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Abstract

The concrete implementation of the Next Generation EU strategy and the recent emergence of energy security problem have brought a decisive issue to the foreground: what is really meant by the “do no significant harm” (DNSH) principle. Up to now, in the EU documents an extreme interpretation of the principle prevailed, that actually hinders investments which are essential for the green transition and the diversification of energy supplies. In this chapter I propose an alternative interpretation of the DNSH principle so that it becomes an effective lever, not an obstacle, for these fundamental investments.

1. Introduction

With the Delegated Act draft approved by the European Commission on February 2, 2022 - which 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 proposal – and the following May 18, 2022 REPowerEU Communication adopted in the light of the invasion of Ukraine by Russia¹ - are, in fact, trying to overcome some of the consequences of the rigidity with which that principle was interpreted in the previous application documents of the Taxonomy launched with the Regulation of 18 June 2020.² In those previous documents, the principle was formulated in an extreme form, that actually risks compromising precisely both the decarbonization roadmap (reduction of emissions by 2030 and their zeroing by 2050) and the diversification of energy sources.

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¹ COM (2022) 231 final.

² (EU) Regulation 2020/852

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 and for the achievement of the European energy security as quickly as possible.

2. 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 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 June 4, 2021 Delegated Regulation which establishes those criteria in detail for the first two environmental objectives.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

³ Commission Delegated Regulation (EU) 2021/2139

⁴ Ibidem., Annex I, para. 4.14.

⁵ Ibidem., para. 5.

⁶ (EU) Regulation 2021/241

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-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 February draft of the Commission's Delegated Act,¹² amending the Delegated Regulation of 4 June 2021 on the technical application criteria of the Taxonomy. 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 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

⁷ COM (2021) 1054 final.

⁸ Ibidem, pp. 2-3.

⁹ Ibidem, p. 7.

¹⁰ Ibidem, p. 8.

¹¹ Ibidem, Annexes 1-4, p. 12.

¹² The draft dated 2 February 2022, already mentioned at the beginning of this paper.

¹³ Ibidem, p. 3.

¹⁴ Ibidem, Annex 1, para. 4.26-4.28.

to in Article 10 (2) of Regulation (EU) 2020/852¹⁵ on Taxonomy¹⁵ - the draft provides 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

3. An evaluation: the need to get out of an impasse

It is clear that with the new Delegated Act 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 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

¹⁵ Ibidem, p. 28.

¹⁶ Ibidem, para 4.29-4.31.

¹⁷ Note that the same Commission forecasts contained in SWD (2020) 176 final, Annexes, p. 50, fig. 36 and p. 61, fig. 49, indicate a still significant use of natural gas in 2030; and that these forecasts - p. 62, fig. 50 and pp. 75-76, figs. 62-63 - seem to count only modest processes of replacing oil and coal with gas in sectors, such as heavy transport and some industrial processes, which could instead benefit from new gas-based technologies while, at the moment, 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 complemented at 2030 by an 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.

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 of the new Delegated Act 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.

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 and pollution. 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

¹⁹ See *supra* COM 2021/1054.

²⁰ *Ibidem*, p. 7.

²¹ *Ibidem*, p. 2.

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!

4. An open minded approach to the DNSH principle

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

²² Ibidem, Annexes 1-4, pp. 12.

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 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.

5. The war, REPowerEU and Taxo4

The European Commission Communication of 18 May 2022 on REPowerEU strategy opens by noting that "unprecedented geopolitical and economic events have drastically impacted the Union's society

and economy”²³. The invasion of Ukraine by Russia has brought back to the foreground the issue of energy security, and REPowerEU is aimed at giving the tools to Member States and the Union in order to address this issue. In particular, the National Recovery and Resilience Plans “shall contain a REPowerEU chapter”, with reforms, investments and other measures aiming to “improving energy infrastructures and facilities to meet immediate security of supply needs for oil and gas, notably to enable diversification”, and “boosting energy efficiency in buildings, decarbonizing industry, [...] and increasing the share of renewable energy”²⁴.

The Communication does not question the way the DNSH principle has been interpreted up to now, and prefers to take a shortcut: “a targeted exemption from the obligation to apply the do no significant harm principle [...] for reforms and investments improving energy infrastructure to meet immediate security” and “to enable diversification” of supply²⁵.

Of course, the solution adopted in REPowerEU Communication has the advantage of avoiding lengthy discussions and immediately unlocking necessary and urgent infrastructures. But it leaves in shadow the role of gas infrastructures not only for energy security but also, as emphasized before, for the green transition itself.

A timid – very timid - step towards a more open way of interpreting the DNSH principle can be found in some passages of the latest document published by the Technical Working Group of the Platform on Sustainable Finance²⁶. The document is called Taxo4, because it provides recommendations for the four environmental objectives other than climate change mitigation and climate change adaptation, addressed by the Regulation 2021/2139.

Taxo4 does little to deal with the DNSH principle: in a short paragraph, the document hints that it would be useful “to undertake a review of the DNSH criteria [...] to improve consistency and usability of the Taxonomy”,²⁷ but does not give more than some very generic, methodological indications.

Later, in dealing with air transport, the document introduces a criterion that in fact abandons the absolute and specific approach to the DNSH evaluation in favor of a comparative and strategic one. The Commission’s strategy proceeds from the awareness that the “so-called zero emission aircraft, electric or powered by green hydrogen” will become ready for market not earlier than 2035; “until then, incremental efficiency improvements of airframes and engines in combination with the use of sustainable aviation fuels (SAF) producing less CO₂ over their life cycle than conventional jet fuel are the main mitigation options available to the sector”, so that “aviation can be included in the taxonomy

²³ COM (2022) 231, p. 1.

²⁴ Ibidem, p. 15.

²⁵ Ibidem, p. 7.

²⁶ See Platform on Sustainable Finance: Technical Working Group, Part A and Part B, March 2022.

²⁷ Ibidem, Part A, p. 73.

as a transition activity” and “the replacement of old, less efficient aircrafts with new, more efficient ones” can satisfy screening criteria²⁸.

This is, however, one of the very few cases in which a comparative and strategic criterion is adopted in the document. The same, for instance, does not happen for the incinerators, which in the Annex dedicated to waste management remain excluded by the Taxonomy²⁹. As well as it is really meaningful that the Annex dedicated to manufacturing does not deal with the most energy-intensive sectors³⁰.

6. We need a flapping of wings

Even after the REPowerEU and Taxo4 documents, the DNSH interpretation remains essentially the extreme one, which per se hinders investments that are fundamental for green transition and energy security: Taxo4 contains only timid steps towards a more open interpretation of the principle, and REPowerEU simply uses the shortcut of exemptions from the application of DNSH, which is like saying that the principle must be circumvented if you do not want to compromise the European energy security objectives.

It is time to free ourselves from the straitjacket of a rigid and short-sighted approach, and to adopt the open mind interpretation of the DNSH principle presented above in section 4 and based on:

- a *comparative*, not absolute, environmental impact assessment criterion: what matters in the acceleration of 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;
- an assessment which considers the investment in the *framework of the green transition strategy* that the Member State is required to adopt; a 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 with an assessment in comparative and strategic terms that it becomes possible to address two further issues - the possible "lock-in" effects and the trade-offs arising between different environmental objectives - which will have decisive relevance in the concrete choices that the authorities will be called upon to make.

In conclusion, we need a flapping of wings: building an economy that has the protection of the environment as its guiding star requires looking with an open mind at the ways of realizing the fundamental goal of a society that finally achieves a balanced, organic exchange between mankind and nature.

²⁸ Ibidem, Part B, pp. 525-526.

²⁹ See Part B, Chapter 11.

³⁰ Ibidem, Chapter 2.