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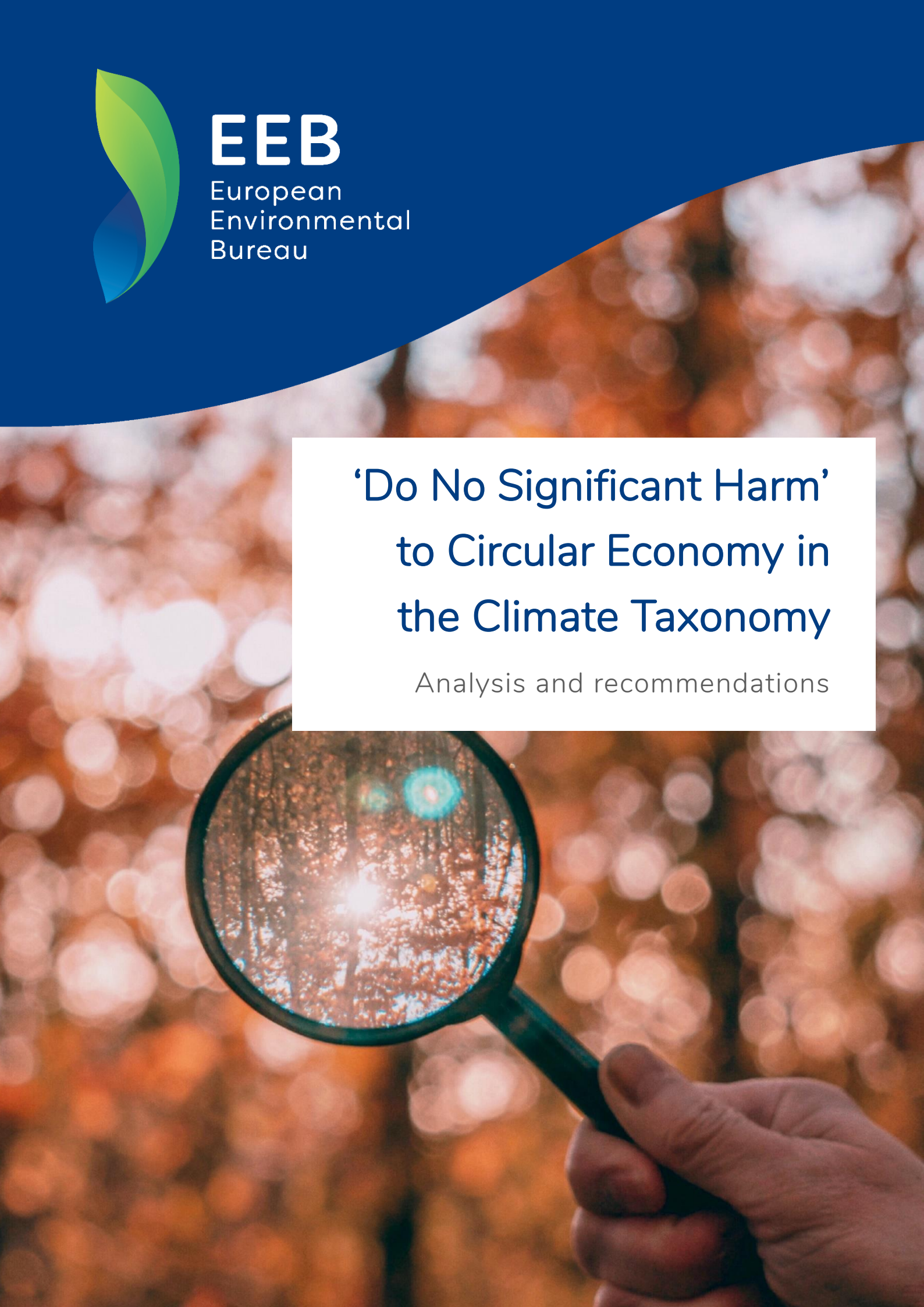
‘Do No Significant Harm’ to Circular Economy in the Climate Taxonomy

Analysis and recommendations



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Executive Summary

This report critically reviews how the Do No Significant Harm (DNSH) principle has been operationalised in the first Taxonomy delegated regulation on climate change mitigation and adaptation. The **focus is put on the transition to the Circular Economy** with the goal of assessing whether the first Taxonomy delegated act offers adequate guarantees against the risks of environmental burden shifting between climate and other environmental objectives.

The assessment looked at the DNSH criteria for the Circular Economy as they have been set by the European Commission in its delegated regulation (EU 2021/2139) covering substantial contribution to climate change mitigation and adaptation as well as in the Complementary Delegated Act on the inclusion of gas and nuclear (draft).

The analysis demonstrates that **DNSH criteria for Circular Economy in these acts are set in an inconsistent way, are unfit for purpose and do not provide a solid framework to prevent negative environmental impacts from a Circular Economy perspective for several economic activities**.

Specific quantitative, and hence measurable, requirements to prevent harm are generally missing from the DNSH criteria for Circular Economy. Additionally, more than half of the economic activities covered by the climate Delegated Act do not include any DNSH criteria for Circular Economy (listed as "not applicable"). These inconsistencies and loopholes in the EU Sustainable Finance Framework create risks of environment burden shifting and greenwashing by misleading consumers and investors.

Ultimately the Taxonomy delegated acts, in their current form, fail to ensure that activities labelled as sustainable, because of their contribution to climate objectives, do not result in significant harm to the transition to the Circular Economy.

Based on the analysis and as a reaction to the identified shortcomings, a number of **concrete recommendations** are put forward.

"The Climate Taxonomy fails to ensure that activities labelled as sustainable, because of their contribution to climate objectives, do not significantly harm the transition to the Circular Economy"

Background

The “Do No Significant Harm” principle for the Circular Economy

To understand the meaning and application of the "Do No Significant Harm" (DNSH) principle it is necessary to introduce how sustainable economic activities are defined under the EU Taxonomy (Regulation (EU) 2020/852).

The EU Taxonomy is intended to serve as a classification system allowing to determine which activity can be considered sustainable. Accordingly, a sustainable activity must significantly contribute to one of the following six environmental objectives, while it should not cause harm to any of the others.

- Climate change mitigation
- Climate change adaptation
- Sustainable use and protection of water and marine resources
- Pollution prevention and control
- Transition to a circular economy
- Protection and restoration of biodiversity and ecosystems

The concept of "Do No Significant Harm" is to be understood within the meaning of article 17 of the Taxonomy Regulation which defines what constitutes ‘significant harm’ for each of the six environmental objectives. Specifically, an activity is considered to do significant harm to the transition to the Circular Economy (including waste prevention and recycling) if that activity:

“(i) leads to significant inefficiencies in the use of materials or in the direct or indirect use of natural resources (...) at one or more stages of the life cycle of products, including in terms of durability, reparability, upgradability, reusability or recyclability of products;

(ii) leads to a significant increase in the generation, incineration or disposal of waste, with the exception of the incineration of non-recyclable hazardous waste; or

(iii) the long-term disposal of waste may cause significant and long-term harm to the environment;”

It is relevant to note that art. 17 also clearly states that when assessing if an economic activity does no significant harm: *“both the environmental impact of the activity itself and the environmental impact of the products and services provided by that activity throughout their life cycle shall be taken into account, in particular by considering the production, use and end of life of those products and services”.*

Demonstrating that investments “do no significant harm” is therefore a cornerstone of the EU Sustainable Finance framework. To this end the European Commission was tasked to develop DNSH criteria for each economic activity covered by the Taxonomy Regulation (next to setting Technical

Screening Criteria to demonstrate substantial contribution to climate objectives). Article 19(1f) of the Regulation also required that the Technical Screening Criteria be based on conclusive scientific evidence and the precautionary principle.

These criteria, to be detailed by means of delegated acts, should have, in principle, clearly specified the minimum requirements to be met by each economic activity to avoid significant harm to the other environmental objectives covered by the Taxonomy, including the transition to the Circular Economy (hereinafter also referred to as CE).

"Demonstrating that investments 'do no significant harm' is a cornerstone of the EU Sustainable Finance framework"

Analysis and key issues

A detailed review of the DSNH criteria for the transition to Circular Economy in the adopted Delegated Act on climate mitigation and adaptation as well as in the draft Complementary Delegated Act on gas and nuclear energy reveals several shortcomings and concerning loopholes:

Inconsistent approach across economic activities

The approach adopted in setting DNSH criteria for Circular Economy is very inconsistent and it does not provide for a solid regulatory framework to prevent negative impacts from a CE perspective for several economic activities.

The first and most evident element of concern is that these **criteria are set in an unharmonized and seemingly arbitrary way** across the different economic activities covered by the climate delegated acts. Specifically, the level of granularity and specificity between different DNSH criteria for CE differs greatly in terms of details and prescriptiveness. This results in **unjustified differences in their implementability and effectiveness in preventing harm** across various economic activities.

Specific quantitative requirements to prevent harm are generally missing from the DNSH criteria for Circular Economy. These range instead from quite detailed criteria (including, in some cases, requirements to have in place specific documentation of waste management plans), to other which are expressed only in the form of mere compliance with EU law, all the way to no wording at all (criteria listed as *''not applicable''*).

The reasons behind this inconsistent approach, characterised also by the omissions of DNSH criteria for several activities (described in more details later), are not explained. The great variance in the level of details and prescriptiveness of the DNSH criteria for CE does not appear to be justified by the features of the concerned economic activities or by an actual lack of risks for the Circular Economy.

Notably also **the Platform on Sustainable Finance**, the Commission's expert group established to assist the development of EU sustainable finance policies, **recently acknowledged the issues with the DNSH criteria for CE in the climate delegated act**. The experts have clearly stressed the need for developing a more consistent approach stating in their recommendations that they consider: *"appropriate to undertake a review of the DNSH criteria from the climate delegated act to improve consistency and usability of the Taxonomy"*[1].

[1] Platform on Sustainable Finance, 30 March 2022, "*Report with recommendations on technical screening criteria for the four remaining environmental objectives of the EU taxonomy*", page 73 (here).

Example

By comparing the DNSH criteria for CE set for different manufacturing activities, these show great variability in terms of approach and details which is not justified by the intrinsic features of the activities. For example, the following DNSH criteria for CE are set for the ***manufacture of renewable energy technologies, equipment for the production and use of hydrogen, low carbon technologies for transport, energy efficiency equipment for buildings and other low carbon technologies*** *(sector codes 3.1-3.3 and 3.5-3.6).*

These activities must: ''assess the availability of and, where feasible, adopts techniques that support:

(a) reuse and use of secondary raw materials and re-used components in products manufactured;
(b) design for high durability, recyclability, easy disassembly and adaptability of products manufactured;
(c) waste management that prioritises recycling over disposal, in the manufacturing process;
(d) information on and traceability of substances of concern throughout the lifecycle of the manufactured products.''

While these criteria lack measurable thresholds and do not set ambitious additional requirements, they at least express the need to comply with the waste hierarchy (note however that these activities are only required "to assess the availability" of these techniques and to adopt them "where feasible", thus making compliance almost voluntary).

Further requirements (reflecting compliance with sectorial EU legislation) are added to the list above for the ***manufacture of batteries*** *(3.4)*: "*Recycling processes meet the conditions set out in Article 12 and in Annex III, Part B, of Directive 2006/66/EC, including the use of the latest relevant Best Available Techniques, the achievement of the efficiencies specified for lead-acid batteries, nickel-cadmium batteries and for other chemistries. These processes ensure the recycling of the metal content to the highest degree that is technically feasible while avoiding excessive costs. Where applicable, facilities carrying out recycling processes meet the requirements laid down in Directive 2010/75/EU.*"

On the contrary no DNSH criteria for CE are set for several other manufacturing activities such for ***manufacture of plastics on primary form and of organic basic chemicals***, but also for the ***manufacture of cement, aluminium, iron and steel, hydrogen, carbon black, soda ash, chlorine anhydrous ammonia, nitric acid*** *(3.7 - 3.17)*.

Also the approach adopted towards energy generation and distributions looks inconsistent. For example, while DNSH for CE for the ***production of heat/cool from solar thermal heating*** *(4.22)* require that: "*The activity assesses availability of and, where feasible, uses equipment and components of high durability and recyclability and that are easy to dismantle and refurbish*", DNSH for CE are said to be not applicable for the ***transmission and distribution networks for renewable and low-carbon gases,*** *(4.14)*. This choice seems unjustified as also this activity entails widely spread equipment that would require (as a minimum) an assessment of durability, repairability, etc.

Indiscriminate use of not applicability

More than half of the economic activities covered by the Delegated Act on climate mitigation and adaptation **do not include any DNSH criteria for Circular Economy** (listed as "not applicable" in 93 cases out of 183).

	Total economic activities covered by the climate DA	*Not applicable DNSH criteria for Circular Economy*	*DNSH criteria for Circular Economy listed*
Climate adaptation and mitigation	183 activities	93	90
Climate mitigation	88	42	46
Climate adaptation	95	51	44

The choice of opting for not applicability for so many activities offers no guarantee that investments in economic activities labelled as sustainable because of their contribution to climate objectives do not result in harm for the Circular Economy (e.g. as a result of inefficient or wasteful use of resources, increase in waste generation, inadequate disposal of waste). This represents a **concerning loophole** in the EU Sustainable Finance Framework which creates **risks of environment burden shifting and greenwashing** by misleading consumers and investors.

The choice by European Commission to rely on such an **indiscriminate use of not applicability** does not seem justified, in several cases, by the features of the economic activities under analysis or by the actual absence of any material risks for circularity deriving from these activities. This calls into question the extent to which the Commission relied on fact and science-based evidence in drafting these criteria. These omissions are even more unjustified when considering the obligations set by art. 17 of the Taxonomy Regulation to consider the whole life cycle of the economic activities when developing DNSH criteria.

As mentioned earlier, these concerns were recently confirmed by the Platform on Sustainable Finance which acknowledged that: *"The work to develop technical screening criteria for the circular economy objective has highlighted potential limitations in the treatment of this objective in the technical work undertaken on the Taxonomy to date. In many cases 'not applicable' is listed against the circular economy DNSH requirement in existing criteria, and there is no 'generic' DNSH articulation present in the appendixes of the annexes to the climate delegated act. As such* ***we have not been able to include a consistent cross reference to circular economy DNSH where it was felt there was a potential material risk to the objective for a given activity, or where the risk was unclear, but needed to be assessed"[2].***

The group of experts also warned that: *"We think that* ***the risk of harm to the circular economy objective is likely to be widely applicable*** *across the economy"[3].*

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[2] Platform on Sustainable Finance, 30 March 2022, "Report with recommendations on technical screening criteria for the four remaining environmental objectives of the EU taxonomy", page 73 (link).
[3] Ibid.

Example

One of the most striking examples of this arbitrary and unjustified approach is that Circular Economy DNSH are said to be not applicable for the ***manufacturing of plastics in primary form*** *(3.17)*. This omission implies that where this activity can prove to make a substantial contribution to climate change goals it will be labelled as sustainable without having to demonstrate that no harm is being done to the CE. In this case, the Commission chose to negligently ignore some of the biggest environmental and societal threats deriving from the current growing production of plastics (e.g. plastics used in short-lived single-use applications which are non-recyclable or not recycled in practice, polymers that act as disruptors of recycling, littering in the open and in the marine environment) thus opening the way for a potential greenwashing of these activities.

The Commission also disregarded the recommendations of the experts of the Platform on Sustainable Finance[4]. The Platform had noted that: "*The manufacturing of plastics is associated with significant life cycle CO2 emissions*" and clearly highlighted the issues linked to single-use plastics: "*Disposable plastic products are highly energy inefficient and undermine efforts to contribute to mitigation*". They therefore proposed (among the criteria to prove that this activity contributes to climate mitigation) that single-use consumer products would have to meet the following additional criteria: "*at least 90% of the type of plastic manufactured is: (1)* ***not used for single use consumer products****, or (2) based on recycled plastics as feedstock*" to be proven by "independent sector study". The Platform also noted that "*Plastics production has been sharply growing over the last years. In order to reduce CO2 emissions from the plastics sector it is therefore important to* ***promote reduction in use of disposable consumer plastics*** *and promote increase in materials recirculation and manufacture of polymers with renewable feedstock.*"

These criteria offering guarantees also from a CE perspective were not picked up by the Commission and all references to the end-use of the plastics are missing from the final technical screening criteria. In the final Commission's climate DA, requirements are set only in terms of feedstock, while the issues with single-use plastic products are completely ignored reaching the implausible conclusion that DNSH criteria for CE are not applicable to the manufacturing of plastics.

The Commission decided also to drop the proposals from the Platform for DSNH criteria for CE which were suggested as follows: "*Wastes and by-products, especially hazardous wastes, are managed in line with the BREF for Waste Treatment*[5]*. A minimum requirement is the implementation and adherence to a recognised environmental management system (ISO 14001, EMAS, or equivalent).*" This is even more concerning as compliance with BREFs (Best Available Technique Reference Documents) is a mere legal requirement. This raises the issue of the relation between DNSH and legal compliance: if mere legal compliance is considered not worth mentioning as a de facto prerequisite, then DNSH should always be differentiated and more stringent than mere legal compliance. In contrary, if DNSH can equal mere legal compliance, then compliance with BREFs should have been referred to *(more on the link between DNSH & compliance in the box at pag.17)*.

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[4] EU Technical Expert Group on Sustainable Finance, March 2020, "*Taxonomy Report: Technical Annex - Updated methodology & Updated Technical Screening Criteria*" (link).

[5] BREF (Best Available Technique (BAT) Reference Document) is a doc resulting from a series of exchanges of information between stakeholders (including regulators, industry and environmental NGOs). BREF Document for Waste Treatment available at http://eippcb.jrc.ec.europa.eu/reference/BREF/WT/JRC113018_WT_Bref.pdf

Lack of generic DNSH criteria for Circular Economy

Another clear inconsistency in the approach adopted towards preventing harm is that **generic DNSH criteria for Circular Economy are missing** from the Annexes of the Delegated Act on climate mitigation and adaptation. **Generic criteria are listed instead for all the other environmental objectives** (e.g. for water protection, pollution prevention & control and biodiversity). Also in this case no clear explanation is given for this arbitrary choice from the European Commission.

These generic DSNH criteria listed in the Annexes provide **horizontal minimum requirements** as well as additional indications of the principles used to develop specific criteria for each economic activity. These also point at the most relevant definitions and standards in EU environmental law or include schematic classification of the hazards *(e.g. "classification of climate-related hazards")* to be taken as a minimum in the environmental impacts assessments.

It is regrettable that generic criteria for Circular Economy are missing, as these would have been especially important considering that specific DNSH criteria were not specified for more than half of the economic activities. Generic criteria could have at least acted as a safety net providing minimum requirements applicable to all activities.

Example

In the Delegated Act on climate change mitigation, generic criteria for DNSH are listed for all the Taxonomy environmental objectives - *Climate Change Adaptation, Sustainable Use and Protection of water and marine resources, Pollution prevention and control and protection and restoration of biodiversity and ecosystems* - with the only exception of the transition to the Circular Economy *(see Appendixes from A to D in Annex I)*.

The same is true also for climate change adaptation where generic criteria for DNSH are listed for all environmental objectives but no for the Circular Economy *(see Appendixes B, C & D in Annex II)*.

The Platform on Sustainable Finance also specifically noted the absence of 'generic' DNSH articulation in the climate DA and proposed that this is to be included as it exists for the other environmental objectives: "*it would be* ***necessary to include a process-based approach to identifying if there is a risk to the circular economy objective and the response to mitigate that risk****. This would need to be tested against relevant activities to ensure its applicability in practice****. The process should follow the same/similar approach to that of other 'generic' DNSH requirements already established in the Taxonomy****, which in principle: assess the context of the activity and risk; identify the impacts, and then those that are material to the activity and the objective; identify a mitigation plan or approach to address the risk*"[6].

[66] Platform on Sustainable Finance, 30 March 2022, "*Report with recommendations on technical screening criteria for the four remaining environmental objectives of the EU taxonomy*", page 73 (link).

Risk of environmental burden shifting

The inconsistencies in the DNSH criteria, coupled with the lack of measurable requirements to ensure no significant harm occurs to the CE, create serious risks of environmental burden shifting as a result of the implementation of the EU Taxonomy framework.

The 'Do No Significant Harm' principle was introduced by EU policymakers to prevent myopic investments, which by focusing only on a particular environmental objective would overlook impacts in other areas. This was to be operationalised in the Taxonomy by ensuring that companies delivering on one objective meet a minimum baseline standard across the others. The European Commission was therefore tasked with developing DNSH criteria to ensure that progress against climate change mitigation/adaptation will not be made at the expense of other environmental objectives, but it has failed to do so regarding the Circular Economy.

The 'Do No Significant Harm' principle as it is currently operationalised in the Taxonomy delegated acts is not sufficiently ambitious, it will it not prevent environmentally harmful activities, nor it will strengthen compliance with existing EU legislation. It also fails to recognise the mutually reinforcing relationship between different environmental objectives (e.g., between circularity & GHGs emissions reduction).

The risks of environmental burden shifting are amplified by the fact that the EU Taxonomy is expected to shape a global standard for green investments and could potentially be used for economic activities outside of the EU as well as a blueprint for other international taxonomy efforts.

The absence of DNSH criteria for most of the economic activities, including those taking place outside the EU, is thus an even bigger loophole, as for these activities the **Taxonomy will not even support compliance with legal requirements applicable in the EU.** While mere legal compliance would not suffice to meet the EU Sustainable Finance's goals, it would still be necessary to have explicit references to applicable EU law as third countries might apply less stringent environmental standards

Failure to consider the whole life cycle of economic activities

The European Commission failed to effectively take into account the whole life cycle of economic activities when drafting the DNSH criteria and did not address the **risks associated to a perpetuation of a linear economy**. A careful analysis of the impacts across all life stages would have been particularly useful in assessing risks to the CE as potential for harm is strongly linked to the end-of life of products and to the consumption patterns.

As a reminder, in accordance with art. 17 of the Regulation the DNSH assessment *"shall take into account the environmental impacts of the economic activity itself, as well as of the products and services provided by that economic activity".* It is therefore problematic that for so many activities the DNSH for CE are listed as not applicable or the criteria only look at potential for harm arising at the production phase. To adequately prevent risks for the transition to CE the assessment should have gone well beyond production and carefully looked at the use and end-of-life phases where most harm is to be expected (e.g., issues arising from the unsustainable use of throwaway products vs reusable/repairable ones).

Example

A striking example of the failure to consider risks through the whole-life cycle is the approach adopted towards the ***manufacturing of organic basic chemicals*** *(3.7)*.

The Commission chose to state that DNSH criteria for CE are not applicable, disregarding the fact that this activity entails the manufacture of the compounds that are used as "building blocks" of plastics (e.g., ethylene, acetylene, propylene, vinyl chloride, styrene, etc..).

Most of the organic basic chemicals in scope are in fact used to produce plastics. For example, according to IEEFA, over 60% of ethylene global production can be linked to the production of plastic that adheres very closely to the definition of single-use plastics[7]. Ethylene is a critical feedstock to produce polyethylene, PVC, PET and polystyrene, which combined represent approximately 65% of global plastics production by weight. Ethylene and propylene are particularly critical in the production of plastic packaging, the largest and fastest growing category of plastics products and the largest contributor to the accelerating crisis of plastics pollution[8]. Notably, the largest application for plastic is packaging (most of which is still single use). At its end of life, the greatest majority of plastic is not recycled and ends up incinerated, landfilled or in the environment.

The Commission therefore clearly failed to comply with the requirements of art. 17 by ignoring the environmental impacts of the manufacture of organic basic chemicals across all the lifecycle, including the use and end-of-life of plastics. Also in this case the Commission chose to disregard the recommendations by the experts of the Platform on Sustainable Finance. The experts had recommended the following DNSH criteria for CE: "*Wastes and by-products, especially hazardous wastes, are managed in line with the BREF for Waste Treatment*[9]", reiterating the same formulation proposed for the manufacturing of plastics. This was regrettably not included by the Commission in the final Delegated Act.

Insufficient implementation of the waste hierarchy

According to the waste hierarchy (established in the EU Waste Framework Directive) priority must be given to reducing waste at source, reuse and repair, before recycling or other less circular end-of life options such as energy recovering and landfilling.

Ensuring the effective implementation of the waste hierarchy is a defining element of the transition to the Circular Economy. Hence it should have been effectively operationalised in the EU Taxonomy by means of substantive and measurable requirements. This is clearly stated in recital 53 of the climate delegated act: "*The technical screening criteria for 'do no significant harm' to transition to a circular economy should be tailored to the specific sectors in order to ensure that economic*

[7] Institute for Energy Economics and Financial Analysis (IEEFA), February 2022, "*European-based regulatory model has global implications for complex plastics questions*" (link).
[8] Client Earth, 2022, "*Request for internal review under Title IV of the Aarhus Regulation of Commission Delegated Regulation (EU) 2021/2139*", (link).
[9] BREF (Best Available Technique (BAT) Reference Document) is a doc resulting from a series of exchanges of information between stakeholders (including regulators, industry and environmental NGOs). BREF Document for Waste Treatment available at http://eippcb.jrc.ec.europa.eu/reference/BREF/WT/JRC113018_WT_Bref.pdf

activities do not lead to inefficiencies in the use of resources or lock-in linear production, that waste is avoided or reduced and, where unavoidable, managed in accordance with the waste hierarchy". It is also further specified in recital 32 stating that: *"technical screening criteria should also ensure that waste treatment options are in line with higher levels of the waste hierarchy"*.

These declarations of principle are, however, not reflected in the actual wording of the DNSH criteria which represents a missed opportunity to ensure the Taxonomy promotes waste prevention and improved waste management. In the limited cases where reference is made to the waste hierarchy, the wording lacks ambition and reflects a purely declaratory nature not supported by clear thresholds and measurable requirements in terms of waste prevention, durability, reparability, upgradability, reusability or recyclability of products. This is particularly problematic for a number of activities, with widely acknowledged issues linked to the production of waste (e.g. manufacturing, construction and transport sectors), where prescriptive DNSH criteria based on the waste hierarchy would be key to prevent harm to the Circular Economy.

Example

DNSH criteria for ***Passenger interurban rail transport*** and ***Freight rail transport*** (6.1-6.2) only require that: "*Measures are in place to manage waste in accordance with the waste hierarchy, in particular during maintenance*" without any further details on how to demonstrate compliance (e.g., mandatory documentation, minimum requirements). More details are provided instead for the ***Installation and operation of electric heat pumps*** (4.16) where it is required that: "*A waste management plan is in place and ensures maximal reuse, remanufacturing or recycling at end of life, including through contractual agreements with waste management partners, reflection in financial projections or official project documentation.*"

The approach of requiring a waste management plan to be in place in line with the waste hierarchy (to be demonstrated through the appropriate documentation and contract) is interesting and could be replicated, as a minimum, for several other activities which currently do not have DNSH for CE or very weak ones. It could also be strengthened by requiring that these waste management plans are made publicly available.

Vague and not actionable criteria

The analysis reveals a generalised **lack of quantitative and hence measurable criteria** to demonstrate that no harm is done to the CE. **Substantive performance requirements and quantifiable targets based on measurable circularity metrics** (e.g., circular material use rate, waste generated upstream & downstream, waste management, recycling & reuse in practice) **have not been included.**

For several economic sectors covered by the Climate Delegated Act, DNSH criteria rarely go beyond reiterating the applicable EU rules which every economy actor is anyway legally obliged to comply with.

Where not missing, **DNSH criteria are often so vaguely formulated that they are not actionable and auditable** in practice. Examples of this are expressions like *"minimise", "where possible", ''ensure*

maximal recycling" which should be further defined in order be verifiable and to allow for third party auditing. In absence of ambitious and substantive criteria that do go beyond existing law, certifying compliance with Circular Economy DNSH becomes a simple tick the box exercise, which essentially any economic activity could pass.

Example

Clear examples of the vagueness and lack of prescriptiveness are the criteria set for:

- ***Electricity generation using solar photovoltaic technology*** *(4.1)*
- ***Electricity generation using concentrated solar power technology*** *(4.2)*
- ***Electricity generation from wind power*** *(4.3)*
- ***Electricity generation from ocean energy technologies*** *(4.4)*
- ***Cogeneration of heat/cool and power from solar energy*** *(4.17)*
- ***Production of heat/cool using waste heat*** *(4.25)*
- ***Production of heat/cool from solar thermal heating*** *(4.21)*

For these activities DNSH criteria for CE are only defined as follows: *''The activity assesses availability of and, where feasible, uses equipment and components of high durability and recyclability and that are easy to dismantle and refurbish.''* These activities are thus only required "to assess the availability" and to use durable/repairable/recyclable components "where feasible", making these criteria essentially irrelevant.
Another instance are the DNSH criteria for CE set for the ***restoration of wetlands*** *(2.1)*: *"Peat extraction is minimised"*. The criterion is worded as a simple declaration of intent and the lack of measurable thresholds does not enable for verification and enforcement.

Nuclear waste vs circular economy

On February 2022, the European Commission put forward a **Complementary Delegated Act** (CDA) **to include gas and nuclear power as sustainable investments in the EU Taxonomy**. These activities are proposed to be classified as investments that make a substantial contribution to climate change mitigation and which do no harm the objectives of the circular economy, pollution prevention, biodiversity, freshwater and marine ecosystems. While potential for harm is evident well beyond the Circular Economy, the analysis below focuses only on the **blatant violation of the DNSH principle for the Circular Economy as a result of the inclusion of nuclear power**.

In drafting the Taxonomy delegated acts, the Commission should have complied with the legal obligations stemming from the Regulation. According to article 17, an activity is considered to do significant harm to the CE if *''the long-term disposal of waste may cause significant and long-term harm to the environment"*. This is precisely the case for nuclear power generation which unavoidably results in the accumulation of highly radioactive waste, which constitutes a major societal hazard as it remains dangerously radioactive for several thousands of years and it has generated, in various instances, long-standing environmental harm.

The **unresolved issue of very long-lived radioactive waste** should, therefore, be a sufficient reason to make nuclear energy production incompatible with the DNSH principle and hence excluded from being listed as a sustainable activity. Moreover, the EU Taxonomy was also designed to be based on 'conclusive scientific evidence' and to comply with the precautionary principle (art. 19.1f). The

inclusion of nuclear energy in the Taxonomy completely disregards these obligations, thus exposing to unacceptable risks of environmental burden shifting in the name of a cheap fix for low carbon energy.

Ultimately, the inclusion of nuclear as a result of political pressures from some European governments, choosing to ignore, or at best dangerously downplay, the unresolved issue linked to the management of extremely long-lasting radioactive waste, is severely detrimental to the Taxonomy's overall credibility.

Case in point

The Commission chose to openly disregard the guidance of the expert Platform on Sustainable Finance which in their response[10] unambiguously stated about the inclusion **of new and existing nuclear energy facilities: "***The TSCs* [Technical Screening Criteria] *do not ensure no significant harm to the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, or the protection and restoration of biodiversity and ecosystems".*

The Platform recommended that these activities "*should not be considered as taxonomy aligned on the basis that they do not ensure DNSH and therefore do not meet the requirements of the Taxonomy Regulation".*

More specifically the experts noted that:

- "*in respect of managing high-level waste in operational final disposal sites - ensuring the viability of DNSH performance on in the order of 1000s of years has not yet been empirically demonstrated, which prevents any claim to sustainable performance."*
- *"There is inconsistency with circular economy objective, and inconsistency with pollution prevention objective of the Taxonomy with no suitable criteria proposed to meet these DNSH objectives in the current draft (…) For example, there is no available technology to reuse or recycle nuclear waste – linked to CE objective. (…) The DNSH criteria currently omits to mention the length of time the waste disposal fund should cover and a reasonable estimate of the cost per tonne of H, M and L level Waste Management."*

It also to be noted that the DNSH criteria for CE included by the Commission regarding the inclusion of nuclear energy (provisions related to the financing schemes for decommissioning nuclear power plants) do not going beyond mere legal compliance.

[10] EU Platform on Sustainable Finance, 21 January 2022, "*Response to Complementary delegated act*", (link).

Issue to be clarified: DNSH & legal compliance

The detailed analysis of the DNSH criteria for CE in the Taxonomy climate delegated act revealed a number of **open questions on the relationship between DNSH and mere legal compliance** with EU law. These should be clarified by the European Commission to ensure a more consistent approach and improve the actionability of the EU Taxonomy.

- *One question is whether the absence of DNSH criteria (referring to legal compliance with EU law) means that when these activities are performed outside of the EU, they would not be subject to the same regulatory requirements:*

As the EU Taxonomy could be used for economic activities outside of the EU, it becomes key to ensure a **level playing field in terms of environmental standards between activities performed within the Union and those taking place outside**. DNSH criteria could thus act as a safety net for activities taking place beyond EU, provided that the criteria are reviewed to, at least, explicitly require legal compliance with EU law and standards for all activities included in the Taxonomy (regardless of where activities/process take place).

- *Another key question is whether to merely require compliance with already applicable EU law should be considered sufficient to meet the ambitious goals of the EU Taxonomy:*

Only requiring that activities which are labelled by the Taxonomy as sustainable cannot be 'illegal' does not seem adequate as **mere legal compliance will not suffice to meet the EU Sustainable Finance goals**. The lack of ambitious measurable requirements going beyond compliance reduces, in fact, the transformative potential and relevance of the EU Taxonomy by failing to distinguish sustainable investments from those which are purely tolerated. While for the reasons explained above, it would be important to clarify that that compliance with EU law is required as a minimum, for activities that have been identified having an impact on CE or may have an impact but were neglected, DNSH should be consistently defined beyond mere legal compliance *(this point is addressed in more details in the recommendations below).*

Recommendations

Prioritise the review of Taxonomy Climate Delegated Act

The analysis demonstrated that **the European Commission in drafting the first Taxonomy Delegated Act failed to effectively uphold its green oath to "do no harm"**[11]. The Delegated Act on climate mitigation and adaptation, adopted in June 2021 and already in force since January 2022, therefore needs to be urgently revised to correct the identified gaps and inconsistencies regarding the prevention of harm to the Circular Economy.

At the same time, the European Commission must allow for the introduction of much more comprehensive and ambitious DNSH criteria in the upcoming Delegated Act which will cover the other four non-climate Taxonomy objectives: sustainable use and protection of water and marine resources, pollution prevention and control, transition to a circular economy, protection and restoration of biodiversity and ecosystems. As the first climate Delegated Act proved to be unfit for purpose in effectively preventing harm for the Circular Economy, simply aligning the approaches without critically reviewing the identified weaknesses would risks amplifying the loopholes and, consequently, the risks of greenwashing and environmental burden-shifting.

As part of an urgent revision of the Climate Delegated Act, it will also be critical to insert an Annex with generic DNSH criteria for Circular Economy which are currently missing (while similar Annexes exists for all the other environmental objectives covered by the Taxonomy). These generic DNSH criteria should provide horizontal minimum requirements to ensure no harm is done to the CE, point at the most relevant definitions and standards in EU environmental law and provide indication of the hazards that are to be taken into consideration for CE impacts assessments.

Correct the blanket use of non-applicability and address gaps and inconsistencies

To address the significant risks of environmental burden shifting it is crucial to correct the current unjustified omission of DNSH criteria for CE for over half of the economic activities.
DNSH criteria must be introduced for as many activities as possible, clarifying which impacts need to be measured and which metrics are to be used. The Delegated Act should also specify a clearer process for investors to demonstrate that their investments are doing no harm, notably for non-EU companies.
In order to adequately assess risks for the transition to the CE, the analysis to develop the DNSH criteria must consider impacts across all-life cycle, going beyond production to look at the phases where most harm is to be expected in terms of circularity (including by looking at consumption patterns). Should there be economic activities for which DNSH criteria for Circular Economy would be objectively not applicable, the Commission must provide clear explanation on the reasons and of the assessment that was made to determine the absence of risks.

[11] European Commission, 2019, *"Communication on the European Green Deal"*, (link).

Beyond mere compliance and level playing field

The analysis of the DNSH for Circular Economy has shown that, in most cases, these are expressed only in terms of compliance with already applicable EU environmental law. This is however not in line with the spirit and objectives of the EU Taxonomy.

The Technical Screening Criteria for substantial contribution as well as the DNSH criteria should set additional requirements beyond what is already a legal obligation. These criteria must in fact be adequate to effectively prevent environmentally harmful activities and create additional incentives to undertake investments that are not merely lawful, but truly sustainable.

The lack of ambitious measurable requirements and thresholds going beyond mere compliance reduces the potential of the EU Taxonomy and risks making it effectively irrelevant by failing to distinguish sustainable investments from those which are merely tolerated. Moreover, the analysis showed that current criteria do not even facilitate or encourage progress towards better implementation of existing legislation (e.g., in the case where DNSH criteria are omitted altogether).

An ambitious review of the climate Delegated Act must therefore set more robust and stringent DNSH criteria to prevent harm going beyond existing horizontal EU legal requirements.

In addition, generic formulations ensuring compliance with EU norms and standards for the part of the activities taking place outside EU should be granted in order to create a real level playing field for Taxonomy rewarded activities. In that perspective generic DNSH formulations for CE should be set for all activities as they exist for other environmental objectives, reflecting the necessary compliance with EU rules, notably with regard waste management, BREFs reference to resource efficiency and waste and due diligence obligations.

Operationalise compliance with the waste hierarchy by means of measurable thresholds and requirements

To ensure no significant harm to the Circular Economy is done in the pursuit of climate objectives and to leverage their mutually reinforcing relationships, compliance with the waste hierarchy must be better operationalised in the specific DNSH criteria.

This can be achieved by **setting clear thresholds and instructions in the DNSH criteria for each economic activity giving priority to waste prevention and reuse/repair** while effectually discouraging inadequate waste management options and wasteful production and consumption patterns.

It is also critical to improve the actionability and auditability of the current criteria. To this end, all specific DNSH criteria must be complemented by clear, measurable and verifiable additional quantitative thresholds setting acceptable tolerances against specific circular economy indicators or (where these thresholds do not yet exist at EU level) the obligation to demonstrate compliance via explicit documentation.

Clarify field of application of DNSH criteria beyond the EU Taxonomy

As outlined by the Action Plan for financing sustainable growth (2018) the Taxonomy is supposed to be the cornerstone of a larger EU framework for sustainable finance, involving several linked regulations and actions on sustainable finance products, disclosures and reporting requirements. Also, a number of other EU policies refer to the Taxonomy as a benchmark for identifying green financial products and environmentally sustainable activities. For example, the Commission intended to apply the 'do no significant harm' criteria to the use of public funds via the EU budget (for the Recovery and Resilience Facility Regulation)[12]. Equally, there are considerations of applying the criteria also to State aid rules in the sectors of climate, energy and environment.

As the analysis revealed that regrettably the Taxonomy criteria to ensure no significant harm is done to the Circular Economy are unfit for purpose, the Commission must refrain from applying these criteria further than the original field of application, until they are revised and strengthened.

In their currents state DNSH criteria cannot be used beyond the Taxonomy Regulation to orient EU public funding as they are not sufficiently robust to prevent environmentally destructive projects from being financed by the public money.

Refrain from including nuclear power as a sustainable investment in the EU taxonomy

The European Commission proposal to include nuclear as sustainable investment for power generation in the EU Taxonomy risks derailing the credibility of the entire EU climate agenda and the European Green Deal. Moreover, when looking specifically at the Circular Economy risks, this represents a blatant violation of the obligation to do no significant harm.

The EU regulator must refrain from including nuclear power as a sustainable investment in the Complementary Delegated Act to the EU Taxonomy and withdraw the act.

[12] European Commission, 12 February 2021, *"Commission Notice - Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility Regulation"*, (link).

About the EEB

The European Environmental Bureau (EEB) brings together citizens' groups from across Europe. Our 160 members from 36 countries have more than 30 million individual supporters.

Vision

A better future where people and nature thrive together.

The next generation deserves a healthy planet. We believe in a world where equal, just, peaceful and democratic societies can prosper. A world with rich biodiversity and a safe climate. A world where laws and policies promote health and wellbeing while respecting nature. We believe that Europe has a crucial role to play in building this future.

Mission

We are the largest and most inclusive European network of environmental citizens' groups – and the only one that works on such a broad range of issues.

We advocate for progressive policies to create a better environment in the European Union and beyond.

Values

The EEB stands for sustainable development, environmental justice, global equity, transparency and participatory democracy. We promote the principles of prevention, precaution and 'polluter pays'.

Our values:

- **Democracy**: We are a representative and inclusive organisation
- **Fairness**: We are committed to justice, equality and non-discrimination
- **Respect**: We provide an enabling, nurturing work culture that inspires excellence
- **Integrity**: We advocate policies based on science and communicate with honesty
- **Sustainability**: We strive to practice what we preach, applying green principles to our work.

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