the goal of containment in 1.5 ° C of global warming compared to the pre-industrial level, we cannot afford delays in adopting all the measures necessary to change that trajectory.¹⁸

It would rather be necessary for the amending scope of the new Delegated Act to go beyond the still partial and restrictive indications contained at the moment in the draft and pave the way for the consideration of the role that the entirety of the possible processes of replacing oil and coal with gas can and must play in the transition, both in electricity generation and in the transport system and industrial production processes.

But how did we end up in the impasse that the draft is trying in some way to unblock? Provided that the "do no significant harm" principle is in itself a positive novelty that ensures the internal consistency of the green transition strategy - avoiding that progress in the pursuit of an environmental objective is achieved at the expense of other objectives - the cause of the impasse lies in the very particular way in which the principle has been formulated in the Acts launched up to now.

In this regard, the approach adopted in the Communication on the Guidelines for the technical screening of investments in the RRF is particularly significant.¹⁹ The two prescriptions mentioned above are decisive in determining the "bottleneck" that risks blocking the transition to projects of great value for the success of the European roadmap.

The first, as we have seen, provides that for the purposes of the DNSH assessment the impact of a given measure must be considered "*in absolute terms*," that is "compared to a situation with no negative environmental impact," and not "in comparison to the impact of another existing or envisaged activity that the measure in question may be replacing."²⁰ Since in absolute terms gas produces CO2 emissions, albeit much lower than those produced by oil and coal that it could replace, its use in electricity generation, in the transport system, and in manufacturing activities can only violate the criterion such as formulated in the Communication.

complemented at 2020 by the use of gas not lower in absolute terms than current levels and the same will happen for the industrial sector; cf. IEA, World Energy Outlook 2021: p. 125, fig. 3.12; p. 133, fig. 3.16; p. 213, fig. 5.2.

¹⁸ Cf. also IEA, World Energy Outlook 2021, p. 34, fig. 1.5.

¹⁹ See *supra* COM 2021/1054.

²⁰ *Ibidem*, p. 7.

Yet, looking at the overall path of decarbonization, we know that in some sectors the alternatives to coal and oil other than gas (electricity generation from renewables, heavy transport by road or sea, as well as industrial processes powered only by electricity or hydrogen or fuels with zero emissions) need investments in plants and further technological innovations that are unlikely to reach the scale necessary to reduce emissions by 55% by 2030. It would be quite logical, then, to consider natural gas as an energy source to be used during the transition phase, until those alternatives are fully developed: curbing the replacement of oil and coal with gas would mean slowing down the path of decarbonization.

But this logical conclusion is prevented by the second DNSH assessment prescription which, together with the one considered above, precisely determines the "bottleneck" I was talking about. I refer to the provision that imposes "an *individual* DNSH assessment for each measure" of the NRRP, without reference to the Plan or its components.²¹ In this way, the single measure is analyzed by removing it from the context within which it plays its role in the path of reducing emissions. Therefore - abstracting from the timeframes, methods and conditions for the adequate scale implementation of alternatives to natural gas in electricity generation, in heavy or maritime transport, and in industrial processes - the conclusion to which the Guidelines lead is to consider natural gas per se not compliant with the DNSH principle.

The results of such a way of interpreting the "do no significant harm" principle are paradoxical. Firstly, because, as mentioned, the technologies that use gas to replace oil and coal and therefore accelerate the abatement of CO₂ emissions, as well as other pollutants, are penalized. Secondly, because, even beyond the energy sector, the introduction and diffusion of "cleaner" technologies in a number of other sectors may be slowed down. The most striking example, in this regard, is that of incinerators.

As we have seen, the DNSH non-compliance of an investment aimed at supporting the construction of new waste-to-energy plants is made explicit in the Guidelines. It is recognized that it would help to divert "combustible non-recyclable waste from landfills", but it is reiterated that it would violate the DNSH principle as it "leads to a significant increase in incineration of waste."²² Such a conclusion of DNSH non-compliance always refers to the evaluation criterion "in absolute terms" combined with the specific consideration of the single measure outside any reference to a coherent plan for the management and closure of the waste cycle that makes use of all the best available technologies. The paradoxical result is that this decision ends up endorsing the choice made up to now by some local government authorities - for example in a part of Italy - to rely on landfilling until the extreme exhaustion of available spaces and for the remainder to resort to the export of waste to waste-to-energy plants located in other territories. With all due respect to the European principles of "proximity" in the treatment of waste and of overcoming landfilling.

²¹ *Ibidem*, p. 2.

²² *Ibidem*, Annexes 1-4, pp. 12.

We need to spread our wings

For the sake of the green transition, it is necessary and urgent to correct at the root the very particular way in which the "do no significant harm" principle has been applied in the Acts launched up to now in order to interpret it in a form that supports – and does not hinder - the set of strategic choices that the Green Deal needs. The analysis conducted in the previous paragraph highlights the key steps of a new, more advanced and comprehensive interpretation of the DNSH principle.

The first consists in adopting a *comparative*, not absolute, environmental impact assessment criterion: what matters to accelerate the abatement of emissions or pollution is the net environmental benefit of the investment. A project must therefore be assessed not with respect to a hypothetical state of nature but comparatively to the activities that are concretely replaced with that investment and that are already in place or would be realized in the future if the investment in question was not made: with respect to them the project must produce a positive net benefit.

The second step consists in the fact that this assessment in comparative terms must be carried out by considering the investment in the *framework of the green transition strategy* that the Member State is required to adopt and which must be consistent in its temporal development with the objectives set at European level. The individual investment, therefore, must be assessed with reference to the role it plays within the path of increasing the share of energy produced from renewable sources, of progress in terms of energy efficiency, of reduction of polluting sources, of protection of natural resources and of biodiversity. Therefore, the project must be compared with those alternatives that can be concretely - not abstractly - implemented with an equivalent timing and scale in order to achieve the planned transition targets.

It is only in this context - thus carrying out the assessment in comparative and strategic terms - that it becomes possible to address two further issues that will have decisive relevance in the concrete choices that the authorities will be called upon to make.

The first concerns the assessment of the possible "lock-in" effects created by an investment: an assessment which in itself requires taking into account the realization times and useful life as well as any future alternative uses of the infrastructure created, so as to make the intervention adopted for the transition consistent with the final objectives. The issue is relevant, for example, precisely for the supply and transport infrastructures of natural gas, for their role in the transition and for their future usability in the transport of gas from renewable sources and hopefully of hydrogen.

The second question concerns the trade-offs that may arise between the different objectives established by the Taxonomy. This is an issue that has so far been substantially "avoided," as if it were possible to consider only interventions that do not cause any harm to one or more environmental objectives compliant with the DNSH principle: a way to reduce "do no significant harm" to "do no harm." Concrete situations are often more complex, with benefits for one objective but possible harm for another. These trade-offs cannot be exorcized and will require a weighing of the costs and benefits of an investment by

the authorities that clarify the degree of "significance" of any harm and therefore the net environmental benefit of the intervention for the purposes of the path towards an environmentally compatible economy. It is with this in mind that the issue of waste-to-energy plants as a tool for closing the waste cycle, complementary to recovery/recycling processes and an alternative to landfill, must be addressed. The nuclear issue also cannot be addressed except by weighing the benefits (lower emissions) and costs (waste problem) and arriving at a positive or negative assessment of the net benefit.

In conclusion, the two assessment criteria indicated - comparative and strategic - would allow us to define a general framework for the application of the "do no significant harm" principle without paradoxes, paradoxes that risk causing serious harm to the green transition. We need to spread our wings: building an economy that has as its pole star the protection of the environment requires us to look with an open mind at the ways to realize the fundamental goal of a society that finally achieves a balanced, organic exchange between man and nature.